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*STARE DECISIS SED CONCRETA INTELLIGERE— PRECEDENT AND LONERGAN'S COMMON SENSE**

"*Stare decisis* serves to take the capricious element out of law and to give stability to a society."¹ These words of Justice Douglas underscore what many authors believe to be the primary value of the doctrine of precedent, that is, its contribution to certainty in the common law.² Precedent has been defined as "[a]n adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law."³ Courts generally isolate the rule of a prior case as the "example or authority," and apply that rule to analogous fact situations, relying on the reasoning which gave expression to the rule.⁴ The doctrine of precedent thus is regarded as providing guidance in the common law.⁵

Two problems, however, are often noted in connection with *stare de-*

* This Article is a student work prepared by William R. Moriarty, a member of the St. Thomas More Institute for Legal Research.

¹ Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). Although Justice Douglas believed that constitutional issues were always open to reexamination, *id.* at 736-37, he did not mean to suggest that "[t]he law is . . . properly susceptible to whim or caprice," *id.* at 735.

² See Llewellyn, *Impressions of the Conference on Precedent*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 116 (1962); Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 409 (1924).

³ BLACK'S LAW DICTIONARY 1059 (rev. 5th ed. 1979).

⁴ See *People v. Hobson*, 39 N.Y.2d 479, 488, 348 N.E.2d 894, 901, 384 N.Y.S.2d 419, 425 (1976). Professor Llewellyn observes that no court ignores the foundation for the doctrine of precedent, "which is to always keep in mind the reason for the rule . . . and alter the rule when the reason is discovered to have ceased or been mistaken . . ." Llewellyn, *supra* note 2, at 117.

⁵ See Llewellyn, *supra* note 2, at 126-27; Von Moschzisker, *supra* note 2, at 413-14.

sis. First, commentators have called attention to the fact that the precise formulation of the doctrine often has proven elusive.⁶ Indeed, Karl Llewellyn identified sixty-four techniques that the courts have employed in applying the doctrine.⁷ Then, too, Roscoe Pound has spoken of the "art" of applying precedent and has urged judges to exercise a "Bergsonian intuition" in deciding cases.⁸ Gidon Gottlieb has narrowed the field to three procedures which isolate precisely what is precedential in a prior case.⁹ And Richard Wasserstrom has proposed a strict formulation of the doctrine which highlights the principle's inadequacy as the sole rule for decisional justification.¹⁰

A second problem noted by jurists is that courts, while asserting the "binding" force of precedent, do not always follow prior rules.¹¹ Some techniques for overlooking prior decisions are: (1) to deny that the prior case controls the present one; (2) to distinguish the prior case from the present one; (3) to overrule the prior case as "wrong."¹² This leads to

⁶ See R. WASSERSTROM, *THE JUDICIAL DECISION* 39 (1961). Professor Wasserstrom contends that "almost all prior discussions" have failed to state clearly the doctrine of precedent. *Id.* Commenting on the University of Cincinnati's Conference on Judicial Precedent, Professor Llewellyn noted that the members of the Conference were unable to agree on a definition of judicial precedent. Llewellyn, *supra* note 2, at 116.

⁷ K. LLEWELLYN, *THE COMMON LAW TRADITION* 77-91 (1960).

⁸ See Pound, *The Theory of Judicial Decision*, 36 *HARV. L. REV.* 940, 951-52 (1923). Pound theorizes that judges grasp individual situations by an intuition analogous to Bergson's *élan vital*, and then advance to "generalize the claims of the parties as individual human claims . . . and endeavor to frame a precept or state a principle that will secure the most of these social interests that we may with the least sacrifice." *Id.* at 955.

⁹ See G. GOTTLIEB, *THE LOGIC OF CHOICE* 82-87 (1968). Gottlieb asserts that courts rely on one or all of the following elements in applying precedent: (1) the inferring in the precedent case; (2) the enunciated rule of the precedent case; and (3) the rule or principle preexisting the precedent case. *Id.* He notes that, in practice, judges who rely on dicta discredit themselves. *Id.*

¹⁰ See R. WASSERSTROM, *supra* note 6, at 54-55. Professor Wasserstrom proposes the following formulation of the doctrine of precedent: "The rule of stare decisis requires that cases which are similar to earlier cases be decided in the same way in which those earlier cases were adjudicated." *Id.* Wasserstrom claims that a legal system which relies on this formulation for its sole rule of decision is inadequate as a system of decision justification. *Id.* at 81-83.

