Default Rules in the Common Law: Substantive Rules and Precedent

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A. Pluralism and default rules

Value pluralism and its conceptual companion, incommensurability, permeate law generally, and in particular the common law.[1] Their significance for the common law reflects the authority which a common law system gives to judges to fashion rules of law when articulating their application to particular cases. This tends to lead them to examine the reason of the law and to seek to conform the content of legal rules to a material degree with the underlying rationale or rationalia for them. As Sir Edward Coke said in the seventeenth century, "Reason is the life of the law, nay the common law is nothing else but reason", albeit this is a technically trained and in that sense artificial form of reason.[2] A judge, in adjudicating upon a dispute involving competing incommensurable values, strikes a balance. In a common law system with the doctrine of precedent, that determination becomes a rule. When tasked with rule design, judges bring into account the values internal to the particular rule, together with those values promoted by *having* a rule. These latter values are the stability that comes from a system of precedent: the knowledge that certain legal questions are settled.

The knowledge that the determination of the norm to be applied in the case at hand may create a rule for other cases can affect the balance to be struck in stating that norm. There is a rule design spectrum. At one end of the spectrum, bright-line rules may be required, giving a clear but inflexible rule to determine the dispute; at the other, there may be broad and open-textured standards, requiring something closer to *de novo* decision making in each particular case.[3]

The latter end of the spectrum leads to rule of law concerns. If judges have the power to do what they like in applying the law, the law does not govern; the judge does. The rule of law therefore demands that legal rules exert sufficient control over a judge's decision.[4] The former end of the spectrum best alleviates those rule of law concerns. However, it purchases clarity at the expense of flexibility and a lack of responsiveness to what may be significant shifts in the balance between the competing values which the rule in question seeks to accommodate.[5]

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[1] P Sales and F Wilmot-Smith, "Justice for Foxes" (2022) 138 LQR 138 583.

[2] P Sales, "The Common Law: Context and Method" (2019) 135 LQR 47, 51-52. In the present paper I leave to one side how common law reasoning of this kind informs statutory interpretation.

[3] See, for example, L. Alexander and E. Sherwin*, The Rule of Rules: Morality, Rules and the Dilemmas of Law* (Durham, North Carolina: Duke University Press, 2001).

[4] n1 above, 590.

[5] n1 above, 593.

For these reasons, many rules of law, which give priority to one particular value (or set of values), are defeasible:[6] they are default rules. In articulating these rules, judges can assign legal weight to incommensurable values. In so doing, the judicial scales are calibrated prior to the adjudication of a particular case. Whilst that initial guidance or presumptive resolution regarding the weighting of competing values is open to change can and be overcome at the point of application of the rule, this will require a greater countervailing weight than would be the case if the scales were evenly balanced from the outset. The level of defeasibility will vary by context.

However, default rules do not only address rule of law concerns brought about by pluralism and incommensurability. They have other purposes too. Four main purposes may be identified:

a. Saving transaction costs: default rules save the parties the time and expense of expressly agreeing and recording any and all terms of their agreement. Such default rules maximise the aggregate welfare of the contracting parties (or society as a whole), notwithstanding that one of the parties may end up worse off as a result.[7] Whilst these default rules may provide for terms that the parties would themselves have chosen anyway,[8] that is not necessarily the case. They seek to improve the parties' bargain, rather than merely helping them to reach the (possibly sub-optimal) terms that they would have otherwise chosen. Default rules may therefore aspire to mimic the terms that would be chosen by idealised contracting parties who enjoy perfect information, face zero transaction costs, and seek to maximise their joint gains.[9]

   Precedent can also save on transaction costs, in two ways. First, from the perspective of the parties, the legal certainty and predictability afforded by a system of precedent reduces transaction costs by allowing them reasonably to predict and anticipate the legal consequences of their actions. The common law is itself, in a sense, a collection of default rules formed (at least predominantly) through precedent which create the legal framework by which parties live and the background against which they can bargain with each other for different outcomes, should they choose them. Second, from the perspective of the court and on a wider view of costs saving, the resource burden is drastically reduced by the availability of a compendium of precedent, providing ready-made answers to the same or similar legal questions. A requirement to decide each legal dispute afresh would, inevitably, create a significant burden.

