
Abstract

Stare decisis et non quieta movere.” The sepulchral words roll from the hidebound pages of Bouvier’s, bearing the tradition of the throaty chimes of Big Ben.

KEYWORDS: peer, discipline, law
"Stare decisis et non quieta movere." The sepuchral words roll from the hidebound pages of Bouvier's, bearing the tradition of the throaty chimes of Big Ben. No phrase better typifies the methodology of the common law, no single group of words better represents the unbroken skein of judicial reasoning binding us to an England yet to hear those notes resonating across the Thames. The common law attorney, wherever located, still feels the compulsion "to stand by the decision and not move that which is settled." Yet the same revolutionary fervor which caused the founding fathers "to dissolve the political bands" connecting the colonies with Mother England also found expression in the treatment of precedent in the courts of the new nation. Certainly, the drafters of the Declaration of Independence maintained a healthy respect for the system of British jurisprudence. One of the grievances against King George listed was his "... abolishing the free system of English laws in a neighbouring province ..." However, the new courts tended to shy away from this precedent, adopting it when appropriate, but feeling no compunctions in ignoring it.

Many reasons have been advanced for this action of the post-colonial judges. Beveridge certainly makes a forceful case for Mr. Chief Justice Marshall's lack of precedents in his opinions as resulting from "the meagerness of his learning in the law." Undeniably, law books were not accorded the highest priority in cargo bound for the New World. Still, as Beveridge continues, "... at a later period, when precedents were more abundant and accessible, he [Marshall] still ignored them."
Certainly the practice of the greatest of the early Chief Justices contributed to what became a very lax view of adherence to precedent. Another factor may have been the total inapplicability of English precedent to the new Constitution. "In constitutional law stare decisis has been applied with much less rigor than in other fields of law, on the theoretical ground that it is the Constitution which is the basic standard and not the previous decisions of the Court." Whatever the reason, our courts interpreting the Constitution have not felt constrained to abide by their own decisions (much less those of England) when the tenor of society demanded otherwise. This willingness to accept change (or, less charitably, this desire to individualize the law) reflects in varying degree in all other areas of the law as interpreted by United States courts. The most prominent legal theorists of the country have earned the collective term of "legal realists" in their advocacy of relaxed acceptance of precedent. Yet what began as a moderate relaxation has today evolved into what some of our contemporaries view as a total abnegation of established rules.

An American edition of Blackstone's COMMENTARIES presents an interesting comparison of the English and American approaches. Blackstone's test is imperative: "The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration." The commentator's note, however, tells us something different:

The rule that established precedents should be adhered to and followed, although it is a general principle wherever the common-law is in force, is not so rigidly observed as to prevent courts of appellate jurisdiction from overruling previous decisions which are deemed to be erroneous and unreasonable.

7. Id. at 36 n.2.
Thus, the English and United States versions differ, perhaps only slightly in test, but considerably in meaning. The development of this change marshalls some of the greatest figures in contemporary jurisprudence, marking perhaps the greatest break between English and American legal theory. However, even before these theorists spoke, precedential value was questioned. By the turn of the century, one historian of the law noted:

Adherence to precedent is useful; but it no longer controls. It is no longer a ground for decision that a question involved has been decided in a certain way by another court or by the same court on a previous occasion. Precedent is persuasive, but no longer decisive. . . .

Gray’s criticism of strict adherence to precedent lay in the danger of accepting as morally right a rule which exists simply because of its venerability. Morality should govern tradition, rather than the reverse. “The decision of a court may unite the character of a judicial precedent with the character of an expression of wise thought or of sound morals, but often these characters are separated.” Yet Gray did not go so far as to demand rejection of precedent. His position instead required harmonizing past decisions with contemporary policy, and using the rationale and logic of past courts to solve current problems. “After all, judicial precedents are only words, written in the past by some judge, and it is only as currently interpreted that they have impact on the community.”

Frank found reliance on precedent to be “illusory.” Indeed, his criticism of the system of precedent goes to the very foundations themselves, questioning the worth of relying on imperfectly reported prior cases. How, he asks, can later judges accurately determine the mental processes by which their predecessors decided the disputes with which they were faced? Judges do not report their entire thoughts and impressions—indeed, they lack the training and capability to do so even if they so desired. Thus, the entire system is suspect. Despite this, Frank

refuses to advocate desertion of the system. It still presents a perfectly valid method of determining disputes, for

... [i]f we relinquish the assumption that law can be made mathematically certain, if we honestly recognize the judicial process as involving unceasing adjustment and individualization, we may be able to reduce the uncertainty which characterizes much of our present judicial output to the extent that such uncertainty is undesirable. By abandoning an infantile hope of absolute legal certainty we may augment the amount of actual legal certainty.12

Cardozo, too, felt unduly confined by precedent.

