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THE ROLE OF PRECEDENT IN JUDICIAL DECISION

JOHN HANNA †

IF JOHN MARSHALL could read the current debates about the Supreme Court he would probably conclude that present criticisms are comparatively moderate. His feeling might well be shared by some of the justices of the early Franklin Roosevelt era. The attacks on Marshall were directed at the precedents he was making rather than at anything to do with *stare decisis*. "The Nine Old Men" of the thirties were assailed on account of what many thought was the tyranny of precedent, although in fact even before the significant change in attitude by the Court under the leadership of Chief Justice Hughes, there had been both more independence from precedent, and, where constitutional precedent was followed, a greater degree of agreement in the Court than is generally realized. The present is a period where those who dislike such decisions as the "Segregation Cases" and certain cases involving the relative functions of the state and federal governments as to sedition and other matters are dissatisfied with what seems to them the Court's lack of respect for precedent. Perhaps it may be observed that there is little evidence that this dissent is shared by a majority of either the bar or the public. In any event, apart from the heat of the issues concerned with particular cases, it may be timely to review again that perennial topic: the proper role of precedent in judicial decision.

I.

INTRODUCTION.

Stare decisis or, in its complete form, *stare decisis et non quieta movere* is usually translated "to stand by (or adhere to) decisions and not to disturb what is settled." The classic English version is by Croke: "They said that those things which have been so often adjudged ought to rest in peace."¹ Blackstone says: "The doctrine of the law then is this: that precedents and rules be followed, unless flatly absurd

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1. *Spicer v. Spicer*, Cro. Jac. 527, 79 Eng. Rep. 451 (1620). *Stare decisis* literally is applicable to questions of *res judicata*, law of the case and rehearings. See Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Green, *Stare Decisis*, 14 AM. L. REV. 609 (1880); Kennedy, *Stare Decisis*, 29 CAN. B. REV. 92 (1951); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1940); see also Comment by Armstrong, 35 A.B.A.J. 541 (1949). In general, *stare decisis* is considered as concerning the binding effect of a decision on other cases rather than on parties and privies to the judgment.

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.”² The general American doctrine as applied to courts of last resort is that a court is not inexorably bound by its own precedents but will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.³ The alternative to stare decisis as popularly defined would be (1) absolute discretion on the part of a court to decide each case without reference to any precedent; or (2) complete codification of our law, with a requirement that each court look independently to the code for a basis of decision. A more limited reform would be to bar the courts from following precedents of decisions on statutory and constitutional law. None of these alternatives is a matter of much contemporary debate in America. If we define stare decisis in terms of its proper limitations, it should always be applied.⁴ We shall stay closer to the points of controversy if we appreciate that our real subject is the theory of judicial precedent.⁵

2. BLACKSTONE, COMMENTARIES *36 (Chase 3d ed. 1910). Blackstone also says: “For it is an established rule to abide by former precedents, when the same points come again in litigation; . . . because the law in that case being solemnly declared and determined, what before was uncertain . . . is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments Yet this rule admits of exception, where the former determination is most evidently contrary to reason, much more if it be clearly contrary to Divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust it is declared, not that such a sentence was *bad law*, but that it was *not law*” See Braybrooke, *Are Rules of Precedent Rules of Law*, 1 VICT. U. C. L. REV. 7 (1956).

3. Mr. Justice Frankfurter calls it a principle of policy. “We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law and is rooted in psychologic need to satisfy reasonable expectation. But stare decisis is a principle of policy and not a mechanical policy of adherence.” *Helvering v. Haddock*, 309 U.S. 106 (1939); cf. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334 (1944); see also Roberts, J., dissenting, *Mahnick v. Southern S. S. Co.*, 321 U.S. 96, 104 (1944); Thornton, *Precedent in the Erie-Tompkins Manner*, 27 N.Y. U.L.Q. REV. 770 (1949).