b. Injection of values: as mentioned above, the creation of default rules crystallises competing values into a pre-formed compromise or resolution. The deployment of those rules as precedent - and particularly from apex courts downwards through the judicial hierarchy, along the transmission lines constituted by the relevant conception of authority in the judicial system

[6] J. Harvie Wilkinson III, "Toward a Jurisprudence of Presumptions" (1992) 67 N.Y.U. L. Rev. 907.
[7] CA Riley, "Designing Default Rules in Contract: Consent, Conventionalism and Efficiency" (2000) 20 OJLS 367, 384.
[8] D Charny, "Hypothetical Bargains: The Normative Structure of Contract Interpretation" (1991) 89 Michigan L Rev 1815, 1840-8.
[9] n7 above, 385.

- allows certain values to be injected into the common law. It ensures judges do not ignore, at the point of application of legal rules, certain special values which the system as a whole has picked out as having special weight. Whilst such values might be defeated in any particular case by a value or set of values which happen to have overwhelming force in that specific situation (which is a possibility inherent in the nature of a rule being defeasible), a judge must grapple directly with why that is and justify the non-application of the presumptive rule by reference to compelling competing values which are themselves worthy of respect. By way of example, default rules in contract may seek to prioritise autonomy and consent over fairness, but in certain marginal contexts fairness may inform, qualify or even result in the disapplication of the presumptive autonomy-focused rules. Similarly, default rules in tort may seek to prioritise certain core interests of persons (such as bodily integrity) over consent, unless perhaps the consent is especially precisely targeted and well-informed.

c. Rule of law principles: I have set out the rule of law concerns associated with the balancing of incommensurables and the way in which bright-line rules can alleviate those concerns by ruling out reference back to the underlying value compromise which justifies them in the first place and the way in which default rules can alleviate those concerns by limiting the extent to which such reference back may be made and the extent to which that value compromise (and hence the rule itself) may be displaced. Such principles are a subset of the broader "injection of values" purpose discussed above. The choice between a bright-line rule or a default, presumptive rule, and how strong the presumptive rule is, will reflect the extent to which importance is assigned to controlling what a judge does at the point of application of the rule, in terms of promoting predictability of outcome (which may be relevant to allowing parties to know where they will stand if a matter comes to court and hence may assist them to bargain "in the shadow of the law" without the need to have recourse to it) and in terms of avoiding capricious or arbitrary differences in outcomes between the same or similar cases. The formulation of a rule, and constraints on the application of that rule in future cases, promote legal certainty, predictability and consistency across the law. The mere existence of a rule is of particular importance given the context of value pluralism. Whilst we cannot unequivocally say, a priori, that one answer is better than another, we cannot let the best be the enemy of the good. The consistent application of a position through a rule is, itself, valuable. Indeed, it may be the highest the law can aspire to. However, use of a default rule allows scope for recognition of particularly compelling combinations of countervailing values to be recognised as justifying different legal outcomes towards the margins of the underlying rationale for the rule itself.

d. Addressing information asymmetries: a more adjudicative function of default rules is to create structures for the alleviation of information asymmetries and incentivisation of parties to fully cooperate in a bargaining process or in the adjudicative process.

At a more general level, the common law system of precedent operates as a system of default rules. Every common law rule (even those formulated as a bright-line rule) is in theory capable of being overridden if later judges, having sufficient authority in the system, decide it should not be followed – although some rules are more embedded and immoveable than others. The system of precedent has an internal and external element. There is the internal aspect of the creation or formulation of rules, referred to above. Any judge, in reaching a decision, potentially creates a default rule through the operation of the system of precedent. The common law can be regarded as a constellation of default rules. This can be explored in a number of contexts. Some relate to default rules in the substantive law: contract, tort and structured discretions. Others relate to default rules as an adjudicative mechanism, such as by allocation of the burden and standard of proof. After consideration of these internal dimensions of the common law, I will then consider the external aspect of precedent as a default rule, i.e. to what extent, and under what circumstances, precedent as a rule in itself is defeasible.

