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Precedent in Law

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PRECEDENT IN LAW. Edited by *Laurence Goldstein.* New York: Oxford University Press. 1987. Pp. xvi, 279. $42.

In *Precedent in Law,* Laurence Goldstein[1] has assembled a collection of essays dealing with the fundamental and pervasive phenomenon of precedent.[2] Although not formally divided into sections, the essays fall into three basic categories: (1) essays providing an historical overview of the approaches to precedent; (2) essays concerning theories of binding precedent; and (3) essays on the less fundamental (though still very important) issue of how one actually reasons from prior cases, assuming that some version of the practice of precedent can be justified.

Goldstein's purpose in bringing together the works of the eight contributing scholars[3] was "to produce a collection of essays that may be read with pleasure and profit by students, practitioners and, indeed, by anyone with an interest in the workings of the law" (p. vi). By thus limiting his goals, Goldstein easily achieves them; yet he also limits *Precedent in Law*'s usefulness to the scholar. The essays focus on such different areas and work from such varying assumptions that the reader does not come away with any coherent sense of the role of precedent in legal theory. Although all of the essays address some aspect of precedent, it is difficult to find a theme that unifies them. A summary of the three essays dealing with the theory of binding precedent will illustrate this point.

In *Theories of Adjudication and the Status of Stare Decisis* (pp. 73-87), Peter Wesley-Smith addresses whether strict *stare decisis* can be justified by either the declaratory or the positivist theory of decision-making. The declaratory theory views the common law as independent of the pronouncements of the judges: it is "unchanging and unchangeable in essential content" (p. 79). Given that it is the judge's duty to rule according to this eternal law and that previous judges may have erred, precedents under the declaratory theory can never be

1. Reader in the Department of Philosophy, University of Hong Kong. Among Goldstein's other works are *Some Problems About Precedent,* 43 CAMBRIDGE L.J. 88 (1984) and *Four Alleged Paradoxes in Legal Reasoning,* 38 CAMBRIDGE L.J. 313 (1979).

2. As usually formulated, the notion of precedent is that like cases should be treated alike.

3. The contributors are: Theodore M. Benditt, Professor of Philosophy and Dean of the School of Humanities at the University of Alabama at Birmingham; Anthony Blackshield, Professor of Legal Studies at La Trobe University, Melbourne; Richard Bronaugh, Professor of Philosophy at the University of Western Ontario; Jim Evans, Senior Lecturer in Law at Auckland University, New Zealand; Neil MacCormick, Regius Professor of Public Law and the Law of Nature and Nations, and Dean of the Faculty of Law at the University of Edinburgh; Michael S. Moore, Robert Kingsley Professor of Law at the University of Southern California, and Professor of Law at the University of California, Berkeley; Gerald J. Postema, Associate Professor of Philosophy at the University of North Carolina at Chapel Hill; and Peter Wesley-Smith, Professor of Law at the University of Hong Kong. Pp. ix-x.

strictly binding — they are good indicators of what the law is, but they are not the law and hence cannot command blind adherence.[4] The positivist theory, on the other hand, views judicial pronouncements as law *made by* judges. This would, at first, seem to require that judge-made law be strictly followed; in fact, Wesley-Smith believes that the positivist theory can support vertical *stare decisis.*[5] But what about horizontal *stare decisis?* It would appear that if a court declares that *stare decisis* is a rule of law, then subsequently that court is explicitly bound to follow its own precedents (p. 85). However, Wesley-Smith argues that "a court's authority to make law must be a continuing authority, which would be denied if a court were bound by its own decisions" (p. 82). He finds horizontal *stare decisis* as untenable as the idea that Parliament could bind itself for the future.[6] To those who would argue that law can derive from a legal system's "rule of recognition,"[7] Wesley-Smith responds that such a rule is nothing more than "the various criteria generally accepted as fundamental by the personnel of the legal system" (p. 86) and that the authority of *stare decisis* (like any rule of law) becomes uncertain when the personnel no longer agree that it is law. Thus, Wesley-Smith concludes, neither the positivist theory nor the declaratory theory can support the practice of *stare decisis.*