4. Stare decisis has been called a custom, doctrine, habit, maxim, policy, principle, rule, technique and theory. Holdsworth regards it as a rule. “Decided cases which lay down rules of law are authoritative and must be followed,” with reservations. Holdsworth, *Case Law*, 50 L. Q. REV. 180, 184 (1934). One might attempt a study of stare decisis in procedure, evidence, real property, contracts of various sorts, criminal law, torts, security, creditors’ rights, corporations, statutory and constitutional interpretation, and other fields of law. Time has settled largely the problem of precedent in some of these fields, such as procedure. In others, such as real property, the advantage of the binding precedent is obvious. While the various fields offer illustrations of the variety of precedents and some difference in the technique of analysis and application, detailed examination tends to become a study of particular fields. Aside from its impractical length, such an outline tends to obscure the principles common to the use of precedents generally. See Comment, *Law of the Case Doctrine*, 28 WASH. L. REV. 137 (1953).

5. This is the uniform approach of Continental jurists who write on English law. Gray studiously avoids the term stare decisis. Pound rarely mentions it in his philo-

This essay assumes that judicial decisions make law. Sir Matthew Hale's opinion⁶ was that judges do not make law but only declare and publish it. Blackstone shared this opinion.⁷ Both seemed to regard English law as, in the phrase of Holmes, a brooding omnipresence in the sky of natural law covering all possible situations perfectly and immutably. Kent said decisions were the "highest evidence" of the law.⁸ James C. Carter was another exponent of the declaratory theory of precedent, although to him all law came from the command of a sovereign whose commands included custom.⁹ Austin calls the declaratory theory "the childish fiction employed by our judges, that judiciary or common law is not made by them but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges."¹⁰ Gray perhaps was more directly responsible than Austin for discrediting the declaratory fiction. Holmes, Salmond, Pound, and Goodhart¹¹ are among modern juristic scholars who agree with Gray.¹² As Gray observes,¹³ in thousands of cases "the law stands as it does today upon the opinions of individuals in judicial positions on matters as to which there was no general practice, no custom, no belief, no expectation, in the community."¹⁴

sophical works though he discusses it in more polemical writing. Salmond, Goodhart, and Allen, among others, deal broadly with the question of judicial precedent. WAMBAUGH, *STUDY OF CASES* 104 (2d ed. 1904); See also von Eyben, *Judicial Lawmaking in Scandinavia*, 5 AM. J. COMP. L. 112 (1956).

6. HALE, *HISTORY OF THE COMMON LAW* 65 (Runnington ed. 1779). The history was first published in 1713 after Hale's death.

7. See note 2 *supra*.

8. 1 KENT, *COMMENTARIES* (10th ed. 1860) *475. While no doubt Kent accepted the declaratory theory of precedents, it is possible some writers in speaking of evidence are thinking of the reports of cases as better evidence than memory or the commentaries of writers. Cf. Coke's statement, "Our Booke cases are the best proof of what the law is." 2 Co. Litt. 254a (Hargrave and Butler ed. 1812).

9. Carter, *The Ideal and the Actual in Law*, 24 AM. L. REV. 752, 758 (1890); see also Loughran, *Judicial Precedent*, 22 FORDHAM L. REV. 1 (1953).

10. 2 AUSTIN, *JURISPRUDENCE* 655 (4th ed. 1863).

11. The opinions of these men on this subject are too familiar to require quotation. It may be enough to quote Holmes: "I recognize without hesitation that judges do and must legislate." *So. Pac. Ry. v. Jensen*, 244 U.S. 205, 221 (1917).

12. Gray makes an effective argument in his review of the three-to-one decision in *Pells v. Brown*, Cro. Jac. 590, 79 Eng. Rep. 504 (1620), by which the King's Bench established that an executory devise after a fee cannot be destroyed by the holder of the fee. First remarking that there is no universality in the idea of the creation of contingent interests by will, since under the civil law contingent interests are valid to a very limited extent if at all, Gray denies that there was any English custom on the subject. Judges and lawyers disagreed among themselves and not one layman in fifty thousand would have known what the question meant. "To say that there was a custom that future contingent interests were indestructible is a baseless dream, invented only to avoid the necessity of saying that judges make law." GRAY, *NATURE AND SOURCES OF THE LAW*, 236, 238 (2d ed. 1927); see also Friedmann, *Stare Decisis at Common Law and Under the Civil Law of Quebec*, 31 CAN. B. REV. 723 (1953).