B. Contract

The parties to a contract are free to determine the primary obligations that they will accept. These obligations will typically be stated in express words, in which case they will (ordinarily) be determinative. But express words are not the sole source of contractual obligations.[10] Whether through inertia, lack of opportunity or foresight, or deliberate choice, parties will not have negotiated express terms to cover certain significant contingencies.[11]

Many default rules in contract apply to contracts of all types. For example, it is unusual for a contract explicitly to state that a breach of an obligation within it will render the other party liable to pay damages for losses caused by the breach. However, such a consequence is the basis of contractual remedies. Indeed, most damages issues arise from the default rules which the law devises to give effect to principles of compensation.[12] This is seen in the rules of remoteness, causation, mitigation, etc. These may be overridden by express agreement, if the parties choose to do so.

Other default rules apply only to certain types of contracts, such as for the sale of goods.[13] Lord Ratcliffe suggested that "the corpus of commercial law has been built up largely by [the] process of supplying from the common usage of the trade what is the unexpressed intention of the parties".[14]Lord Steyn employed "default rules" terminology, used more widely in the US, in relation to implied terms. He described how terms implied by law operate as "general default rules" and how terms implied by fact (according to the business efficacy or officious bystander test) operate as "ad hoc gap fillers".[15]

[10] See, for example, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock).
[11] *Barton v Gwyn-Jones* [2023] UKSC 3, per Lord Leggatt at para 128.
[12] *Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain v Fulton Shipping Inc of Panama* [2017] UKSC 43, para 29.
[13] Codified in the Sale of Goods Acts 1893 and, now, the Sale of Goods Act 1979.
[14] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, 122.
[15] *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 458–459.

By reason of the default nature of these rules, the parties are able to reject or modify obligations, which would otherwise be incorporated, by use of express words.[16] The default rules thus fulfil a facilitative function. They provide a basic platform or menu of standard terms fashioned by reference to what are likely to be the reasonable expectations of the parties, which helps make the parties' bargain for them (thus promoting economic efficiency and doing justice between them) while also giving them a background against which they can bargain in a more focused way for what they want to achieve by their agreement.

The purpose of saving transaction costs is an obvious reason for having such contractual default rules, and is itself a value which the common law recognises and to which it gives weight in the formulation of doctrine. Their calibration crystallises the balance of certain incommensurable values, protected by contract, subject to the overriding values of party autonomy and consent. At the same time, the use of default rules, through a system of precedent, saves contracts from being unenforceable through incompleteness (contrary to the intention of the parties) and promotes legal certainty and predictability, thereby alleviating rule of law concerns.

C. Tort

Many of the same issues will apply in the context of tort, though the primary obligations will not necessarily (and often will not) be imposed by agreement. In a given context a person may owe a duty of care to another, and be subject to remedies for its breach as set out in the general law of tort. The duty of care is, typically, itself a default rule which is capable of being disapplied or modified either by express agreement between the parties or by close examination at the margins of its operation whether it should apply at all. The rules on remedies are default rules in the same way. Parties may contract out, or modify, the operation of those rules by sufficiently clear agreement. The ability to do so may be moderated by statute,[17] reflecting the limits of consent and party autonomy as values injected into the law, against which competing identified human values may have to be weighed, which will vary in the tort context.

The tacit consent of the parties is not in itself the rationale for default rules in a contract or tort setting. Whilst default rules may reflect the parties' tacit intentions – and the court may, in general terms, seek (objectively) to deduce what the parties thought, but which they failed to articulate, and may not even have been consciously addressing, at the moment of their agreement - a theory of tacit consent cannot provide a convincing or full rationale for such rules.[18] Primarily, this is because default rules will often come into play only when the legitimising power of the agreement is exhausted.[19] As a result, a theory based on consent, which purports to justify the binding force of actual promises, has no implications for the content of the law's default rules.[20] Such a focus can also misstate the problem which default rules seek to address. The real problem may not be unplanned contingencies, but rather the fact that parties may avoid gaps only

[16] n10 above.
[17] See, generally, the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.
[18] n7 above, 370-374.
[19] S. J. Burton, "Default Principles, Legitimacy, and the Authority of a Contract" (1993) 3 S Cal Interdisciplinary LJ 115, 117.
[20] R. Craswell, "Contract Law, Default Rules, and the Philosophy of Promising" (1989) 88 Mich L Rev 489.

by adopting otherwise suboptimal contractual arrangements.[21] In other words, the substantial resources required to effect any and all of the parties' intentions may itself undermine the coherence and efficiency of the agreement.