¹¹ See Douglas, *supra* note 1, at 737 (in the constitutional arena, "stare decisis must give way before the dynamic component of history"); see also *The Status of the Rule of Judicial Precedent*, 14 *U. CIN. L. REV.* 203, 246 (1940) (remarks of Hutcheson, J.) ("[t]he idea of complete fixity has never been associated with [the doctrine of precedent]").

¹² See, e.g., *People v. Hobson*, 39 *N.Y.2d* 479, 488, 348 *N.E.2d* 894, 901, 384 *N.Y.S.2d* 419, 425 (1976) ("[d]istinctions in the application and withholding of stare decisis require a nice delicacy and judicial self-restraint"); Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in *OXFORD ESSAYS IN JURISPRUDENCE* 164 (A. Guest ed. 1961) (broadly stated rules may later be declared wrong); see also Salmond, *The Theory of Judicial Precedents*, 16 *LAW Q. REV.* 376, 381 (1900) (decisions contrary to reason are "wrong"). See generally R. WASSERSTROM, *supra* note 6, at 39-55.

the question, what, in a particular case, is binding upon future cases?

Insofar as this paper seeks to contribute to an understanding of the doctrine of precedent in the common-law system, it seeks to provide an answer to the two problems posed above. It proposes to reach that understanding through an investigation of the common sense of the common-law judge. The investigation is guided in large part by the analysis of common sense contained in *Insight*, Father Bernard Lonergan's study of human understanding.

In the introduction to *Insight*, Lonergan sets out the book's program. "Thoroughly understand what it is to understand, and not only will you understand the broad lines of all there is to be understood but also you will possess a fixed base, an invariant pattern, opening upon all further developments of understanding."¹³ The act of understanding is termed an insight,¹⁴ and its occurrence is recognized in the experience of "getting the point," or "catching on."¹⁵ Lonergan explores this act of understanding as it takes place in mathematicians, scientists and men of common sense.¹⁶

Contrasting scientific and commonsense understanding,¹⁷ Lonergan proffers that science moves from description of data to a complete explanation of the relations of things to each other.¹⁸ To achieve this understanding, science develops a technical vocabulary and a special method to aid in proceeding from the familiar to the yet-to-be understood.¹⁹ Finally, science embodies its understanding in abstract laws of universal validity.²⁰ Common sense, on the other hand, is content with descriptions which relate things to the commonsense knower.²¹ Common sense has no need of a technical vocabulary or a specialized method, because it remains within the realm of the familiar.²² And common sense's understanding of things finds expression in "proverbs," which, far from demanding universal validity in every case, tolerate exceptions without

¹³ B. LONERGAN, *INSIGHT* xxviii (3d ed. 1970) [hereinafter cited as *INSIGHT*].

¹⁴ *Id.* at ix.

¹⁵ *Id.* at 173. Lonergan presents a dramatic instance of the act of insight in the image of Archimedes, who, preoccupied with the problem of Hiero's gold crown, suddenly "caught on" when he lowered himself into the bath and realized that he could tell a pure gold crown from a fake if he weighed the crown in water. Ecstatic about his find, Archimedes ran naked from the bath shouting "Eureka!" or "I've got it!" *Id.* at 3.

¹⁶ *Id.* at ix, xxviii-xxix.

¹⁷ *Id.* at 175-79, 293-99. The first five chapters of *Insight* concentrate on insights in mathematicians and scientists. *See id.* at 3-172. Chapters six and seven turn to the matter of common sense. *See id.* at 173-244.

¹⁸ *Id.* at 178.

¹⁹ *Id.* at 176-77, 179.

²⁰ *Id.* at 175-76.

²¹ *Id.* at 178.