13. Gray, *op. cit. supra* note 12, at 239.

14. See also Dillon, *Our Legal Chaos*, 2 POL. SCI. Q. (1894).

Gray's slip about opinions making law¹⁵ furnishes an appropriate occasion for a comment on the nature of precedents.

Where a court makes a decision that contains in itself a principle, it creates a judicial precedent.¹⁶ The opinion in which the judge formulates his reasons for the decision is not the precedent, although it may be impossible to ascertain the precedent without a study of the opinion, since only from the opinion may one discover what facts are regarded by the court as material. The reason the judge gives is not necessarily the *ratio decidendi*. He makes law by his choice of material facts, which implies an exclusion of some facts as immaterial. From the decision considered in relation to the material facts, one can isolate the principle of the case, which is the precedent.¹⁷

A simple illustration of the effect of the selection of material facts in the making of a precedent is found in *Rylands v. Fletcher*.¹⁸ The facts were that (1) defendant had a reservoir built on his land (2) by an independent contractor (3) who was negligent; (4) water escaped and (5) injured the plaintiff. The court regarded the facts of the independence of the contractor and his negligence as immaterial. The principle stated is at least one of absolute liability on the landowner for injury done by the escape of water stored thereon with his consent.¹⁹

15. Gray of course had no such opinion. Gray, *op. cit. supra* note 12, at 261.

16. SALMOND, *JURISPRUDENCE* 201 (3d ed. 1924).

17. Goodhart, *Ratio Decidendi*, 40 *YALE L. J.* 161 (1930). Felix Cohen calls Goodhart's rules "an orthodox wild goose chase." Cohen, *Transcendental Nonsense*, 35 *COLUM. L. REV.* 809, 844 (1935); cf. LEWELLYN, *BRAMBLE BUSH* 47, 61 (1930); Holmes, *Codes and the Arrangement of the Law*, 5 *AM. L. REV.* 1 (1870); 54 *HARV. L. REV.* 725 (1931).

The following is a summary, somewhat condensed, of Professor Goodhart's rules: 1. All facts of person, time, place, kind and amount are immaterial unless stated to be material. 2. If there is no opinion, or the opinion gives no facts, then all other facts in the record are material. 3. If there is an opinion, the facts stated in the opinion cannot be contradicted from the record. 4. If the opinion omits a fact in the record this is assumed to be a finding that the fact is immaterial in the absence of evidence that its omission was an oversight. 5. All facts stated by the judge to be immaterial or impliedly so treated must be considered immaterial. 6. All facts specifically stated to be material must be considered material. If the opinion does not distinguish between material and immaterial facts, all facts set forth must be considered material. 7. If there are several opinions, which agree as to the result but differ as to material facts, the principle of the case is limited to fit the sum of all the facts held material by the various judges. 8. A conclusion based on a hypothetical fact is a dictum.

Learned Hand illustrates beautifully the judicial technique of analyzing and applying precedents in his dissent in *De Acosta v. Brown*, 146 F.2d 408, 412 (2d Cir. 1944).

18. 3 H. L. 330 (1868).

19. A precedent may be a reiteration of an existing precedent, may be supplementary or may establish new law. It may also be authoritative or only persuasive, may be absolutely or conditionally binding. See Salmond, *Theory of Judicial Precedents*, 40 *YALE L. J.* 376 (1900). An affirmation of necessity does not create a precedent, as Chief Justice Marshall noted in *Etting v. U.S. Bank*, 24 U.S. (11 Wheat.) 59 (1826). Authority of a precedent is affected by whether the decision was by a unanimous or by a divided court, and especially by dissenting opinions. While a single decision may be a binding precedent, its significance is lessened if it is neither followed in subsequent decisions nor results in a course of practice.