Battered and pelted, we grope for a principle of order that will compose the jarring atoms, ... for a rationalizing principle whereby precedents that are outworn may be decently discarded without affront to the sentiment that there shall be no breach of the legal order in the house of its custodians.13

His statement reflects the struggle of the "legal realists" to retain the principles of law while accepting a flexible application of stare decisis. Tritely, they did not want to send the cleansed jurisprudence down the drain along with the bath water now befouled by the elimination of stale precedent.14

Contemporary writers have abandoned this moderate stance. They recognize that to a great extent judges continue to seek at least guidance and frequently control from prior cases. One commentator attributes this to self-preservation, for judges who disregard precedent frequently find their decisions reversed, while courts refusing to follow their own cases will not themselves be followed.15

For whatever reason, the new breed of computer devotees and

12. Id. at 159.
14. "The theme of the legal realists is not, then, that courts ought to disregard established rules in the process of reaching decisions. The point which they wished to emphasize is, rather, that the consideration of such rules ought not to be the decisive method by which decisions are reached." W. RUMBLE, AMERICAN LEGAL REALISM 190 (1968).
statisticians would throw over precedent and restructure the law along more relevant lines. Destroy the building, they urge, when “the pillars, main beams, or indeed any essential parts of the structure are rotten.”

We need only look to the causes for dissent on the Supreme Court to see that the greatest fomenter of judicial disharmony is the debate on adherence to precedent in the face of social need. At the very least, let us have frequent turnover in judicial precedent. Judicial opinions and capital assets are analogous: “[a]s old precedents obsolesce, eventually ceasing to be a part of the usable stock of precedents, new ones are added to the stock through litigation.” Now is the time for all good computers to come to the aid of the law.

Fortunately, in this time of troubled theory, a new voice comes to us—a voice that has been urging reforms in England, yet which returns us to the moderate, sensible world of the legal realists. In a brilliant volume that gives as much pleasure to read as it does in provoking thought, an eminent British jurist advocates reshaping the law, but doing so by continuing to use the theory behind cases of the past no longer directly relevant to contemporary society. This call for change in England sounds to Americans as a plea for a reasoned approach to judicial decision-making: one which draws on the past yet seeks to apply it to present problems rather than to either reject it absolutely as no longer relevant or to follow it slavishly as an inflexible dictate.

Lord Denning does not stand alone among British jurists and legal thinkers, although advocates of easing the burden of precedent constitute, at best, a minority. Among others, H.L.A. Hart strongly questions the propriety of unswerving adherence to prior cases, although recognizing that to be accepted practice. Hart’s “rule-scepticism” for judicial precedent springs from three observations.

First, there is no single method of determining the rule for which a given authoritative precedent is an authority. . . . Secondly, there is no authoritative or uniquely correct formulation of any rule to be extracted

18. POSNER, supra note 15, at 420.
20. LORD DENNING, THE DISCIPLINE OF LAW (1979) [hereinafter cited as DENNING].
from cases. . . . Thirdly, . . . courts deciding a later case may reach an opposite decision to that in a precedent by narrowing the rule extracted . . . [or] discard a restriction found in the rule as formulated from the earlier case, on the ground that it is not required by any rule established by statute or earlier precedent.\textsuperscript{21}

Thus, whether because rules cannot be determined in a uniform manner or with certainty, or because in practice the judiciary has ample tools at its disposal to avoid the general principle, Hart questions the wisdom of total obedience to precedent.

Denning, too, questions precedent on a purely theoretical basis. He goes beyond this, however, to consider the effect of strict stare decisis on practitioners and judges. For the attorney, it means: “He can argue either way as you please.” More significantly, to the judge it means one of two things. The individual judge “. . . does not have to think for himself or to decide for himself. It has already been decided on the previous authority.” For most judges, however, the result is even more insidious:

Whilst ready to applaud the doctrine of precedent when it leads to a just and fair result, they become restless under it when they are compelled by it to do what is unjust or unfair. This restlessness leads them to various expedients to get round a previous authority.\textsuperscript{22}

Judges are thus tempted into the intellectual dishonesty of accepting a rule of decision when it pleases them and, working under cover of the rule (as Hart also noted), avoiding its effects—a mild form of hypocrisy which, although perhaps justified as a means to a laudable end, nonetheless compromises the underlying rationale and ostensibly logical process of judicial reasoning.

