Where to With Stare Decisis?

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Today there is a spirit of change abroad in the land. It is present on every hand. Nowhere it is more apparent than in the legal field, where thoughts and work about law and its place in society have assumed a new vitality. Indeed some students of legal phenomenon believe it to be a period of major significance. Dean Pound has described it as one of the great periodic swings back to justice without law.[1] Judge Joseph C. Hutcheson looks upon it as one of the greatest periods of revival for the judiciary and the law in several centuries. "We are now in fact," he says, "in the bursting time of one of law's long, slow but greatly glorious springs. I look for a great flowering."[2]

In the schools a movement has arisen, variously described, which puts emphasis on what courts do. Some speak of this movement as "a scientific approach to law"; others as "the skeptical movement," or the "neo-realist" movement; while still others describe it as "the functional approach" which stresses the interest in, and valuation by, effects. The "objective method" and "fact-research" are looked upon as having an important place in this movement and interest in the actuality of what happens is emphasized, and distrust of formula is expressed. Although the individuals who have taken part in this movement differ somewhat in point of view, in interest, and in emphasis, certain points of departure seem common to all.[3]

Karl Llewellyn believes any such common approach would involve: "(1) The conception of law in flux, of moving law, and of judicial creation of law; (2) the conception of law as a

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[1] "Justice According to Law," 13 COL. L. REV., 696 (1913).

[2] "Judging as Administration," 7 AMERICAN LAW SCHOOL REV., 1071 (1934).

[3] "Some Realism About Realism—Responding to Dean Pound," 44 HARV. L. REV., 1222 (1931).

means to social ends and not an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect and to be judged in the light of both and of their relation to each other; (3) the conception of society in flux, and a flux typically faster than the law, so that the probability is that any portion of law needs re-examination to determine how far it fits the society it purports to serve; (4) the temporary disregarding of the question of what the courts ought to do, while engaged in the study of what the courts are doing; (5) distrust of traditional legal rules and concepts insofar as they purport to *describe* what courts or people are actually doing; (6) distrust of the theory that prescriptive rule-formulations are the heavily operative factors in producing court decisions. This involves the tentative adoption of the theory of rationalization for the study of opinions; (7) the belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past; (8) an insistence on evaluation of any part of the law in terms of its effects; (9) insistence on sustained and programmatic attack on the problems of law along any of these lines."[4]

Accompanying this realistic movement in jurisprudence is a tendency to put a new emphasis on the rôle and importance of the judge in orienting law to life.[5] In this view, it is the duty of the judge to administer law, "not merely possessively, but dynamically and actively"; adapting the law to changing social

[4] "Some Realism About Realism—Responding to Dean Pound," 44 HARV. L. REV., 1222 (1931).

[5] "In such times judging is administration, and the actual and the ideal draw close in the law. When I say then, that there is nothing modern in what I am to say, this must be taken as true only in a restricted sense. Though the idea that judging is the administration of justice according to law is very old, there is, in the acute awareness of today of the need for, and the *meaning of a functional approach in judging* as in everything, a real modernism." (Italics mine). "The Worm Turns," 27 ILL. L. REV. 357 (1932); Stone, "Some Aspects of the Problem of Law Simplification," 23 COL. L. REV. 319 (1923); Wigmore's inimitable critique on judges and their ways, 5 Wigmore, Evidence (second Ed. 1915), Preface to Supplement Index; Judge Joseph C. Hutcheson, Jr., "Judging as Administration," 7 AMER. LAW SCHOOL REV. 1071 (1934).

needs[6] so far as possible through the judicial process; and where the law is lacking anywhere and beyond the judicial power of repair, to co-operate with judicial councils and their agencies in getting change through other channels.[7]

Emphasis on a conscious recognition of the factor of social control in the judging process is greatly favored by the realists. It has some interesting sidelights.[8] It is in line with the pragmatic philosophy now so widely accepted.[9]