D. Structured Discretions

Structured discretions present perhaps the clearest articulation of the rule design spectrum alluded to previously. These principles have recently been articulated by the Supreme Court in *AIC Ltd v Federal Airports Authority of Nigeria.*[22] This case was concerned with the weight to be given to the principle of finality in litigation in the context of the exercise of discretion by a judge in what, from one perspective, was a matter of the exercise of discretion in a case management decision (where, usually, the discretion for a judge is taken to be very wide and unconstrained). In considering when a judge should reconsider a final judgment or order before that order has been sealed, the court held that "a judge should not start from anything like neutrality or evenly-balanced scales".[23] This was because of the particular weight to be given to the principle of finality in the judge's exercise of discretion.

However, nor was it possible to pre-determine the balancing exercise entirely through the application of a bright line rule. To do so would "be to impose a straitjacket upon the judicial exercise of a discretionary jurisdiction", which would be "alien to the essentially flexible nature of the judge's task when weighing competing considerations of potentially limitless variety against each other."[24] Instead, "[a]n evaluative judgment has to be made, but it has to reflect and respect the importance in this context of the principle of finality." That starting point creates a default rule, by structuring the exercise of discretion in a particular way.[25] In exercising that discretion, a judge "will err in law if he or she does not act in accordance with the principles which govern that exercise". Having considered bright-line rules at one end of the rule design spectrum, with structured discretions in the middle, the court went on to consider the other extreme: "[i]n other contexts, by contrast, a discretion may be more open-ended, such as in relation to ordinary case management decisions, and leave greater choice to the judge to decide the weight to be given to each factor."[26]

E. Burdens and standards of proof

A further form of default rule is those which lay down burdens and standards or proof. Any such rule is a default rule: if the party tasked with overcoming an evidential threshold fails to do so, they will have failed on that particular cause of action, such failure being the default rule. The question of on whom the relevant burden falls (and the standard of proof to be satisfied to discharge that burden) will, itself, reflect certain

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[21] n7 above, 374.
[22] [2022] UKSC 16.
[23] *Ibid.*, para 32.
[24] *Ibid.*, para 33.
[25] Which, the court noted at para 37, arise quite often in the law: eg the principles governing the grant of injunctive relief (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396; *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320, paras 16, 25 and 30) and the exercise of discretion regarding service out of the jurisdiction (*Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460; *VTB Capital Plc v Nutritek International Corpn* [2013] UKSC 5; [2013] 2 AC 337).
[26] *Ibid.*, para 37.

underlying values in the law. Ordinarily, the claimant will be tasked with discharging the burden, given it is they who have made the allegation. It will therefore, in general terms, be harder to prove a claim than not to succeed. In the context of the criminal law, this architecture gives effect to the common law's value system to avoid the punishment of the innocent, even if doing so is at the expense of a failure in some cases to punish the guilty.[27] The differing standards between the criminal and civil laws reflects the greater coercive power of the state consequent on an adverse finding in the former than the latter, and the underlying values of freedom and justice implicitly (but powerfully) endorsed by the common law. By contrast, a balance of probabilities standard of proof in the civil law reflects the fact that for one side to win means that the other loses, while the background value context for favouring one outcome rather than the other is more or less evenly balanced.