Lord Denning’s efforts to turn the tide have extended as far as his stepping down from the House of Lords to accept a seat on the inferior Court of Appeals. Realizing that dissent was futile in the Parliamentary court, he elected to sit on a bench where his voice might be heard more forcefully—where his influence could work greater good although he would suffer a resulting loss of personal status. “In the Court of Appeals it [dissent] is some good. On occasion a head-note there says:

\textsuperscript{22} Denning at 285.
'Lord Denning dissenting.' 

This same dedication to and love of the Law and desire to see it improve and more accurately deal with contemporary problems reflects throughout the pages of the book. The dedication and vitality of the man impel the reader through his work, making it a pleasant as well as an enlightening experience. For the joy Lord Denning experiences in the law and transmits to his reader, this volume would be highly recommended to all attorneys and legal scholars. Yet it goes beyond this, for we find a thoughtful, reasoned chronicle of cases in which precedent's dictates led to decisions which were unquestionably morally flawed. In these cases, Lord Denning would have overruled prior decisions and thus permitted the law to mirror society's sense of propriety and to grow in the process.

Unfortunately, Lord Denning bypassed an ideal opportunity to respond to the well-reasoned criticism of Julius Stone. Stone examined the opinion of the Court of Appeals in *Boys v. Chaplin* in which Lord Denning, writing for the majority, did not follow a precedent which he deemed erroneous. Stone viewed Denning's attempt to overrule the earlier case as exposing "...the potential of creative chaos existing behind a fragile shell of orderly, settled precedent." Rather than overruling the case, Stone would have in some way distinguished it, as Denning's fellow judges attempted to do.

This case, in short, illustrates well the unwillingness of judges to recognize the rather inescapable import for the theory of binding precedent of their own use of precedent. Most appellate judges apparently continue to believe that stability with growth within the common law turns somehow on whether the rule of the *Young* case should be formally abandoned. Yet, by their actual techniques of handling legal issues, they constantly demonstrate their own freedom to limit the scope within which precedents are binding, so that the question of formal abandonment may be...
one that rarely need arise.\textsuperscript{28}

Stone has long espoused the principle of strict adherence, yet has tempered it by relying on the creativity of judges to find ways of avoiding any harsh effects.\textsuperscript{29} As has been noted, this places the judge in jeopardy of creating forced exceptions to the general rule to avoid violating a general principle which would lead to a harsh result. The jurist thus must resolve the impossible dilemma of whether the ends (maintaining the stiff upper lip of precedent) justify the means (strained readings of cases and a proliferation of hypertechnical exceptions). Although Lord Denning addresses the issue generally throughout the book, he never comes to grips with the criticism as it relates to \textit{Boys}. It is never mentioned—even in passing.

This small criticism aside, Lord Denning has produced a marvelous work which should be read by all those who must work with precedent and should be in any serious legal collection. He sounds the clarion of change: in Great Britain, change which moves forward creatively; in the United States, change which retrenches to a more moderate, more meaningful position. At the same time, the force and beauty of his prose add immeasurably to the strength of his argument.

Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. . . . All that I am against is its too rigid application—a rigidity which insists that a bad precedent must necessarily be followed. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which impede it.\textsuperscript{30}

\textsuperscript{28} Stone, supra note 24 at 1442 (footnote added).
\textsuperscript{29} \textit{E.g.}, J. Stone, \textit{Social Dimensions of Law and Justice} 656 \textit{et seq.} (1966); J. Stone, \textit{The Province and Function of Law} 166 \textit{et seq.} (1961).
\textsuperscript{30} Denning at 314.
Judge John Sirica has presented his view of the Watergate affair and his role in it in To Set The Record Straight.1 While the judge would never be accused of being a great writer, his narrative is extremely interesting. It allows us to vicariously experience the two most significant trials of the century and the monumental confrontation between the executive and judicial branches of the federal government which resulted from the battle from the Watergate tapes. It also reveals the author as a person caught in the pivotal position in this confrontation. Judge Sirica's story may eliminate some of the doubts about the conduct of the trials of the Watergate burglars and conspirators and it does seem to successfully justify the sentences of those defendants. It does little, however, to convince us that the integrity of our legal system survived the Watergate crisis.

Judge Sirica describes himself as a regular trial judge, one of hundreds of District Court Judges, in fact, "an obscure judge."2 Surprisingly, he is thrust into a conflict with the President of the United States, a man for whom Sirica practically brags that he had voted. But he recognizes his duty; how he lives up to that duty is the heart of this narrative. It is easy to identify with him and sympathize with his struggle. Understandably, he admits to few errors in his handling of the trials.