²² *Id.* at 179.

embarrassment.²³ Lonergan concludes that, although scientific understanding and commonsense understanding contemplate distinct objects, they are complementary modes of understanding within the same subject.²⁴

In his later works, Lonergan identifies stages of meaning, each stage representing a shift in the knower's horizon.²⁵ At the first level is common sense, a level at which the knower explores neither himself nor the relationships of things to each other, but confines his concern to the immediate and the practical.²⁶ At a second level, the level of theory, scientists seek the complete explanation of things attained only through an understanding of their interrelationships.²⁷ On the third level, the level of interiority, the knower grasps the interrelationships of the elements of his own cognitional structure and takes control of their operation.²⁸ In order to appreciate fully the working of common sense, Lonergan would say, one must shift one's horizon into the third stage of meaning.²⁹

Lonergan's analysis of common sense covers three principal topics. He examines: (1) common sense and its subject;³⁰ (2) common sense as object,³¹ and (3) commonsense judgments.³² On the side of the subject, or knower, an advance in common sense broadens the individual's horizon, providing a ground for further questions and, hence, further insights.³³ On the side of the object, the advance of practical common sense effects a development in the social and political structures.³⁴ Finally, it is through a series of correct commonsense judgments that this twofold development

²³ *Id.* at 176.

²⁴ *Id.* at 179.

²⁵ See B. LONERGAN, *METHOD IN THEOLOGY* 85-99 (1972) [hereinafter cited as *METHOD*]. One's horizon corresponds to the scope of one's knowledge and interests. *Id.* at 236. Not only may horizons overlap, as in the case of a lawyer who is also a family man, *id.*, but by a succession of "conversions," one's horizon can shift. This shift is marked by an appropriation of one's own feelings, intelligence, moral structure and religious values. See *id.* at 237-44.

²⁶ See *id.* at 85.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.* at 97-99. "Common sense knows, but it does not know what it knows nor how it knows nor how to correct and complement its own inadequacies." *INSIGHT*, *supra* note 13, at 216. It stands in need of a "higher viewpoint" and a method which can appropriate it and explain it fully. See *id.* at 394.

³⁰ *INSIGHT*, *supra* note 13, at 173-206.

³¹ *Id.* at 207-44.

³² *Id.* at 289-99.

³³ See *METHOD*, *supra* note 25, at 81-83. One's horizon broadens as one engages spontaneously in a "self-correcting process of learning." *Id.* at 81; see *INSIGHT*, *supra* note 13, at 174-75.

³⁴ *INSIGHT*, *supra* note 13, at 214; see *infra* notes 79-94 and accompanying text.

is assured.³⁵

While Lonergan himself has not made explicit the implications of his account of common sense for the field of legal philosophy, it is submitted that his analysis of common sense points toward the resolution of the two jurisprudential problems raised earlier. It would appear that the elements of such a solution track the broad outline of Lonergan's account. That is, the suggested solution rests upon an understanding that (1) the common-law judge is a commonsense subject; (2) his dispute resolution role is an object of common sense's practical orientation; and (3) the judge's activity in rendering common-law decisions is a function of his activity of making commonsense judgments.

COMMON SENSE

Common Sense and its Subject

Lonergan begins his study of common sense with the observation that every human being is an asker of questions.³⁶ As the questions arise spontaneously, prompted by a pure, unrestricted desire to know, so too, their answers arise spontaneously.³⁷ But if these answers, called insights, are incomplete, they give rise to further questions.³⁸ This cycle of "question-answer" is a self-correcting process of learning.³⁹

Lonergan observes that working out the answers for oneself is a laborious task.⁴⁰ Teaching, however, eases the burden by offering hints which lead to insights and by cajoling attention away from blind alleys.⁴¹ This task of teaching, Lonergan notes, may be executed formally by professionals, or informally as one listens to and observes the daily conversa-

³⁵ INSIGHT, *supra* note 13, at 290-91. The community of mankind profits from the self-correcting process which takes place in individuals. *Id.* at 290. The shared intellectual curiosity of a community leads to further insights and to the development of the society. *Id.* But men can reject intellect and opt for passion and prejudice. In the measure that they do so they contribute to society's decline. *Id.* at 290-91.

³⁶ *Id.* at 173-74. Lonergan points to the natural curiosity of children to demonstrate man's informal questioning. *Id.* He notes that one either admits to being anxious for understanding or one must confess to being a somnambulist. See METHOD, *supra* note 25, at 17. As Professor McShane writes, "There is no denying the native wonder of man." P. McSHANE, WEALTH OF SELF AND WEALTH OF NATIONS 17 (1975).

³⁷ INSIGHT, *supra* note 13, at 174.

³⁸ *Id.*

³⁹ *Id.* Lonergan writes that once any insight has been attained, "one has only . . . to think on the basis of that insight, for its incompleteness to come to light and thereby generate a further question." *Id.* As questions call forth insights which call forth further questions in a spontaneous cycle, there can be identified a self-correcting process of learning. *Id.*

⁴⁰ *Id.* at 289. Lonergan observes that while garnering insights on one's own can be a difficult task, it is the most fruitful way of discovering answers to questions. *Id.* at 174.