Theodore M. Benditt, in *The Rule of Precedent* (pp. 89-106), examines the theoretical basis of precedent from a different angle, asking how a rule of *stare decisis* can logically arise in the first place. After first analyzing various justifications for *stare decisis,*[8] Benditt argues

4. P. 79. In another part of the essay, Wesley-Smith gives what might seem to be a different account of the declaratory theory: "[T]he judge searches the records, discovers the law previously recognized, declares and expounds it, and applies it to the dispute before him." P. 74. Although this statement suggests reliance on the rulings in previous cases rather than on the judge's own determination of the law, it assumes that the law is "recognized" (*i.e.,* discovered) and not created.

5. Vertical *stare decisis* refers to "a court being bound by decisions of courts above it in the hierarchy." P. 81. Horizontal *stare decisis* refers to a court being bound by its own earlier decisions. *See* p. 82.

6. P. 82 n.46. *But cf.* Simpson, *The* Ratio Decidendi *of a Case and the Doctrine of Binding Precedent,* in OXFORD ESSAYS IN JURISPRUDENCE 148, 154 (A. Guest ed. 1961).

7. P. 85; *see, e.g.,* Simpson, *supra* note 6, at 154-55.

8. Benditt examines four such arguments. The first is that logical consistency demands that later cases be treated like previous similar cases. Benditt dismisses this argument with the observation that logical consistency merely demands that a *reason* be given that justifies the change in treatment. Pp. 89-90. The second argument addressed is the familiar one that justice requires that like cases be treated alike. The problem with this argument, according to Benditt, is that disparate treatment of similar cases means only that *one* of the parties is being treated unfairly — the party whose case is decided wrongly, who can be the litigant in either the first or second case. P. 90. Third, following precedent promotes stability and certainty in the legal system. While acknowledging the value of stability, Benditt warns that "[t]he law cannot become entirely static"; flexibility is needed to meet inevitable social change. P. 91. The fourth argument for *stare decisis* applies when the prior decision was reached by "a more or less arbitrary drawing of lines for future reference." P. 92 (quoting Lyons, *Formal Justice, Moral Commitment, and Judicial Precedent,* 1984 J. PHIL. 580, 585). The argument for following precedent in such cases is

that a rule of precedent evolves just like ordinary substantive rules of law: through "repeated, reinforcing judicial decisions" establishing a rule of, in this case, following past decisions (p. 97). The argument, in detail, runs as follows:

> Suppose a rule of law favoring complainants in a given sort of case becomes established . . . by a line of decisions in which each judge decides that the best reasons favor following the prior decisions [independent of the merits of each case]. Let us suppose further that in other sorts of cases judges have regularly followed prior decisions, and that as an upshot various rules of law have been established. An important by-product of this process is that a legal rule of precedent is likely to become established in the same way. It is easy to imagine it becoming both the accepted and expected practice of and among judges to decide cases by appeal to past decisions. Judges come to regard the following of prior decisions as appropriate for themselves and for other judges, and to think it wrong — legally wrong — to do otherwise. . . . [W]hen this stage has been reached it is correct to say that a legal rule exists. [p. 97]

More important than the possible criticisms of this argument[9] is its strong positivist assumption: that judicial decisions, at least collectively and over time, *make* law. It is on this positivist assumption that Benditt bases his theory of *stare decisis.* Yet Wesley-Smith argued in the previous essay that positivism fails to support *stare decisis.* Clearly, the authors' theses conflict — yet, because they pursue different topics and because they fail to address directly each other's arguments, the extent and seriousness of the conflict and whether and how the conflict can be reconciled is left unclear.