[6] "Now it is commonplace to say that the functional approach of the judge to his work in administering justice is perhaps more important than the methodic; that in short a judge must in discharging the great office to which he is called, conceive his function in dynamic terms. Everywhere people are inquiring, what are you doing? in order to know why are you doing it. Everywhere the predicate is being laid for more and better administration; pragmatic idealists, idealistic pragmatists, are abroad in the law. They want to know if what you are doing is working well. If not, why not scrap it. ("Functionalism means thinking of effort in terms of what it is intended to accomplish rather than what it is. This is where pure description fails. It sees a thing or an effort as it is going rather than as it ought to be or ought to go or to be or do the thing we want. This is the key to the new direction of effort; to look at intended results and to survey all the possible means for their accomplishment regardless of the means which happen to be in use. For it may very likely be that present means have been arrived at in some haphazard and rule of thumb fashion rather than by an effort of genuine analysis." Tugwell, *The Industrial Discipline*). It is almost as if there were a great wind blowing, throwing open the shutters of our minds, dashing down old signs pointing tabu there, and having opened the closed and dark places, already sweeping the dust and rubbish gathered there." Judge Joseph C. Hutcheson, Jr., ibid., p. 1071.

[7] F. R. Aumann, "The Ohio Judicial Council Embarks on a Survey of Justice," 24 AMERICAN POLITICAL SCIENCE REV. 416 (1930); F. R. Aumann, "The Judicial Council Movement and Iowa," 15 IOWA L. REV. 425 (1930); F. R. Aumann, "The Ohio Judicial Council: Studies and Reports," 27 AMERICAN POLITICAL SCIENCE REV. 957 (1933).

[8] Walter W. Cook's "Scientific Method and the Law," 13 AM. BAR ASS. J. 303 (1927); Herman Oliphant, "A Return to *Stare Decisis*," 14 AM. BAR ASS. J. 71 (1928).

[9] "As a point of view, pragmatism may perhaps be best described as an effort to take fully to heart the lesson of evolution, first as it appeared in the work of Darwin, and then as a way of looking at all sorts of social phenomena. Darwin's work was epoch-making in the history of thought, because it was the first scientific achievement, on a vast scale, along the lines of a purely empirical method such as English philosophy from the days of Francis Bacon had loved to emphasize, namely the ordering of a great mass of seemingly unrelated data without the clues of mathematics. But the results of evolution radically changed the pre-Darwinian picture of nature and of human thought. It sug-

In emphasizing the factor of control the realists do not deny that "purpose has always been an inescapable factor in determining what shall be enforced as law" but stress the point that the adaptation of means to an end ought to be self-conscious and methodical, a recognized part of the jurists' problem.[10]

Closely related to this tendency to give the judge an increased or reemphasized responsibility[11] in the sphere of con-

gested a process of endless change, without fixed ends, in which the course of change, could be plotted only for limited intervals and in terms of causal relations having a rather limited span. It swept away the whole apparatus of fixed categories of explanation such as the species of pre-Darwinian biology, and reduced the so-called self-evident and *a priori* principles upon which both science and philosophy had been supposed to rest to the level of "provisional" rules. And if one asked "Provisional for What?", a generation that had learned of Darwin could only answer, "Provisional for human action." Thus it became natural to picture thought as a factor in behaviour, significant for what it effectively does in modifying the habitual adaptation of men to the conditions of their life. Thus philosophic pragmatism may be said to stand like a tripod upon the three supports of empiricism, evolution, and the instrumentalism of thought in human behaviour. It accepts control as the end of knowledge and the test of its efficacy, and therefore makes purpose an ineradicable part of all thinking." Geo. H. Sabine, "The Pragmatic Approach to Politics," 24 AMERICAN POLITICAL SCIENCE REV. 865 (1930).

[10] "The object of the law is to regulate conduct for some end, and the end sought is the only criterion by which to decide what similarities are essential and what are not. The ruling consideration in making the choice ought to be the desirability of the practical results which will follow. Consequently, the jurist ought not to try to escape the consideration of ends and the means of obtaining them, but should make such matters consciously and overtly a part of his study of the law. As I understand Professors Cook and Oliphant, they mean to assert that some choice of public policy cannot practically be avoided by judges and students of the law. The objection is not that judges fail to do this, but that they do it confusedly, or ignorantly, and therefore without a full sense of responsibility for what they are doing. By setting up the fiction that cases themselves contain the principles for their own classification, they really become the victims of their own preconceptions. There is no system of formal legal logic by which cases can validly be decided, and the pretense that decisions are made in this way merely encourages clandestine ways of making them." Geo. H. Sabine, "The Pragmatic Approach to Politics," 24 AMERICAN POLITICAL SCIENCE REV. 865 (1930).