⁴¹ *Id.* at 174-75.

tions and performances of those around him.⁴² Through communication, ideas are disseminated throughout a community which scrutinizes them in the light of its experience, accepting the workable and rejecting the impracticable.⁴³ Thus, by a process of collaboration there is compiled a common fund of tested answers from which each member of the community may draw his share according to his ability.⁴⁴

Lonerger writes that common sense "is a specialization of intelligence in the particular and the concrete."⁴⁵ Its common fund of answers is an incomplete set of insights which requires further insights into concrete situations for its completion in any given set of circumstances.⁴⁶ This is so, he notes, because unlike the sciences, common sense has no propensity for universal laws which are valid in every instance, but is concerned, rather, with describing events as they relate to the commonsense subject.⁴⁷ When common sense appears to generalize,⁴⁸ states Lonergan, it gives utterance to statements akin to proverbs which are not meant to be the premises for logical deductions, but which are attempts to express an incomplete set of insights.⁴⁹ Examples of such proverbs are "Look before you leap," and "A wink is as good as a nod."

It is proposed that rules of law resemble commonsense generalizations more closely than they resemble the universal laws of science. This proposition may be illustrated by an example from the law of torts. The general rule is that one who negligently injures another is liable to the injured party in damages. This rule of law is not an abstract law valid in every instance. It is an incomplete appreciation of the relationship be-

⁴² *Id.*

⁴³ *Id.* at 175.

⁴⁴ *Id.* Men belong to a community which possesses a common fund of tested answers. As new ideas arise to challenge the old answers, that common fund suffers modification. Through the efforts of a sustained communication, the self-correcting process of learning is at work, not only in the individual, but in the community as well. *Id.*; see *supra* note 39.

⁴⁵ INSIGHT, *supra* note 13, at 175.

⁴⁶ *Id.* Common sense, writes Lonergan, "is common without being general . . ." *Id.* This is so because it consists of a set of incomplete insights. *Id.*

⁴⁷ *Id.* at 178. This conclusion rests on a strange insight, called an inverse insight, in which the point to be grasped is that one's question is beside the point. See *id.* at 19-25. Since common sense resembles science in that it is an activity of the intellect, one may ask, "What are the postulates, definitions, and inferences of common sense?" This question is beside the point, for common sense has no postulates, definitions, or inferences. These elements pertain to the abstract, and common sense is concerned only with the concrete. *Id.* at 175.

⁴⁸ Lonergan offers the following analysis of analogies and generalizations. Analogies proceed from the assumption that some concrete situation, *A*, is correctly understood, to argue that some other similar situation, *B*, is to be understood in the same way. Generalizations argue that every other similar situation, *X*, is to be understood in the same way as *A*. *Id.* at 287-88. Concrete situations, however, do not as a rule yield insights of general application. Generalizing from such situations, therefore, is often met with suspicion. *Id.* at 288-89.

⁴⁹ *Id.* at 176.

tween parties in a personal injury suit. Complete appreciation, however, is not the expression of a rule, but results when a particular instance of negligence commands the attention of a commonsense knower.⁵⁰ When *A*, driving on the wrong side of the road, injures *B*, the commonsense knower adds to the rule of law the insights to be gleaned from these concrete facts in order to find *A* liable to *B*. Until then, the rule expresses an incomplete understanding which, like a proverb, is merely well to bear in mind.

A chief characteristic of common sense, Lonergan notes, is its restriction of its horizon to questions about the concrete and particular, the practical and immediate.⁵¹ "To advance in common sense is to restrain the omnivorous drive of inquiring intelligence and to brush aside as irrelevant, if not silly, any question whose answer would not make an immediately palpable difference."⁵² Consonant with this movement of common sense, it is suggested, the decisions of judges display a reluctance to confront questions not necessary for the resolution of the dispute before the court.⁵³

Finally, as Lonergan observes, common sense varies with time and place, occupation and circumstance.⁵⁴ It appears, therefore, that a judicial common sense can be identified, the horizon of which is a common fund of insights called the common law.⁵⁵ The common-law judge grasps the "insights into" the concrete situation presented by the material facts, adds these insights to his already accumulated store, and renders a decision. He deliberately excludes from consideration further questions of no immediate practicality. He is not reluctant to admit obvious exceptions in the law because the administration of justice is not a matter of deduction from universal principles, but of insight into concrete situations of fact. In sum, it is submitted, the mode of understanding of the common-law judge is the mode of understanding of the commonsense subject.⁵⁶

⁵⁰ *Id.* at 175-77.