Before any question of overruling a precedent arises, the principle must be formulated, not from the opinion, not from headnotes, not from digests, not from textbooks, but from the actual decision upon the material facts. Time and place, often immaterial, cannot be ignored. They may be material and decisive. The next task is the application. Is there likeness? Are the cases "on all fours"? Is there a choice of analogies? Is the precedent a narrow rule or a standard? Many decisions that are said to overrule do nothing of the sort. They only declare the true precedent, or supplement or distinguish it. No doubt there are some decisions which in reality overrule while professing the contrary. Rightly understood the rule of precedent can be the same in law, in equity or statutory and constitutional interpretation. Granted that the judge in constitutional cases is interpreting a charter of government, his task of statesmanship differs only in degree from that when he is construing a municipal ordinance or a problem of corporation law. In some cases the material facts are few and easy to grasp. In others the judge enters an appalling domain of economic, social and individual facts about which there are profound disagreements. The very magnitude of the responsibility is an argument against yielding to the expediency of the moment to the pressure of those with no patience with general principles.

It is with the assumption that the problem of *stare decisis* can be viewed as a whole that this discussion proceeds to a factual statement about judicial precedent in England and America, a brief survey of the historical development with a glance at the Continental use of precedent, a summary of the advantages and disadvantages of our system, and an appraisal in the light of theories as to the nature of the judicial function.

II.

ACTUAL AUTHORITY OF PRECEDENTS.

England

The English doctrine of precedents is that the House of Lords is absolutely bound by its own decisions,²⁰ and every court is absolutely

20. *London Street Tramways v. London City Council*, [1898] A.C. 375. This rule occasionally puts a lower court in the embarrassing position of being required to choose between two apparently inconsistent decisions of the House of Lords. *Cf.* *N.Y. Life Ins. Co. v. Styles*, [1889] 14 A.C. 381 and *Losch v. London Assurance Corp.*, [1885] 10 A.C. 438. The first case holds that a bonus on a mutual policy is income, the second that it is a capital gain.

The House of Lords up to 1760 occasionally departed from its precedents. *Pelham v. Gregory*, 3 Bro. P.C. 204, 1 Eng. Rep. 1271 (H.L. 1760). In Peerage cases the House is not absolutely bound by previous decisions, *St. John Peerage Claims*, [1915] A.C. 282, 308. If the House of Lords had the jurisdiction of our Supreme Court in constitutional cases the pressure on it to overrule previous decisions would be increased.

bound by decisions of all superior courts. The Court of Appeal is probably bound by its own decisions.²¹ A decision of one court of first instance is only of persuasive force on another similar court. A decision of an inferior court does not bind a higher court, although a course of decisions may have considerable influence. The Judicial Committee of the Privy Council may overrule its own decisions.²²

United States

In the United States no court of last resort considers that it is absolutely bound by its own precedents. It is generally stated that inferior courts are bound to follow the precedents of superior courts. Litigants should not be put to the unnecessary expense of appeal when reversal is almost certain. Lower courts occasionally do not follow an existing precedent of a higher court where the inferior court has reason to believe that the upper court will overrule a precedent. For example, in a Jehovah's Witnesses flag-salute case, a district court²³ refused to follow a Supreme Court decision and was rewarded for its temerity by the Supreme Court's agreeing with it.²⁴ A district court usually will follow an appellate court decision, even if it expresses disapproval, and will leave it to the losing party, if he can, to obtain a reversal.²⁵

Among courts of coordinate jurisdiction, precedents have about the same persuasive weight as in similar situations in England.

If the court of one state must determine the law of another state, the decisions of the courts of the latter state are absolutely binding on the former. Where a state has been once part of another state, the decisions of the parent state before the separation have the same force in the new state as in the old.