[11] "Just as when communities go religiously dead, and revivals sweep over them to make religion live again there, the religion when it comes is in spirit though not in form, the same old religion, so ever recurring these stirrings in the law are not new; they are revivals, for the whole truth of the matter is that in method law is ever changing. The function of its administrators to do justice is ever constant. What strictures and prevents the actual

scious renovation, or judicial legislation, or judicial restatement of the law, is a perceptible change of judicial attitude toward the function of precedent in our system. At the present time there are many indications that the doctrine of "*stare decisis*" is undergoing a marked decline in its influence and practical application in this country.[12] Authority for this statement may be found in many places.[13] We can turn to the utterances of the

from growing ever toward the ideal in the law, is administrative lack. Because of this lack, form is taken for substance. Method becomes more important than function. Predictability, certainty and fixity of line, rule and precept in the law cease to be elements of, they become, law, transcending all other elements in it, standing for the time for justice itself. As the law crystallizes under this treatment, its ministers, the judges become administrators less and less, oracles, more and more. Then, in periods of change and revival, the administrator appears again. Greatly conscious of his function he tumbles down the pent house in which formalism has confined the law, and working sometimes with old straw, sometimes with new, sometimes without straw at all, he lifts the temples of the law higher toward the Heavens, where long enough housed, its administrators cease again to be administrators, become again diviners, patterers, soothsayers, lever shifters of legal slot machines." Judge Joseph C. Hutcheson, Jr., *ibid.*, p. 1070.

[12] There does not seem to be such a trend in England. Justice Cardozo in comparing the position of the doctrine in this country and England said: "The House of Lords holds itself absolutely bound by its own prior decisions." Gray, supra, Sec. 462; Salmond, "Jurisprudence," p. 164, Sec. 64; Pound, "Juristic Science and the Law," 31 HARV. L. REV. 1053 (1918); London Street Tramways Co. v. London County Council, 1898, A. C. 375, 379. The United States Supreme Court and the highest court of the several states overrule their own prior decisions when manifestly erroneous. Pollock, "First Book of Jurisprudence," pp. 319, 320; Gray, "Judicial Precedents," 9 HARV. L. REV. 27, 400 (1895). Pollock in a paper entitled, "The Science of Case Law," written more than fifty years ago, spoke of the freedom with which this was done, as suggesting that the law was nothing more than a matter of individual opinion. *Essays in Jurisprudence and Ethics*, p. 245. Since then the tendency has if anything increased.—Cardozo, "The Nature of the Judicial Process," p. 158. Arthur L. Goodhart gives a very reasonable explanation as to why the doctrine of "*Stare Decisis*" is losing prestige in this country and not in England. "Case Law in England and America," 15 CORNELL L. Q. 189 (1930).

[13] "In such matters we can only speak of averages, of tendencies. And it is, I think, safe to say that in most American jurisdictions today a more rational theory as to the binding force of precedents generally obtains than that held by the British House of Lords. The very multiplication of authority tends to impair to some extent its force, especially where the decisions in various jurisdictions are inconsistent and conflicting. The better class of modern lawyers and judges have in part from the very copiouness of authority come to regard

courts;[14] or we can turn to the pages of our leading legal publications and find indications of this changing attitude toward *stare decisis*. Expressions from both Bench and Bar would leave one to believe that a modification of the doctrine,[15] if not its complete abandonment, would find favor in many quarters.[16]

These expressions do not come from unimportant persons or places. Quite the contrary, they emanate from sources which call for attention and respect from the legal profession in general. Members of the United States Supreme Court,[17] the Su-

precedent as their servant and not their master, as presumptive evidence of what the law is rather than as absolutely conclusive evidence."—Orin McMurray, "Changing Conceptions of Law," 3 CALIF. L. REV. 441, 446 (1915).

[14] In Washington v. Dawson and Co., 264 U. S. 21, 238, 44 Sup. Ct. 302, 309, (1904) Mr. Justice Brandeis cites twelve instances in which the Supreme Court has reversed itself.