⁵¹ *Id.* at 179.

⁵² *Id.* at 178.

⁵³ See Simpson, *supra* note 12, at 160.

⁵⁴ INSIGHT, *supra* note 13, at 180. Lonergan notes that "[f]or every difference of geography . . . of occupation . . . of social arrangements, there is an appropriate variation of common sense." *Id.* In the limit, the cumulative differences in common sense make for different nations, civilizations, and eras of human history. *Id.*

⁵⁵ The notion that the common law consists of a common set of insights finds different formulation elsewhere among commentators. *E.g.*, Stone, *From Principles to Principles*, 97 *LAW Q. REV.* 224, 229-33 (1981) (discussion of Professor Atiyah's "received ideals" which are incarnated in the community).

⁵⁶ Throughout this discussion, attention has been directed to the free operation of common sense. But Lonergan observes that men are motivated by a variety of drives. They can stifle the pure desire to know. They can flee from insight, refuse to ask further questions, prevent the possibility of their occurrence. To the extent that an entire community flees from under-

Common Sense as Object

Lonergeran remarks that common sense is practical.⁵⁷ In its practical orientation, he states, common sense is concerned with the satisfaction of a series of recurrent human desires.⁵⁸ By a spontaneous intersubjectivity these desires are felt to be common, and so, primitive community coheres.⁵⁹ But civil community moves away from "its obscure origins in human intersubjectivity,"⁶⁰ and toward a grander enterprise, as common sense attempts to provide abundant satisfaction for a range of common desires. To deal with the recurrent problem of human desires, practical common sense generates a technology which satisfies those desires efficiently. To deal with the recurrent problem of the balance between capital formation and a distribution scheme, common sense generates an economics. Finally, to deal with the recurrent problem of effective human agreement, practical common sense generates a polity.⁶¹

Practical common sense, Lonergan observes, is different to some extent in each individual, and to the degree that the satisfaction of individual desires conflicts, there arises the problem of effective human agreement.⁶² Those men who can best persuade others to a common course of action present an immediate solution to this problem. With their rise, he notes, rises the political structure.⁶³ Within that structure, a machinery for dispute resolution is required. Thus, there has developed a judicial scheme whose purpose is to administer justice.

Still, justice is to be administered, not in accordance with the universal laws of science, nor in strict conformity with an analytical logic, but by an exercise of the same practical common sense which gave rise to the complex structures of civil community. Thus, within the political specialization of common sense, it is submitted, there is a judicial common sense, the horizon of which, again, is a common fund of insights called the common law. To the extent that judges contribute to the advance of practical intelligence as it penetrates civil community, it would appear, they are responsible for a transformation which lifts man from the level of intersubjectivity to the level of a community in control of its development.⁶⁴

standing, there arises all the prejudice and blindness of a civilization. See *INSIGHT*, *supra* note 13, at 222-32. The further result of this flight is the disappearance of common sense itself, as the common horizon shrinks. D. TRACY, *THE ACHIEVEMENT OF BERNARD LONERGAN* 116-18 (1970).

⁵⁷ *INSIGHT*, *supra* note 13, at 179, 207-09.

⁵⁸ *Id.* at 208.

⁵⁹ *Id.* at 212.

⁶⁰ *Id.* at 212-13.

⁶¹ *Id.* at 208-09.

⁶² *Id.*

⁶³ *Id.* at 209.