The reader revisits horizontal *stare decisis* in Anthony Blackshield's *"Practical Reason" and "Conventional Wisdom": The House of Lords and Precedent* (pp. 107-54). Specifically, Blackshield examines how the House of Lords has historically dealt with its own precedents and the theories, new and old, of how to justify these approaches. In the nineteenth-century case of *London Street Tramways, Ltd. v. London County Council,*[10] the House of Lords declared itself absolutely bound by its own prior decisions. The House aban-

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that "the original decision *constitutes a commitment,* made to others, that future decisions in similar cases shall be made similarly." *Id.* (emphasis in original). Benditt likes this approach and thinks an analogous situation appears in cases where the previous decision is not arbitrary, but where the disagreement in society is so sharp that it might *seem* arbitrary. As he puts it, "the less the agreement on principles [in society], the more like an arbitrary commitment a judicial decision will seem." P. 92. Benditt's support for following precedent thus seems to be based on societal skepticism, namely "our (collective, though not individual) lack of certainty about the correctness of certain of the social and political principles we adopt." P. 92.

9. One difficulty is that it assumes (incorrectly) that judges can determine that the *best* reasons favor following past decisions *without* knowing the alternative, *i.e.,* the arguments that go to the merits of the case. Yet if judges *do* consider the arguments that go to the merits and reject them in favor of following the prior decisions, then they — to some extent — *have* decided on the merits.

10. 1898 App. Cas. 375.

doned this approach in 1966 by declaring that, while normally it would follow precedents, it would "depart from a previous decision when it appeared right to do so."[11]

One possible explanation for this history is that the House of Lord's approach to its own precedents is "not itself a subject-matter for precedent" (p. 110). By this view, the House's approach is considered a matter of "practice." Rules of practice are not the same as rules of law, though they can "harden into law and create new rules of law where no relevant rule existed before" (p. 110). In short, rules of practice appear to be law-like except that their application is, to some extent, subject to the discretion of judges. As Blackshield puts it, "however firmly a 'practice' may seem to have hardened into 'law,' it is always open to courts to affirm that it was after all *only* a 'practice,' and thus to change it in circumstances where they would not be willing (or able) to change a rule of law" (p. 111; emphasis in original). However, as Blackshield points out, explaining the House's approach to precedent in this way does not fully account for the belief that prevailed during the *London Street Tramways* regime that the rule against self-overruling was *legally binding* and thus not subject to judicial discretion. Blackshield also seems unconvinced by the notion of a court's "inherent" power to regulate its own practice, though he fails to explain the theoretical basis of his objection.

Blackshield then considers explaining the House's approach to precedent in terms of a "constitutional convention." This differs from a "practice" in that a constitutional convention must

> have about it a quality of *moral restraint,* importing (i) that the effect of the convention must somehow be to limit the exercise of power, and (ii) that observance of the limits imposed must be perceived not merely in terms of practical convenience, nor even of rational "principle," but as some kind of moral obligation.[12]

Although it may be easy to see the *London Street Tramways* rule as an

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11. Lord Gardiner's announcement of the new practice reads:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House.

Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234, 1234.

12. P. 144 (emphasis in original, footnote omitted). Just why a moral obligation cannot involve a rational principle is not explained.

instrument of restraint, to view the Practice Statement rule that way requires a change in perspective. Instead of describing it as *allowing* departures from past precedent, Blackshield suggests that the Practice Statement is simply a less strict version of the *London Street Tramways* rule: The House of Lords will use this newly proclaimed power to overrule *sparingly* so that the judiciary will not usurp *too much* the functions of the legislative branch of government.[13] The Practice Statement can thus be seen not as *granting* power to overrule, but as assuring that such power will be used within limits. As Blackshield observes, "[t]hese limits and assurances are precisely the stuff that constitutional convention is made of" (p. 144).

Since Blackshield defines a "constitutional convention" in terms of "moral restraint,"[14] he must confront the fact that "[m]oral restraints on power-wielders are not intended for the benefit of other power-wielders" (p. 146) but rather for the "public good."[15] Here, Blackshield is skeptical that either individual interests or the "public good" have ever been promoted by the House's strict adherence to precedent (p. 151). In the end, therefore, he views the attempt to conceptualize the House's approach to precedent as a "constitutional convention" as a theoretically unsound, though possibly convenient, "carpet" under which we can sweep our worries concerning its juristic status (pp. 153-54).