[15] Judge Cardozo says: "I think adherence to precedents should be the rule and not the exception. . . . But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. . . . There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years."—Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS, (1921) pp. 149, 150, 151.

[16] Professor Herman Oliphant takes a very advanced position in the matter. "Not the judges' opinions, but which way they decide cases will be the dominant subject-matter of any truly scientific study of law. This is the field of scholarly work worthy of best talents, for the work to be done is not the study of such things as the accumulated wisdom of men taught by immediate experiences in contemporary life,—the battered experiences of judges among brutal facts."—"A Return to *Stare Decisis*" 14 A.B.A.J. 71, 159, (1928).

[17] "The Circuit Court of Appeals was obviously not bound to follow its prior decision. The rule of "*stare decisis*," though one tending to consistency and uniformity of decision, is not a question entirely within the discretion of the court, which is called upon to consider a question once decided."—Mr. Justice Lurton in Hertz v. Woodman, 218 U.S. 205, 212, 30 Sup. Ct. 621 (1910).

"Satisfied as we are that the legislation and the very great weight of judicial authority which have been developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon a sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied in such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."—Mr. Justice Clark in Rosen v. United States, 245 U. S. 465, 471, 38 Sup. Ct. 148, 150, (1918).

preme Court of Kansas,[18] the Supreme Court of Ohio,[19] and the New York Court of Appeals[20] are included in the list of those persons who have expressed the view that the doctrine may and should be modified when circumstances require it.

Members of the Bar and legal publicists who have expressed the opinion that the doctrine should be modified to a greater or lesser extent would make a distinguished company indeed. Included in its membership is a group of eminent law school deans. Dean Roscoe Pound,[21] Dean Henry H. Wigmore,[22] Dean Leon Green,[23] Dean Orin MacMurray,[24] and Associate Justice Harlan Stone of the United States Supreme Court,[25] formerly Dean of the Columbia Law School. All of these men have criticized the practice of following the principle of *stare decisis* too closely. Dean Wigmore has been particularly emphatic in his criticism of the doctrine.

[18] "The doctrine of "*stare decisis*" does not preclude a departure from precedent established by a series of decisions clearly erroneous, unless property complications have resulted, and a reversal would work a greater injury and injustice than would ensue by following the rule."—Thurston v. Fritz, 91 Kan. 625, 194. In this case the Supreme Court of Kansas departed from the common-law rule concerning dying declarations.

[19] "A decided case is worth as much as it weighs in reason and righteousness, and no more. It is not enough to say, 'thus saith the court.' It must prove its right to control in any given situation by the degree in which it supports the right of a party violated and serves the cause of justice as to all parties concerned."—Adams Express Co. v. Beckwith, (100 Ohio St. 348, 351, 352, 126 N.E. 300, 301, 1919). In this case the court overruled a doctrine which had been the law of Ohio since 1825.

[20] "In fact, there has been no objection raised anywhere to the right of the wife to maintain the action for criminal conversation except the plea that the ancient law did not give it to her. Reverence for antiquity demands no such denial. Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress when it can be done without interfering with vested rights." Oppenheim v. Kridel, 236 N.Y. 156, 165, 140 N.E. 227, 230, (1923).

[21] "Law in Books and Law in Action," (1904), 44 AM. L. REV. 12, 20; "Mechanical Jurisprudence," 8 COL. L. REV. 605, 614, (1908). "The Theory of Judicial Decision," 36 HARV. L. REV. 940-943 (1923).

[22] PROBLEMS OF LAW, p. 79. (1920).

[23] "The Duty Problem in Negligence Cases," 28 COL. L. REV. 1014, 1036 (1928).

[24] "Changing Conceptions of Law," 3 CALIF. L. REV. 441, 446 (1915).

[25] "Some Aspects of the Problem of Law Simplification," 23 COL. L. REV. 319, 320 (1923).