⁶⁴ See *id.* at 213. Lonergan states that common sense brings about a shift from intersubjec-

This transformation is marked by a new notion of the good. Not only is there the satisfaction of individual desires, but there comes to be acknowledged what Lonergan calls the good of order.⁶⁵ This good of order is, in fact, "the concrete manner in which cooperation is working out."⁶⁶ Lonergan identifies the state and the law as the institutional bases upon which this "working out" is grounded.⁶⁷ While the good of order does not neglect instances of the particular good, it regards them in the aggregate and as recurrent.⁶⁸ For example, just dispute resolution between *A* and *B* is an instance of a particular good. Just dispute resolution among all parties, however, is a part of the good of order.⁶⁹

Lonergan asserts that this order is not abstract, but concrete.⁷⁰ In a spontaneous fashion, it becomes an indispensable component of concrete human living.⁷¹ Thus, for example, a common understanding can be expressed in a state's constitution. Technical and material changes, however, have their counterparts in economics and politics. To meet these changes, the nature of the state can be changed explicitly by amending its constitution. But the same change can be wrought, subtly, by reinterpretation of that constitution.⁷² As Lonergan notes, any change in the commonsense subject's understanding has its parallel in the objects of common sense,⁷³ among which is the political structure.

To summarize, practical common sense generates the institutions of the state and the law in an effort to deal with the problem of human agreement. Common sense works a change in the notion of the good to bring about the notion of the good of order. The common-law scheme, it appears, with its judges and juries, its doctrines and statutes, is a part of

tivity, with its identification of the good with particular goods, to a grander civil community, where technology interposes itself between man and nature, and economics and the state interpose themselves between man and man. *Id.* Since common-law judges are men of common sense, it would appear that they help bring about a continual shift in the object of practical common sense identified as the political structure.

⁶⁵ *Id.* Lonergan defines the good of order as "an intelligible pattern of relationships that conditions the fulfilment of each man's desires by his contribution to the fulfilment of the desires of others, and, similarly, protect each from the object of his fears in the measure he contributes to warding off the objects feared by others." *Id.*

⁶⁶ METHOD, *supra* note 25, at 49.

⁶⁷ *Id.*

⁶⁸ *Id.* Lonergan notes that while the good of order is distinct from instances of particular goods, it is not separate from them. It is no mere showcase for particular goods, however, but serves as the concrete possibility of their emergence. *Id.*

⁶⁹ *Id.* Lonergan offers several examples of the good of order. Among the possibilities are dinner for all men, or education for all who desire it. *Id.*

⁷⁰ INSIGHT, *supra* note 13, at 213.

⁷¹ *Id.* at 214.

⁷² B. LONERGAN, COLLECTION 254 (1967).

⁷³ INSIGHT, *supra* note 13, at 207.

that good of order. It is within this scheme that the doctrine of stare decisis finds expression.

THE DOCTRINE OF PRECEDENT

The doctrine of stare decisis has its place in both the objective and subjective components of common sense. On the side of the object, it is an insight of practical common sense which recognizes the value of consistency in the law.⁷⁴ As such, it becomes an indispensable part of the good of order identified as the common-law legal system. On the side of the subject, the doctrine finds its roots in an immanent and operative principle of human knowing which Lonergan expresses as follows: similars are to be similarly understood.⁷⁵ Lonergan demonstrates that this principle serves as the ground for the spontaneous tendency of common sense to analogize and generalize in an informal manner.⁷⁶ Hence, common sense need not be taught to identify similarities or to make generalizations.⁷⁷ The problem lies, Lonergan writes, in teaching common sense to frame its generalizations with care.⁷⁸

It is submitted that this natural tendency of common sense to analogize and generalize helps to explain why judges follow some cases and distinguish others. Judges follow cases when they grasp the insight that a prior situation is similar to the present situation and that the prior situation was understood correctly. They distinguish cases when they grasp the material differences between the prior situation and the present situation and reach a solution which meets the present circumstance. But the questions remain. How does common sense confirm its insights that situations are or are not similar? How does common sense sustain its understanding that a prior situation is or is not correctly met? It is proposed that in order to understand the binding element in preceding cases, it is necessary to answer these questions successfully. The suggested solution rests upon the analysis of the correctness of commonsense judgments offered by Father Lonergan.

Commonsense Judgments

A judgment, as Lonergan observes, is merely an assent or a denial.⁷⁹ According to Lonergan, any judgment involves a grasp of the virtually unconditioned, that is, a conditioned that in fact has all its conditions

⁷⁴ See *supra* notes 1-5 and accompanying text.

⁷⁵ INSIGHT, *supra* note 13, at 288.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 272.

fulfilled.⁸⁰ He identifies three elements in the virtually unconditioned: (1) a conditioned; (2) a link between the conditions and the conditioned; and (3) the fulfillment of the conditions.⁸¹ The act by which these three elements are grasped and understood as a virtually unconditioned Lonergan calls the act of reflective understanding.⁸²

The simplest example of a virtually unconditioned is the form of inference.

