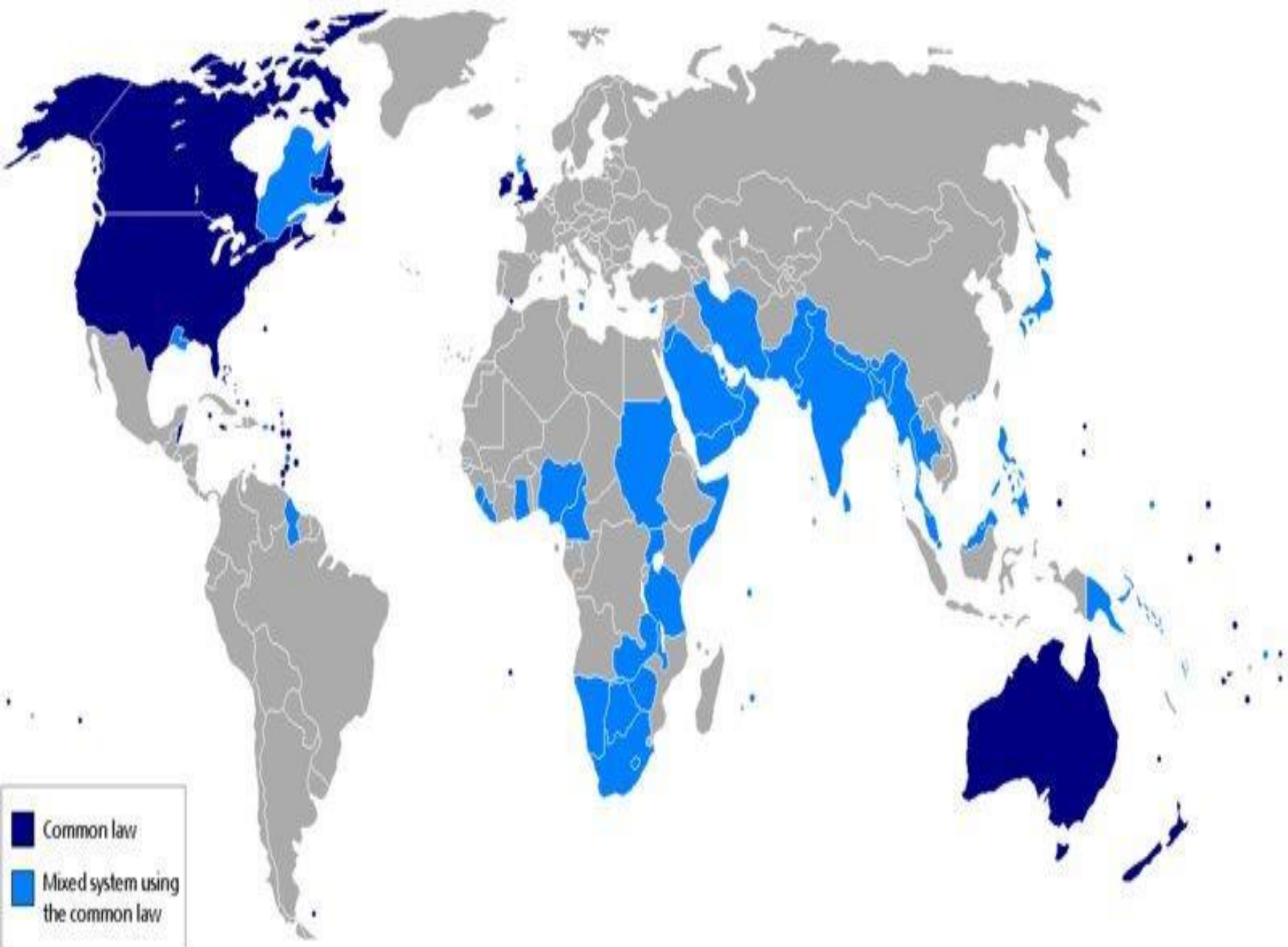


CLIE Pre-sessional Lecture: 21st July 2015

The Common Law

David Cameron, Speech 20th July 2015

“We are all British. We respect democracy and the rule of law. We believe in freedom of speech, freedom of the press, freedom of worship, equal rights regardless of race, sex, sexuality or faith... These are British values. And are underpinned by distinct British institutions. Our freedom comes from Parliamentary democracy. The rule of law exists because of our independent judiciary. This is the home that we are building together.”