Like the previous two essays, Blackshield's is internally coherent. The problem lies in relating it to the other essays, both those dealing with the same general subject and the others in the book. As Benditt does in his essay, Blackshield implicitly accepts a positivist view of law in his discussions of "practice" and "convention."[16] Blackshield, unlike Benditt, does respond to Wesley-Smith's argument that a court cannot bind its successors,[17] arguing that since it "depends on an inference from the nature of sovereign *legislative* power, this attempt to extend it to *judicial* power is probably more ingenious than persuasive" (pp. 137-38; emphasis in original). Here, however, Blackshield misses Wesley-Smith's point: that when the House overrules previous decisions it is exercising legislative-like powers. Thus, his response is insufficient. On the other hand, though Blackshield and Benditt both

13. *See* p. 144.

14. *See supra* text accompanying note 12.

15. P. 148. Blackshield recognizes the difficulty in determining just what the "public good" refers to, but suggests that rather than responsiveness to public opinion, "the aspects of 'public good' which have especial relevance and significance for judicial institutions may have to be found elsewhere, for instance in the need for protection of individual freedom." P. 149.

16. For Benditt's support of positivism, see *supra* note 9 and accompanying text. Although neither a "practice" nor a "constitutional convention" is "law," they both share with the law the characteristic of being *created* by judges, as opposed to existing eternally as in the declaratory theory. Pp. 110, 139-40; *see supra* note 4 and accompanying text.

17. *See supra* text accompanying note 6.

presuppose positivism, they do not even address the same issues. Hence, despite some tantalizing points at which the essays converge, these points are too few and not significant enough to add a unifying element to the essays.

It is even more difficult to relate these essays to the others dealing with different general areas. For example, in *Precedent, Induction, and Ethical Generalization* (pp. 183-216), Michael S. Moore attempts to solve two problems of generalization he finds in law, science, and ethics. The first problem concerns how to justify going from particular bits of evidence (*e.g.*, past decisions, scientific data, or specific ethical judgments) to general rules. Moore's solution is, in short, to deny any need to justify the principle of induction separately from the justification of the particular rules sought to be established (pp. 196-97). To those who would object that the particular inductive arguments for the particular rules ultimately rely on some other inductive arguments, which in turn must rely on some other inductive arguments, and so forth, Moore responds that no starting point is necessary since new beliefs are justified according to their *coherence* with old beliefs (pp. 197-98). As for the second problem — *which* rule to generalize to when more than one fits the data — Moore argues that one should pick the rule that most coheres with other accepted beliefs (pp. 206-09).

How Moore's arguments affect the theories in the three essays described above is not clear. What relation does Wesley-Smith's rejection of *stare decisis* have to the problem of induction? How does Moore's theory affect Blackshield's analysis, which assumes that "practice" and "convention" are both deliberately *chosen* and not "discovered" through a process of generalization? Moore and Benditt might seem to advocate similar theories[18] yet, as it turns out, the similarities are superficial. Benditt assumes that judges can generalize from past decisions to form a rule of precedent, while Moore's whole essay focuses on the very process of generalizing. So again, significant debate on any single issue fails to materialize, and the reader is left wondering why these essays are in the same book.

The essays in *Precedent in Law* deal with numerous aspects of precedent, but the diversity of these works makes it difficult to relate one piece to another. Thus it is unlikely that the scholar will find more than a few of the essays useful. However, despite the lack of coherence among the contributions, *Precedent in Law* is still worth reading. The essays themselves are generally very good: well-organized, interesting, and accessible to the general reader. While the works have a

18. Both argue that what seems to be a special problem is not really so special. Moore claims that the process of induction needs no more justification than the particular rules sought to be established; Benditt argues that the rule of precedent does not need to be established any differently than typical substantive rules of law.

theoretical emphasis, they also provide appropriate support for their theories. *Precedent in Law*'s value is as an introduction to some of the historical and contemporary thinking on precedent.

— *Erik G. Light*