If A, then B.
But A.
Therefore, B.

The conditioned is the conclusion, "Therefore, B." The link is provided by the major premise, "If A, then B." The fulfillment of the conditions occurs in the minor premise, "But A."⁸³

The same scheme can be illustrated by any concrete judgment.⁸⁴ Suppose that X is driving on the wrong side of the road and collides with Y, injuring Y. Is X liable to Y? The conditioned is the prospective judgment, "X is liable to Y." It is only a prospective judgment because all the conditions have not yet been established as fulfilled. The link is the insight that relates the data of the hypothetical to the question of X's liability to Y. The fulfilling conditions are the data, that is, that X was driving on the wrong side of the road when he hit Y and injured him. By an act of reflective understanding, one grasps these three elements as a virtually unconditioned, and the judgment, "X is liable to Y," follows.

It appears that Lonergan's analysis of judgment has marshalled the elements for establishing as valid commonsense determinations of the similarity of prior and present cases. Common sense validates these insights, Lonergan would say, by correct judgments.⁸⁵ It does so by grasping

⁸⁰ *Id.* at 280. The development of judgment as a "virtually unconditioned" has been considered by many commentators as Lonergan's "most important and original technical innovation." D. TRACY, *supra* note 56, at 128. While the vocabulary of the "virtually unconditioned" is easily mastered, one runs the risk of slipping into nominalism unless one finds oneself making judgments in the manner brought to light in *Insight*. See P. McSHANE, *THE SHAPING OF THE FOUNDATIONS* 9 (1976).

⁸¹ *INSIGHT*, *supra* note 13, at 280.

⁸² *Id.* at 279. Lonergan distinguishes between questions for intelligence and questions for reflection. The former are met by definitions and formulations. The latter are met by a "Yes" or a "No." *Id.* at 271-74. The act of reflective understanding is that act by which the virtually unconditioned is grasped. *Id.*

⁸³ *Id.* at 280-81. Lonergan has argued that the form of inference "reveals the nature of the mind" irrespective of the content of the judgment. B. LONERGAN, *supra* note 72, at 2. The form of inference is merely a clear example of the virtually unconditioned, however, not a model for every type of judgment. *INSIGHT*, *supra* note 13, at 281.

⁸⁴ *INSIGHT*, *supra* note 13, at 281-83.

⁸⁵ See *id.* at 284.

the virtually unconditioned in similar situations. The conditioned is a prospective judgment, "Case A is similar to Case B." The fulfilling conditions are the data of Case A and the data of Case B. The link between the two is a law immanent and operative in human knowing. It is the principle that similars are to be similarly understood, that human knowers cannot help understanding like situations as like.⁸⁶ Again, through an act of reflective understanding, the human knower reached the judgment: "Case A is similar to Case B."

There remains to be asked: How does one know that one's judgments are correct? The answer lies in the inquiring and rational nature of human knowing.

Although Lonergan observes that man asks questions spontaneously and insights arise spontaneously to answer the questions,⁸⁷ he distinguishes between vulnerable and invulnerable insights.⁸⁸ Insights are vulnerable when there remain further questions to be asked on the issue.⁸⁹ Insights are invulnerable when there are no further questions to be asked.⁹⁰ When there are no further questions and all the evidence is in, by an act of reflective understanding the rational human knower affirms that his judgment on the matter is correct.⁹¹ As Lonergan writes, "If, in fact, there are no further questions, then, in fact, the insight is invulnerable; if, in fact, the insight is invulnerable, then, in fact, the judgment approving it will be correct."⁹²

Lonergan's solution to the problem of correct judgment is, as he states, in terms of the virtually unconditioned.⁹³ This can be illustrated as follows. The conditioned is the prospective judgment: "It is correct that X is liable to Y." The fulfilling condition is human rationality itself, the very fact that human knowers affirm or deny by an act of reflective understanding.⁹⁴ The link between the two is a dual consideration: (1) the insight rendering X liable to Y is correct if it is invulnerable; and (2) that insight is invulnerable if there remain no further questions relative to X's liability to Y. There follows the judgment: "It is correct that X is liable to Y."

It would appear, therefore, that common-law judges correctly affirm

⁸⁶ *Id.* at 287-89. David Tracy has observed that the link in judgments of an analogical nature is a law immanent and operative in human knowing, that is, that similars are to be similarly understood. D. TRACY, *supra* note 56, at 131.