- Common law
- Mixed system using the common law

John Entick: c.1703-1773



New Spelling Dictionary
(1764)

New Latin and English
Dictionary (1771)

From 1755: paid £200 to write
for a weekly anti-government
newspaper *The Monitor or,
The British Freeholder*

A “hack” or “Grub Street”
writer

George Montagu Dunk, Second Earl of Halifax: 1716-1771



“extremely brilliant scholar”

Only son of 1st Earl of Halifax, married daughter of William Richards

From 1748-1761, President of the Board of Trade: “Father of the Colonies”

1763-1765: Secretary of State

The Dispute

On 11 November 1762, Carrington and three other messengers of the King break into Entick's house and search for and remove various papers

They are acting on a warrant issued by the Earl of Halifax allowing them to search for papers at Entick's house as he was "the author of, or one concerned in the writing of, several weekly very seditious papers, entitled *The Monitor or British Freeholder* containing gross and scandalous reflections and invectives upon his Majesty's Government, and upon both House of Parliament"

Resolving the Dispute: *Entick v Carrington* (1765, Court of Common Pleas)

Lord Camden, Lord Chief Justice

“[We] were told by one of these messengers that he was obliged by his oath to sweep away all papers whatsoever; if this is the law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour’s ground he must justify it by law.”

No legal justification here: £300 in damages to be paid

The Effect of *Entick v Carrington* (1765, Court of Common Pleas)

William Pitt, Earl of Chatham (1708-1778): “The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dare not cross the threshold of the ruined tenement.”

A V Dicey, *The Law of the Constitution* (6th edn, 1902) p. 203: “with us individual rights are the basis not the result of the law of the constitution.”