However, the burden of proof will not always and for all purposes fall upon the party asserting the claim. The circumstances in which there is a departure from this reveal a further purpose of default rules. The historic example is *Armory v Delamirie*.[28] In that case, the defendant goldsmith had retained a jewel given to him by the claimant (a chimney-sweeper's boy who had found the jewel and had taken it to the defendant to find out what it was worth) and would not produce it for it to be valued for the purposes of the damages claim brought against him. The Chief Justice's direction to the jury was that "unless the defendant produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages". It was not acceptable for the defendant to fail to participate fully in the adjudicative process, seeking to rely on information asymmetry to render the claimant unable to discharge the usual evidential burden upon him. Instead, where a party has sole or privileged access to evidence relevant to the determination of a claim but elects not to bring forward that evidence, the court may draw inferences of fact against that party.[29]

Another example, in the context of security for costs, is the stifling principle. The burden is on the party resisting security for costs, in claiming that its claim would be stifled by virtue of an order to provide security, to that its claim would indeed be stifled; it has the best information about this, and the law puts the onus on it to explain the position with full candour.[30] The use of default rules in this context injects values of equality of arms, whilst also furthering principles of justice in facilitating the court's ability fairly and properly to adjudicate in a dispute. The mechanism also incentivises both parties to cooperate fully with the judicial process, which can save costs.

Another way in which default rules can seek to address asymmetries of information, in a more substantive context, is through what have been described in the US as "penalty defaults".[31] These defaults are typically

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[27] This is reflected in Blackstone's old adage that "[i]t is better that ten guilty persons escape than that one innocent suffer."
[28] (1721) 93 E.R. 664
[29] See *The Law Debenture Trust Co. Plc v Elektrim* [2009] EWHC 1801 (Ch), para 176 and *AstraZeneca AB v KRKA dd Novo Mesto* [2014] EWHC 84 (Pat), paras 41 and 42.
[30] Most recently, see *Responsible Development for Abaco (RDA) Ltd v Christie* [2023] UKPC 2, para 67.
[31] See, for example: I. Ayres and R. Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99 Yale LJ 87; J. S. Johnston, "Strategic Bargaining and the Economic Theory of Contract Default Rules" (1990) 100 Yale

default obligations within contracts which may be unattractive to one party. For example, one party may know more about the quality of goods subject to a transaction than another; if a default rule provides for the goods to be of a certain quality, and one party is aware that the particular goods will not satisfy that warranty, they will be forced to reveal their privately held information in seeking to remove it from the contract or face the risk of a warranty claim. The party with that information is incentivised to surrender their information asymmetry. An increase in the disclosure of information will increase aggregate welfare, even though it may also increase transaction costs.[32]

A further example of a rule which addresses information asymmetry is the rule in *Hadley v Baxendale*,[33] which governs remoteness of damage in claims for breach of contract. A party will only be able to claim for "abnormal damages", ie beyond what might have been expected in the ordinary course of events as contemplated by both parties at the time of contracting, if the other party is actually aware (when the contract is made) of the likelihood of such loss being incurred. As a result, a claimant who is (privately) aware that it will suffer abnormally high losses if the contract is breached will not be able to recover those losses unless they bring this information to the attention of the defendant at the time of contracting, thereby giving the defendant an opportunity to bargain regarding whether and to what extent to accept responsibility for such potential losses. The rule is structurally different from a "penalty default" in that the failure to disclose the privately held information will not prejudice the other party, but rather will prejudice the holder of the information by disabling them from recovering the higher level of damages. The default rule remains in place to allow recovery of a "normal" level of damages, unless and until that party displaces the rule through disclosure. However, this also incentivises provision of information to enhance the bargaining process.

F. Precedent

So far, I have primarily dealt with the internal aspect of the common law and precedent in laying down a set of default rules as a matter of substantive law. I now turn to the external aspect, which is to address, at a higher (or meta) level, the nature of the common law itself as a default system. This has two dimensions. First, when a rule has already been created by an existing precedent, there is the way in which it is applied (or not) or distinguished (or not). Secondly, and of equal or perhaps even greater interest for present purposes, is when superior judges, and particularly judges in the Supreme Court, decide that the particular balance of values crystallised by an existing rule (precedent) is imperfect and the rule should be remade (thereby returning to the internal aspect of rule creation).

In relation to the application of precedent, the nature of the rule (and the freedom or constraint a judge deciding whether to apply it may feel) will vary depending on the court applying the rule and the court from where the rule derives. However, according to the orthodox application of a superior court precedent in a

LJ 615; I. Ayres and R. Gertner, "Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules" (1992) 101 Yale LJ 729.

[32] n7 above, 386.