⁸⁷ See *supra* notes 36-37 and accompanying text.

⁸⁸ INSIGHT, *supra* note 13, at 284.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 284-85.

⁹³ *Id.* at 287.

⁹⁴ *Id.* at 284; see D. TRACY, *supra* note 56, at 129.

that prior cases are similar to present cases if in fact there are no further pertinent questions to be asked which would reveal any material dissimilarities between the prior and present situations. The same procedure seemingly can be extended to those cases in which the judge distinguishes the present case from the prior case, for if the cases are similar, he cannot help understanding them to be similar. If the prior case was decided correctly, it would be unintelligent presently to decide otherwise. But if the situations are dissimilar, this dissimilarity will reveal itself to the common-law judge in the occurrence of further questions which remain unanswered by the analysis of the prior case.

By the same token, if the prior decision was incorrectly decided or misunderstood, further questions will arise and challenge the incomplete answers of the past. The judge, if he is not to deny his intelligence nor abdicate his responsibility, must answer the further questions which will lead to a revision of the former position, and determine that the earlier decision was incorrect. It is submitted that this is no arbitrary demand, for the inquiry is not whether further questions occur to a particular judge.⁹⁵ The inquiry is whether there are in fact any further questions to be asked in order to understand correctly a given situation.

This analysis appears consonant with what judges themselves have said about precedent. *Stare decisis* is not a rule whereby the most recent case controls the future regardless of whether that case was correct.⁹⁶ Judges impose upon themselves a requirement that precedent be applied fairly and intelligently.⁹⁷ It is suggested that the authoritativeness of prior decisions rests not upon priority in time, but rather upon a series of judgments affirming the correctness of the prior decisions. With the ad-

⁹⁵ See *INSIGHT*, *supra* note 13, at 284. The virtually unconditioned is not reached merely because questions fail to occur to a particular subject. Further questions may fail to arise for a variety of reasons, among them inattention, boredom and complacency. To pass judgment in such a situation is unauthentic. *Id.* There is no formula for producing men of good judgment. *Id.* at 285.

⁹⁶ In *Helvering v. Hallock*, 309 U.S. 106 (1940), Justice Frankfurter wrote, "[*S*]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Id.* at 119; see also *People v. Hobson*, 39 N.Y.2d 479, 488, 348 N.E.2d 894, 901, 384 N.Y.S.2d 419, 425 (1976).

⁹⁷ Judges refuse to apply precedent unthinkingly, because they realize that "reason and the power to advance justice must always be [the law's] chief essentials . . ." Von Moschzisker, *supra* note 2, at 414. Adherence to reason in decisionmaking can be seen in the efforts of jurists to develop systems for justifying decisions. See, e.g., R. WASSERSTROM, *supra* note 6, at 1-11. Britain's Lord Denning is a notable example of a judge who refuses to apply precedent blindly. He is of the opinion that "mistaken" decisions are without the purview of *stare decisis*. See Carty, *Precedent and the Court of Appeal*, 1 *LEGAL STUD.* 68, 71-73 (1981).

vent of this series of judgments, further insights, slowly, collaboratively, pass into the common fund of insights called the common law.

CONCLUSION

Any attempt at precise formulation of the doctrine of precedent, it is suggested, will take account of its roots in common sense. On the side of the object, it is an insight of practical intelligence which favors consistency and intelligent growth in the law. On the side of the subject, the doctrine is grounded in common sense's natural propensity to analogize and generalize. Further, the validity, in limited circumstances, of these procedures, is established by a series of correct judgments made by common-law judges with reference to the similarity or dissimilarity of prior and present cases.

Additionally, it is proposed that any account of the binding element in precedent will advert to the role of correct judgment. By an act of reflective understanding judges affirm that prior decisions are or are not correct. While it may be argued that this undermines certainty in the common law, it is submitted that, as practical common sense advances to effect changes in technology, economics and politics, so too, does the common fund of tested answers change. The common law is not a body of universal rules, valid in every instance. It is, instead, a common store of insights that awaits insights into concrete situations for its completion. Although Father Lonergan has not addressed directly any jurisprudential problems in *Insight*, it is indeed evident that his analysis of common sense has far-reaching implications for both the legal profession and the common-law system of jurisprudence.