In the trial of the Watergate burglars, however, he reveals that he suspected a coverup even before the trial started. Before becoming a judge, he had been counsel for the Select Committee of the House of Representatives on the Federal Communications Commission. There he had encountered what he believed to be a coverup and resigned his position, stating, "I don't want it on my conscience that anyone can

* B.S.M.E., 1970, Northeastern University; J.D., 1973, University of Connecticut; L.L.M., 1976, Temple University; Associate Professor of Law, Nova University Center for the Study of Law.
2. Id. at 143.

Published by NSUWorks, 1980
say John Sirica, a resident of the District for many years, is a party to a whitewash . . . . "

This experience, Judge Sirica explains, prepared him to deal with the attempted coverup in the Watergate case. There is something unsettling about the trial judge admitting to such suspicions before the trial. It sounds ominously reminiscent of the Captain in The Caine Mutiny insinuating that a duplicate key existed.

Judge Sirica admits to moments of anger, frustration, and to less than ideal judicial demeanor, but reveals nothing substantial enough in this account to lead the reader to conclude that the trials were improperly handled. On the other hand, he does little to convince the reader that they were properly conducted. There is, for example, the conspiracy trial which took place after Nixon had already resigned and been pardoned. The defendants argued that Sirica should not hear the case because of his participation in the earlier burglary trial and in the Watergate tapes subpoena case. As the Chief Judge, he had the power to decide the assignment of these cases. One must wonder if assignment of the case to a different judge would not have contributed at least to the appearance of fairness. Sirica’s reasons, 1) that he was best qualified to hear the case because he had already “supervised virtually every aspect of the case”5 and, 2) that people might think he avoided the trial with “the big names”6 leave much to be desired.

Again referring to the conspiracy trial, Judge Sirica admits that he felt from the beginning that the defendants had no viable defense and, therefore, based their hopes on provoking him into making an error. “Wilson knew that my Italian temper was one of my main weaknesses.

3. Id. at 59.
4. H. WOUK, The Caine Mutiny (1954). The Captain there insisted that the theft of the strawberries had been accomplished by the use of a duplicate key to the food stores because he had discovered just such a duplicate key in investigating the theft of food years earlier.
5. Sirica, at 242.
6. Id.
7. See A.B.A. Project on Standards for Criminal Justice §1.7 The Function of a Trial Judge (1972), which requires that the trial judge should excuse himself whenever he believes that “his impartiality can reasonably be questioned.” Here Judge Sirica did the opposite by assigning himself. He could easily have assigned another judge to hear and avoided any question of impartiality.
From the start he tried to use that weakness to his client's advantage." Judge Sirica congratulates himself on having resisted these attempts, but the picture of the trials which emerges falls short of the ideal.

Judge Sirica treats us to a number of interesting capsule portraits of the personalities involved, particularly the lawyers. Alch was "a bit theatrical and always seemed to be wearing heavy makeup." Henry Rothblatt was "flamboyant" with his toupee and thin moustache "that almost seemed to be drawn onto his upper lip with a pencil." Ben- Veniste "despite his youth showed a lot of courtroom savvy." Hun- dley could always be counted on to get off a wisecrack." Frates had "rugged good looks" and a "deep resonant voice that absolutely dominated the courtroom." Jill Volner was "quietly competent." Judge Sirica reveals the demeanor of the lawyers and the defendants certainly do make an impression upon the trial judge.

The sentencing of the defendants has been the object of many negative comments. Judge Sirica’s nickname of “Maximum John” combined with his use of provisional sentences has led some to the conclusion that the sentences were overly harsh. His response is clear and convincing:

To be sure, I have always leaned towards stiffer sentences then some of my colleagues on the District Court, especially for white collar crimes, but the outcry about the provisional sentences always ignored two facts; that they were provisional, and that they were required by the statute I had used to put off final sentencing.

The saga of the subpoena for the Watergate tapes is the most compelling part of this book. The discovery that the President has a system to tape record conversations in the White House presented the Senate Committee, the Watergate Special Prosecutor and the public...
with the means for verifying the testimony of those involved, particularly John Dean. There was, unfortunately, one problem. The President did not believe that these tapes could be subpoenaed.

Sirica, at this point, realized that he was involved in a contest of strength between the judicial branch and the executive branch over the claim that these tapes were protected by “Executive Privilege,” and it became clear to him that Nixon was counting on his appointees to the Supreme Court for support in this claim. Judge Sirica concludes that the constitutional crisis precipitated has been satisfactorily resolved. “Despite efforts in our Executive branch to distort the truth, to fabricate a set of facts that looked innocent, the court system served to set the record straight.” But those who have read The Brethren and contemplated what might have happened had Nixon ultimately refused to hand over the tapes may wonder at the accuracy of his assessment.