[33] (1854) 9 Exch 341.

lower court, the judge is to apply the rule or, if he or she determines that the *ratio decidendi* does not apply, they can consider whether to distinguish it and articulate another rule to be applied instead (of course, they might decide that although not strictly bound by the previous authority, the reason for the rule it laid down does extend to cover the case at hand).[34] When a judge distinguishes an earlier case, they add or subtract factors thought to be of sufficient importance to take the case outside the rule.

The precedent rule, by which a norm formulated by a superior court is imposed on a lower court, is therefore a bright-line rule: if it applies, it is an indefeasible, pre-formulated crystallisation of the resultant of the vectors of competing values which must be applied to the present case. The operation of precedent is an important means of ensuring that the law is clear and predictable.[35] However, such values may come at the price of flexibility. From the late nineteenth century until the 1966 Practice Statement was issued,[36] the House of Lords could not depart from its previous decisions at all.[37] This inflexibility led to what has been described as "judicial gymnastics" as the Law Lords sought to distinguish precedent that they did not wish to follow[38]. That was itself damaging to certainty and consistency, the very values the rule sought to promote.[39] By 1966, there was an acceptance that greater flexibility was needed to enable the court to correct wrong turns and to enable the common law to develop in response to changes in society.[40] The previous bright-line rule was an imperfect balance of competing values requiring reformulation.

So the question arises at the highest level: when can a judge overturn precedent?

The nature of the rule depends both on the court applying the rule and the court which originally formulated it. In broad terms, focusing on the superior courts in England and Wales, (i) High Court judges are bound by decisions of the Court of Appeal and the Supreme Court, and (ii) the Court of Appeal is bound by decisions of the Supreme Court.[41] Further rules are introduced when it comes to courts of co-ordinate jurisdiction. So, in broad terms (a) High Court judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so;[42] (b) subject to limited exceptions, the Court of Appeal will bind itself;[43] and (c)

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[34] See generally, "Law and Value in Adjudication" in J. Raz, *The Authority of Law: Essays on Law and Morality* (1979).
[35] See, for example, *Knauer v Ministry of Justice* [2016] UKSC 9, para 21 (Lord Neuberger and Lady Hale).
[36] Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.
[37] The doctrine of self-binding precedent is usually attributed to *London Tramways v London County Council* [1898] AC 375. However, the rule that the Appellate Committee of the House of Lords was bound by its own previous decisions can be traced to earlier decisions. See David Pugsley, "London Tramways (1898)" (1996) 17 Journal of Legal History 172 and Louis Blom-Cooper, "1966 and All That: The Story of the Practice Statement", in Louis Blom-Cooper, Brice Bickson and Gavin Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford University Press, 2009), Ch. 9, 129.
[38] Neil Duxbury, "Final Court Jurisprudence in the Crystallisation Era" (2023) 139 LQR 153, 159.
[39] *R v National Insurance Commissioner, ex parte Hudson* [1972] AC 944, 966 (Lord Reid).
[40] See Louis Blom-Cooper, "1966 and All That: The Story of the Practice Statement", n 33 above; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013), 263–8.
[41] *Willers v Gubay* [2016] UKSC 44, para 5.
[42] *Ibid.*, para 9; *Roberts (A Child) v Soldiers, Sailors, Airmen and Families Association-Forces Help* [2019] EWHC 1104 (QB); [2019] 5 WLUK 34.
[43] *Young v Bristol Aeroplane Co* [1944] K.B. 718; [1944] 2 All E.R. 293.

the Supreme Court, under the 1966 Practice Statement, regards its decisions (or those of the House of Lords) as "normally binding", but it will depart from them "when it appears right to do so".[44]

At each level, therefore, the same (or similar) values are attributed different weight, resulting in differently structured rules, from bright-line rules to structured discretions. I will explore this balance principally by reference to the test applied by the Supreme Court under the 1966 Practice Statement.

There are various meta-values - values about how the law's rules should be modified (or maintained) - which affect whether the power under the Practice Statement should be invoked.[45] Whilst the rule within the Practice Statement may be more open-textured than the equivalent rules in lower courts, it is still restrictive: the benefits flowing from predictability and certainty in the law continue to weigh heavily in the scales.