Resolving the Dispute

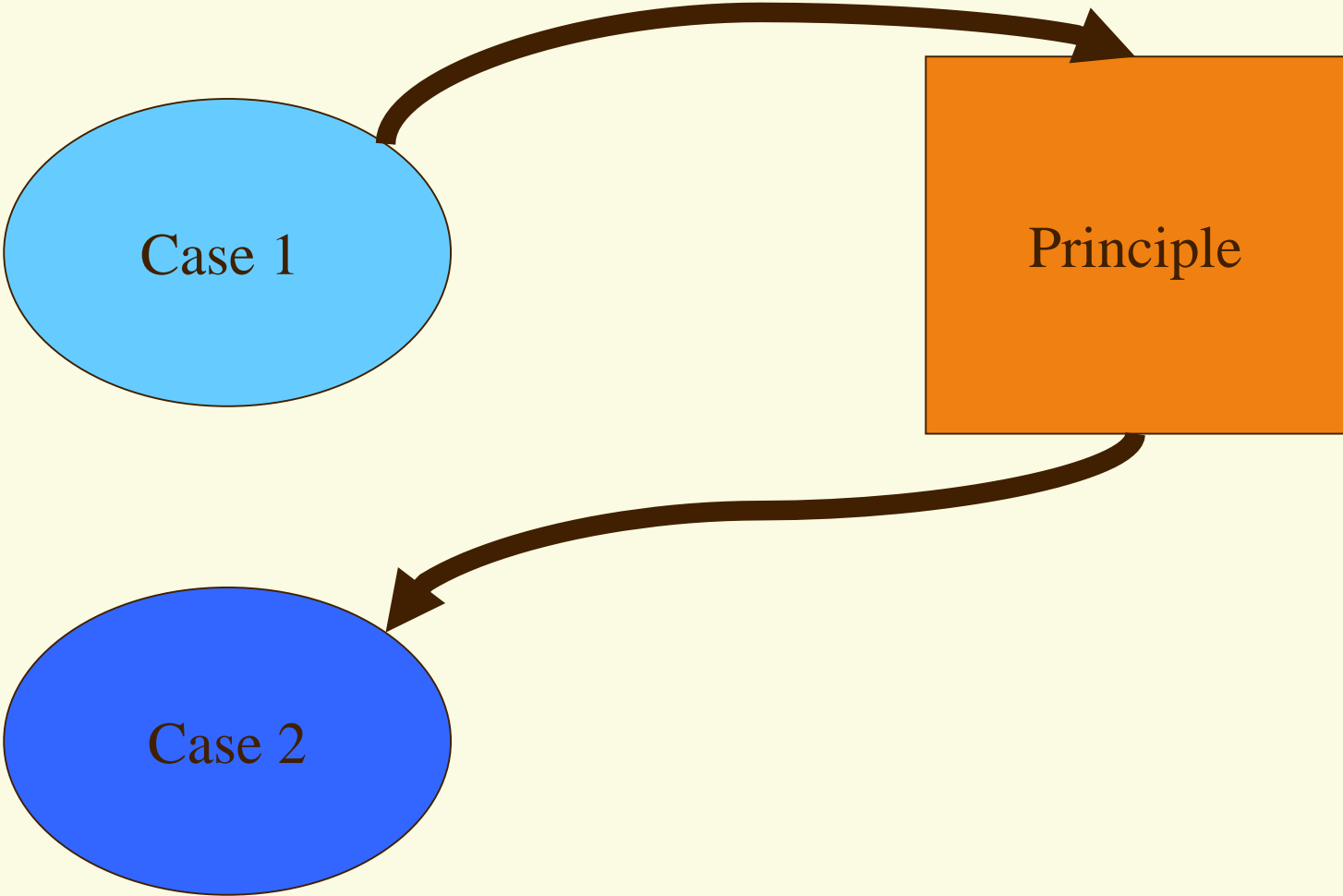
Compare: Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"

Cross & Harris: Precedent in English Law

* **‘Case-law’ consists of the rules and principles stated and acted upon by judges in giving decisions.** In a system based on case-law judges *must* have regard to these matters; they are not, as in some other legal systems, merely material which he *may* take into consideration in coming to his decision. The fact that English law is largely a system of case-law means that the judge’s decision in a particular case constitutes a ‘precedent’ ... **the judge in the instant case may be obliged to decide it in the same way as that in which the previous case was decided, even if he can give a good reason for not doing so**

The doctrine of precedent



The doctrine of precedent

Aim: Consistency within the law: **treating like cases alike**

Method: In later cases, judges *must* use principles from certain earlier cases: can be “coercive”

Result?: Limits judges’ freedom to apply their personal opinions/ prejudices

But still leaves room for judgment to be exercised:
what counts as a “like case”? What is the true principle to be taken from the earlier case?

The defence of necessity: *Mouse's Case* (1608)

- * Storm during a ferry crossing – people on the ferry are in danger
- * The ferry needs to be made lighter so B throws A's property overboard
- * A sues B for damages: says B should pay for the property he threw overboard
- * B claims he has a defence: did throw the property overboard, but acted out of **necessity: needed to lighten the boat to save lives**

R v Dudley & Stephens: The unfortunate cabin-boy

- * Yacht wrecked during sea voyage – passengers escape in an open boat
- * 20 days pass and seems that no prospect of immediate rescue – B and C decide desperate measures are necessary
- * 4 days later B and C are saved – on their return, they are tried for the murder of the cabin-boy
- * B & C claim they have a defence: did kill the cabin-boy, but acted out of **necessity**: needed to kill him in order to save lives

R v Dudley & Stephens: Lord Coleridge CJ

* It is not needful to point out **the awful danger of admitting the principle** which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No"

The need to draw a line? Can necessity ever excuse murder?