The grand juries which investigated the Watergate affair are described by Judge Sirica as “courageous.” They emerge from this book as the unnoticed heroes of the entire conflict. They spent arduous months investigating. They bore the real burden in the subpoena battle. “Here was the Grand Jury made up of ordinary citizens from the District of Columbia, some of them poor people, telling the President of the United States, the most powerful man in the world, to turn over the tapes.”

On reaching the end of the text, one discovers an appendix which includes short excerpts from the transcripts of the tapes made in the White House. Unfortunately, these excerpts are too short to be particularly informative. Following these are Judge Sirica’s opinion and order that the subpoena issued to the President for the Watergate tapes be obeyed; a copy of the opinion of the court of appeals in upholding that decision; a copy of Judge Sirica’s opinion on whether the Grand Jury could release information to the House Judiciary Committee; a copy of the United States Supreme Court decision upholding the sub-

17. Id. at 301.
19. Sirica, at 301.
20. Id. at 401.
poena;\textsuperscript{24} and finally, a copy of Judge Sirica’s order on Liddy’s motion for reduction of sentence.\textsuperscript{25} These opinions are not integrated into the text. Why sixty pages of this book are devoted to reprinting opinions which are readily available in any law library remains a mystery.

EDITORIAL BOARD

Editor-in-Chief

CARA EBERT CAMERON

Associate Editors

FRANCES AVERY ARNOLD
SUSAN J. BROTMAN
ELEANOR HALPERIN-KORNFELD
ROBERT KELLEY
JUDITH RUSHLOW
ROBERT SIDWEBER
VICTORIA S. SIGLER

Members

F. BRANDON CHAPMAN
RANDY R. FREEDMAN
PAUL GOUGELMAN
MICHAEL HAND
DONALD JARET
GARY KORNFELD
MELANIE MAY

Business Manager

BECKY SCHAFFER

Faculty Advisor

PROFESSOR JAMES J. BROWN
NOVA LAW CENTER

ADMINISTRATION
Ovid Lewis, A.B., J.D., LL.M., J.S.D., Dean
Marianna S. Smith, B.S., J.D., LL.M., Associate Dean
John C. Burris, B.S., J.D., Assistant Dean
Roland Graff, Director of Continuing Legal Education and Placement
Judy Hoch, Administrative Assistant

FACULTY
Thomas Baynes, Jr., B.B.A., J.D., LL.M., Associate Professor of Law
Joel Berman, B.A., J.D., Associate Professor of Law
James J. Brown, B.S., J.D., LL.M., Professor of Law
Ronald B. Brown, B.S.M.E., J.D., LL.M., Assistant Professor of Law
Michael Burns, B.A., J.D., Assistant Professor of Law
Anthony Chase, J.D., LL.M., Assistant Professor of Law
Phyllis Coleman, B.S., M.Ed., J.D., Assistant Professor of Law
Gaylord Dold, J.D., LL.M., Assistant Professor of Law
Cheryl R. Eisen, B.A., J.D., Associate Professor of Law
Laurence H. Hyde, A.B., J.D., Professor of Law
Ellen Hyman, J.D., LL.M., Assistant Professor of Law
Valerie G. Kanouse, B.S., J.D., Assistant Professor of Law
Karl Krastin, A.B., LL.B., J.S.D., Professor of Law
Allen M. Lerner, A.B., J.D., Adjunct Professor of Law
Don W. Llewellyn, A.B., LL.B., LL.M., Professor of Law
Arthur V. Lynch, B.S., J.D., Visiting Professor of Law
Michael Masinter, A.B., M.B.A., J.D., Assistant Professor of Law
Gail L. Richmond, A.B., M.B.A., J.D., Associate Professor of Law
Michael L. Richmond, A.B., J.D., M.S.L.S., Associate Professor of Law
Bruce S. Rogow, B.B.A., J.D., Professor of Law
Marc Rohr, B.A., J.D., Assistant Professor of Law
Beverly A. Rohan, A.B., J.D., Associate Professor of Law
Jon A. Sale, B.A., J.D., Adjunct Professor of Law
Joseph F. Smith, Jr., B.A., J.D., Professor of Law
Jean Underhill, B.A., M.L.S., J.D., Research Librarian
Edward N. Winitz, B.B.A., J.D., LL.M., Adjunct Professor of Law
Steven J. Wisotsky, B.A., J.D., LL.M., Associate Professor of Law