A group of able jurists, including Justice Clarke,[26] Justice Lurton,[27] Justice Cardozo,[28] Justce Pound,[29] and Judge Von Moschzsker,[30] have advanced somewhat similar ideas, as have such distinguished lawyers as John W. Davis,[31] and Findlay L. Garrison.[32] An equally impressive list of legal scholars and publicists have taken a similar position. Included in this group are Arthur L. Goodhart,[33] Herman Oliphant,[34] and many others.[35]

In other words, there is a considerable body of legal opinion in this country, emanating from respectable sources, which believes that a noticeable modification of the doctrine of *stare decisis* is now taking place in our system. This relaxation of the ancient dogma is looked upon by this group as a necessary and wholesome tendency, one which should be encouraged to the degree that it becomes necessary to adapt our law to the living present.[36] Indeed there are some who would go so far as to predict a day when precedents, and especially the precedent of

[26] Rosen v. United States, 245 U.S. 465, 471, 38 Sup. Ct. 148, 150, (1918).

[27] Hertz v. Woodman, 218 U.S. 205, 212, 30 Sup. Ct. 621 (1910).

[28] THE NATURE OF THE JUDICIAL PROCESS, (1921) 149-151.

[29] "Some Recent Phases of the Evolution of Case Law," 31 YALE L. J. 361, 363 (1923).

[30] "*Stare Decisis* in Courts of Last Resort," 37 HARV. L. REV. 409, 413 (1924).

[31] "The Case for the Case Lawyer," 3 MASS. L. J. 99, 102, (1916).

[32] "Blind Adherence to Precedence," 51 AM. L. REV. 251, 252, (1907).

[33] "Case Law in England and America," 15 CORNELL L. Q. 186 (1930).

[34] "A Return to *Stare Decisis*," 14 A.B.A.J., 71, 159, (1928).

[35] John Young, "Law as an Expression of Ideals," (1917) 27 YALE L. J. 1, 29; Edward B. Whitney, "The Doctrine of *Stare Decisis*," (1904) 3 MICH. L. REV. 89, 94; Frederick G. McKean, "The Rule of Precedents," (1927) U. OF PA. L. REV. 481; Robert S. Hall, "Precedents and Courts," (1917) 51 AM. L. REV. 833; Thomas P. Hardman, "*Stare Decisis* and the Modern Trend," (1926) 32 W. VA. L. Q. 165, 166; Clarence G. Skelton, "The Common Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence," (1918) 23 DICK. L. REV. 37; Samuel B. Clarke, "What May Be Done to Enable the Courts to Allay the Present Discontent With the Administration of Justice," (1916) 50 AM. L. REV. 161; C. E. Blydenbaugh, "*Stare Decisis*," (1918) 86 CENTRAL L. J. 388.

[36] F. R. Aumann, "Judicial Law Making and *Stare Decisis*," 21 KY. L. J. 156 (1933).

a single case, will no longer be considered a binding source of law which judges must accept under all circumstances.[37] Whether we go that far or not, the tendency to relax the force of precedent in our judicial process is bound to give the judge a larger rôle in determining what the law is which shall be applied.[38] The ultimate outcome of this trend is difficult to predict. In some quarters the belief is held that the final result will be a condition approximating the civil law.[39]

There are several practical factors which might bring about such a result. For one thing, there is a growing demand for speedy settlement of cases. At the same time the volume of judicial business has continued to increase rapidly.[40] With this

[37] "Precedents, and especially the precedent of a single case, will no longer be considered a binding source of law which judges must accept under all circumstances. Only if decided cases have created a practice upon which laymen have relied will the American courts feel that they are bound to follow them. This, as I have attempted to show, is the doctrine of the civil law and directly contrary to that of the English law with its insistence upon the need for certainty. I therefore believe that, as concerns the fundamental doctrine of precedent, English and American law are at the parting of the ways." Goodhart, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW, p. 74.

[38] Under the present system our judges have a difficult time in adjusting the law to the rapidly changing social and economic conditions of the country. "Where a rule has once been decided, even though wrongly, it is difficult or impossible to depart from it. I do not agree with those who think that *flexibility* is a characteristic of Case Law. The binding force of precedent is a fetter on the discretion of the judge; but for precedent he would have a much freer hand."—Geldart, ELEMENTS OF ENGLISH LAW, p. 28.