It is, perhaps, instructive to consider first the values which will *not* be sufficient to override the default rule. The most obvious is that judges cannot, and should not, update the rule simply because they take a different view about where the balance of competing values should lie.[46] That is reflective of the pluralistic backdrop I have explored. Where it is difficult to say that an updated rule is unequivocally better than an earlier one, then rule-conservatism in the interests of predictability favours the status quo.

However, these important rule of law values remain defeasible in the Supreme Court. To maintain its legitimacy, the law must be kept in line with social expectations. As the community's commitments on the best balance of incommensurable values shift, so, eventually, must the law's.[47] This balance is reflected in the wording of the Practice Statement. It begins by emphasising the importance of precedent in providing "at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules." It goes on to recognise, however, that "too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law." The default rule therefore favours the status quo. The court will be "very circumspect"[48] before accepting an invitation to invoke the Practice Statement, because it considers it to be "important not to undermine the role of precedent and the certainty which it promotes."[49] The test is therefore constrained, albeit formulated as allowing departure from precedent when it appears "right to do so".

Whilst this is rather amorphous in the abstract, the context of the exercise - in which competing meta-values of legal certainty and flexibility in the interests of maintaining the legitimacy of the law fall to be

[44] n 34 above.
[45] n1 above, 595-6.
[46] *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, para 49 (Lord Wilson), citing *Horton v Sadler* [2007] 1 AC 307, para 29 (Lord Bingham). See also H. Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford: Oxford University Press, 2013), 194: "[b]ecause private law institutions are supposed to consolidate expectations and express ideals of interpersonal relationships, private law pluralism supports, even requires, relatively stable and internally coherent—albeit properly narrow—doctrinal categories."
[47] See, for example, the account in Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (2013); cf. Benjamin Cardozo, *The Paradoxes of Legal Science* (New York: Columbia University Press, 1928), at 51: "The common will must have made itself known for so long a time as well as in so distinct a manner as to have gained stability and authority"; for discussion see Sales, "The Common Law", n 2 above.
[48] *Knauer v Ministry of Justice* [2016] UKSC 9, para 23 (Lord Neuberger and Lady Hale).
[49] *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, para 87 (Lord Hamblen).

balanced through the structure of a default rule - is well known to the court. The question is always whether the disruptive movement of social and other values have reached sufficient force to displace the incumbent weight of legal certainty and predictability. That tipping point will vary according to the particular context.

There is, for example, a particular need for certainty in the criminal law.[50] In general terms, it will be easier to reconsider a recent precedent than one which has stood for a long time, since people are more likely to have relied on a decision in the latter category.[51] The court may be quicker to reconsider a decision which is thought to be impeding the proper development of the law,[52] or is clearly causing uncertainty,[53] administrative difficulties or individual injustice.[54] However, the court will be slower to overrule a previous decision where it risks retrospectively disturbing the basis on which contracts and other commercial transactions have been entered into. The court will be slower to reverse decisions on detailed questions of construction of legislation or other documents, which are often a matter of impression, than broader questions raising issues of legal principle.[55] The court will also consider whether any proposed change in the law is so complex, or carries with it potential injustices or wider implications, so that the matter is more appropriately left to the legislature.[56] On the other hand, the court will reconsider. In each case, the exercise is the displacement of a default rule: precedent.

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[50] *Horton v Sadler* [2007] 1 AC 307, para 31 (Lord Bingham).
[51] *R v National Insurance Commissioner, ex parte Hudson* [1972] AC 944, 993 (Viscount Dilhorne).
[52] *Ibid.,* 966 (Lord Reid).
[53] *Oldendorff v Tradax Export* [1974] AC 479, 533 and 535 (Lord Reid).
[54] *Ex parte Hudson* (n 51 above), 1024 (Lord Simon of Glaisdale).
[55] *Ex parte Hudson* (n 51 above), 966 (Lord Reid) and 1024 (Lord Simon of Glaisdale). See also *R v G* [2004] 1 AC 1034, paras 30-35 (Lord Bingham).
[56] *Ex parte Hudson* (n 51 above), 1025 (Lord Simon of Glaisdale); *Knauer* (n 48 above), para 26.