In re A: The conjoined twins

- * Parents apply to court to prevent doctors operating to separate conjoined twins, Jodie and Mary
- * Doctors are under a duty to both twins – they believe their medical duty to Jodie, the stronger twin, means they have to operate
- * The operation will inevitably cause Mary to die more quickly than she would without the operation but will prevent Jodie's imminent death
- * Doctors claim they have a defence: will be acting out of **necessity to save Jodie's life**

In re A: Robert Walker LJ

* The **special features** of this case are that the doctors do have duties to their two patients, that it is impossible for them to undertake any relevant surgery affecting one twin without also affecting the other, and that the evidence indicates that both twins will die in a matter of months if nothing is done. It is a situation in which surgical intervention is a necessity if either life is to be saved... It is a case of doctors owing conflicting legal (and not merely social or moral) duties. It is not a case of evaluating the relative worth of two human lives, but of undertaking surgery without which neither life will have the bodily integrity (or wholeness) which is its due.

In re A: Robert Walker LJ

* “It should not be regarded as a further step down a slippery slope because the case of conjoined twins presents an unique problem”

The need to draw a line? Can necessity ever excuse murder?

* Suggestion is that this is an exceptional or even “unique” case – but what is the principle behind it? Can that principle apply to other cases? *Can there ever be a case which is “like” the conjoined twins case?*

The Slippery Slope? *Mountaineers' Case*

- * A, B and C are climbing a mountain and are roped together
- * A slips over the side of the cliff and is dragging B and C over the side
- * B cuts the rope to save B and C, who are both currently on the mountain face – this sends A to his death
- * B claims he has a defence: acted out of **necessity** to **save the lives of B and C**

BASED ON THE INTERNATIONAL BEST-SELLER
"ONE OF THE BEST FILMS OF THE YEAR" by RICHARD ROYCE

A diver in a blue wetsuit is shown from the chest up, reaching upwards with their right hand towards a thick red vertical bar. The diver's face is visible, looking upwards with an expression of focus or effort. The background is a plain, light color. The red bar is positioned on the right side of the frame, and the diver's hand is just below it, as if about to touch it. The overall composition is simple and emphasizes the physical effort of the diver.

TOUCHING THE VOID

FROM OSCAR-WINNING DIRECTOR KEVIN MACDONALD
REPRODUCED WITH PERMISSION FROM THE
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*Cannibal
Case*

*Conjoined
Twins*

*Slippery
Slope*

Emergency?

Harm to victim?


Victim causing
threat?

Choice of victim?

Legal duty of D to
another?

Other factors?

Decision



	<i>Cannibal Case</i>	<i>Conjoined Twins</i>	<i>Slippery Slope</i>
Emergency?	Seemed so		
Harm to victim?	Death		
Victim causing threat?	No		
Choice of victim?	Yes		
Legal duty of D to another?	No		
Other factors?			
Decision	Guilty		

	<i>Cannibal Case</i>	<i>Conjoined Twins</i>	<i>Slippery Slope</i>
Emergency?	Seemed so	Yes	
Harm to victim?	Death	Death	
Victim causing threat?	No	Yes (?)	
Choice of victim?	Yes	No	
Legal duty of D to another?	No	Yes	
Other factors?			
Decision	Guilty	Not guilty	

	<i>Cannibal Case</i>	<i>Conjoined Twins</i>	<i>Slippery Slope</i>
Emergency?	Seemed so	Yes	Yes
Harm to victim?	Death	Death	Death
Victim causing threat?	No	Yes (?)	Yes
Choice of victim?	Yes	No	No
Legal duty of D to another?	No	Yes	No (?)
Other factors?			
Decision	Guilty	Not guilty	??????????

The problem: What are the crucial factors in the Conjoined Twins Case?

- * Is the fact that the doctors were under a duty to Jodie decisive? It meant they were in a dilemma as doing nothing could make them guilty of killing Jodie
- * Is it the fact that, unlike the Cannibal Case, Mary was causing the threat to Jodie? This means there is no choice of victim so the “picking on people” problem does not arise
- * Question becomes crucial in the Slippery Slope Case: probably no duty of B to another, but A is causing the threat

How do we tell what the correct principle is???