[39] "It is, I think, therefore safe to say that the present American doctrine is strongly away from the strict English doctrine of '*stare decisis*.' But is this merely a temporary step to be followed by the reaction which so frequently succeeds legal innovations, or is it likely to be accentuated in the future? I believe that the latter is the fact, and that in no distant time the American doctrine will approximate the civil law. This will be due in large part to five reasons: (a) the uncontrollable flood of American decisions, (b) the predominant position of constitutional questions in American law, (c) the American need for flexibility in legal development, (d) the method of teaching in the American law schools, and (e) the restatement of the law by the American Law Institute."—Goodhart, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW, p. 65.

[40] "All available figures show consistent and large growth in the amount of litigation." See GENERAL TRENDS IN VOLUME OF BUSINESS, RECENT SOCIAL TRENDS IN THE UNITED STATES, Vol. 2, (1933) pp. 1450-1453.

increase has come an expansion of case law.[41] In bulk it has now become almost unmanageable.[42] Some method of control must be devised.[43] Although there is some evidence that the courts are trying to limit their written opinions, the problem remains unsolved.[44] One way to cut through this wilderness is to free the judge from the demands of *stare decisis*.[45]

Whether any movement to modify the doctrine of *stare decisis* would extend to the point of civil law practice is not so clear. Whatever the final state of affairs may be, it would seem safe to say that our judges are likely to enjoy a period in which they will be given a much freer hand in determining the law, unfettered by precedent. In other words, it would seem that for a time at least, the scope of judicial law-making will be a wide one.

Insofar as this tendency makes for flexibility in our regular judicial tribunals it would seem to be highly desirable. As Dean Pound,[46] Robert Jackson[47] and a multitude of others have

[41] "Each year about 350 volumes of reports are being published, which can be compared with the five or six volumes for all of England and Wales. As far back as 1902 the President of the American Bar Association, in his annual address to the Association, cited by Whitney, 'The Doctrine of *Stare Decisis*,' 3 MICH. L. REV. 90, 97 (1904), stated that the law reports of the past year contained 262,000 pages and estimated that a man by reading 100 pages a day might go through them in eight years; by which time there would be new reports on hand sufficient to occupy him for 56 years more." Goodhart, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW, (1931) p. 65.

[42] "As to rulings of courts, it is estimated that in America alone there are a million and a half reported decisions available as judicial precedents; and the increase each year represents 170,000 printed pages." Root, Elihu, ADDRESS TO AMERICAN LAW INSTITUTE FOR THE STUDY OF LAW, Circular, 1929, No. 7, p. 10; Y. B. Smith, EDUCATION AND RESEARCH, New York State Bar Association Bulletin, 1930, pp. 189, 190.

[43] RECENT SOCIAL TRENDS IN THE UNITED STATES, Vol. 2, (1933) p. 1430; see also Cardozo, THE GROWTH OF THE LAW, 1924, p. 4. "Unless courts set some restraints on the length and number of published opinions, it is inevitable that our present system of making the law reports the chief repository of our unwritten law will break down of its own weight."

[44] For the percentage of cases where written opinions were reduced in U. S. Supreme Court and New York Court of Appeals see Rosbrook, "The Art of Judicial Reporting," 10 CORNELL L. Q. 103 (1925).

[45] Objections are encountered from those who cling to what Morris Cohen calls "the phonographic theory of the judicial function."

[46] "Justice According to Law," 13 COL. L. REV. 696 (1913).

[47] "An Organized American Bar," 18 AM. BAR ASS. J. 384 (1932).

pointed out, the modern demand is for executive justice as oposed to judicial justice. The public wants speedy settlement, finality and freedom from procedural contention. Hence it ousts the regular courts and settles its problem through administrative agencies unhampered by technical rules of evidence.

The legalist on the other hand, has put great store by a traditional set of values, such as separation of powers in government, the supremacy of an independent judiciary, proof of every allegation according to time tried rules of evidence, testing each witness by cross-examination, deliberation, jury-trial and appeal. The legalist cannot forget that the history of Anglo-Saxon political and legal institutions is the history of the battles for these rights, despite the delay, technicality, and expense which frequently accompany them. The conclusion is obvious. If judicial justice is to retain its prerogative it must be made more flexible. If relaxing the doctrine of *stare decisis* and enlarging the discretionary role of the judge assists in this process it should be so recognized and treated accordingly.