In that territory of the United States which was once a part of the British colonial empire, English decisions before the settlement of

One should note that until 1783 appeals before the House of Lords were decided by the whole House. It was only as late as 1844 that the convention was firmly established that only Lords learned in the law could hear appeals. See 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 351 (3d ed. 1922); Smith, *Public Interest and the Scope of House of Lords Precedents*, 19 *MODERN L. REV.* 427 (1956).

21. See Goodhart, *Precedent in English and Continental Law*, 50 *L. Q. REV.* 40, 42 (1934).

22. *Cf.* *Kielley v. Carson*, 4 *Moo.* 63, 13 *Eng. Rep.* 225 (P.C. 1842); *Beaumont v. Barrett*, 1 *Moo.* 59, 12 *Eng. Rep.* 733 (P.C. 1836). In the former case the Privy Council overruled its former decision that a colonial legislature had common-law power to punish contempts. Baron Parke delivered both opinions. See also *Read v. Bishop of Lincoln*, [1892] *A.C.* 644, 654. It is worth recalling that the Privy Council was not a court during the American colonial period.

23. *Barnette v. West Va. State Board of Education*, 47 *F. Supp.* 251 (S.D. W.Va. 1942). The court refused to follow *Minersville School District v. Gobitis*, 310 *U.S.* 586 (1940) because of a dictum in *Jones v. Opelika*, 316 *U.S.* 584 (1942).

24. *West Va. State Board of Education v. Barnette*, 319 *U.S.* 643 (1943).

25. See *Douglas v. Jeannette*, 130 *F.2d* 652 (3d Cir. 1942).

the Colonies are precedents. English decisions following the Revolution are not precedents. Decisions between the establishment of the Colonies and the Revolution are, strictly speaking, not precedents, for there was in general no appeal to English courts from the Colonies. In practice, however, English decisions during the colonial period had, in the Colonies, substantially the prestige of precedents.²⁶

In their respective jurisdictions federal and state courts regard the precedents of each other as do any other courts of coordinate jurisdiction. In matters of federal law, state courts follow federal precedents. Federal courts, in matters of substance on questions of state law, are absolutely bound by state precedents.²⁷ If there are no authoritative decisions by the highest court of the state, it is generally the duty of the federal court to follow the precedents of inferior state courts.²⁸

III.

HISTORICAL BACKGROUND.

The theory of the binding judicial precedent was so firmly established in England prior to the Revolution that it was accepted without debate in America. Americans had no codes and little inclination to permit either executive or legislature to interfere with judicial functions. Lawyers were confirmed in their attitude by Blackstone and

26. GRAY, *NATURE AND SOURCES OF LAW* 244 (2d ed. 1921). See especially Professor Gray's amusing account of Kentucky's attempt to prevent citation of English decisions made after 1776. *Id.* at 245.

27. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). See note 3, *supra*. The latter case held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by the highest court; that they were free to exercise an independent judgment as to what the common law of the state is or should be. The Fed. Judiciary Act of Sept. 24, 1789, 28 U.S.C. § 725 provides: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." It is often a matter of considerable difficulty to determine whether a situation is within the field of state law or has been sufficiently taken over by federal legislation to make federal law apply. For example, if a telegram alleged to be libelous is sent from Massachusetts to Michigan, the federal court need not apply either the law of Michigan or of Massachusetts, since interstate telegraphic communication is subject to federal regulation. *O'Brien v. W. U. Tel. Co.*, 113 F.2d 530 (1st Cir. 1940). See also Broh-Kahn, *More on the Erie Case*, 30 KY. L. J. 3 (1940); Tunks, *Categorization and Federalism*, 34 ILL. L. REV. 271 (1939); 9. U. CHI. L. REV. 113, 127, 308 (1942).

28. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940). See *Vandenbark v. Owen-Illinois Glass Co.*, 311 U.S. 538 (1941), for the culmination of litigation in which a district court followed an Ohio Supreme Court precedent, which was subsequently overruled. *Trif v. Nat. Br. & Alum. Co.*, 135 Ohio St. 191 (1939). The Supreme Court of the United States thereafter reversed the district court.

The federal courts are not relieved of the duty of determining state law because of the difficulty of finding an authoritative state decision on state law. *Meredith v. Winter Haven*, 320 U.S. 228 (1943).

Kent. In England the history of precedent is bound up with the history of law reporting. Decisions cannot be precedents without reliable publication.

English law reporting may be divided into four periods: (1) 1272 to 1537, the time of the Year Books; (2) 1537 to 1765, characterized by the reports of Plowden and Coke; (3) 1765 to 1865, the years of the authorized reports; and (4) the modern period since 1865.²⁹ In the Anglo-Saxon epoch there is no evidence of any notion of judicial precedent. The so-called codes of this age were collections of judgments, illustrative of customs. After the conquest, William I confirmed the laws of Edward the Confessor but made few additions. The legal sources of the Norman period, such as the Domesday Book, the Pipe Rolls, the records of the Curia Regis and of various assizes, throw little light on judicial precedent. Glanvil's treatise, written about 1187, is based on a collection of writs. Bracton's *Treatise* about 1250 cites approximately 500 cases. The *Note Book* attributed to him mentions about 2,000, only a small part of which are cited in the *Treatise*. Bracton seems to have regarded legal opinions both in and out of court as of substantially the same authority. He nowhere argues that a new case be adjudged by the precedent of a similar earlier case. Bracton, however, does emphasize the importance of judicial decisions as a source of law, and is the first to do so. Britton, who edited Bracton about 1291, omitted Bracton's citations. In *Littleton's Tenures* (1475), only 25 cases are cited. Littleton's work is a logical study of principle. That judicial precedents were gaining in authority is indicated by *Doctor and Student* (1540), where we read that "all cases like unto other cases shall be judged after the same law as other cases be."³⁰

While the later Year Books may have had some official character, most of them were notebooks of lawyers and students. Their object was to provide materials for arguments on pleading. Such statements as that by a pleader about 1300 that "the judgment to be given by you will be thereafter an authority" may be, as Pollock³¹ suggests, a proof of the importance of precedent or, as Lewis thinks, only a flattering remark of counsel.³² It seems likely that during the Year Book period cases were used as evidence of judicial tradition but not as precedents. As Lewis remarks, authority for anything can be found in the Year

29. See Lewis, *The History of Judicial Precedent*, 46 L.Q. REV. 207, 341 (1930), 47 L.Q. REV. 411 (1931), 48 L.Q. REV. 230 (1932); Veeder, *The English Reports, 1292-1865*, 15 HARV. L. REV. 1, 109 (1901).

30. SAINT-GERMAIN, *DOCTOR AND STUDENT* ii c.4, 133 (1540).

31. POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 233 (6th ed. 1896).

32. Lewis, *History of Judicial Precedent*, 46 L.Q. REV. 207, 353 (1930).

Books. He takes the more skeptical view that they are no authority for anything.³³

Coke clearly regards decisions as authoritative, and no doubt he represented the prevailing opinion. His citations would scarcely be exceeded by a modern reporter.³⁴ Coke asserted: "Law is said to be a science and book cases provide a solution for all new cases."³⁵ Bacon approved the authority of the decided case.³⁶ Croke in 1620 reports a judicial statement that precedents are founded on great reason and are to be observed.³⁷ Chief Justice Vaughan in 1673 shows some dissent in his insistence that a judge cannot be bound by an authority he personally believes to be erroneous,³⁸ but Hale regards decisions as the best evidence of the law.³⁹ By the time of Blackstone in England few would question the existence of the rule of the binding judicial precedent without distinction between law and equity.⁴⁰

IV.

PRECEDENT IN THE CIVIL LAW.

Judicial decisions influence judges in subsequent cases in any country,⁴¹ especially where the judges are members of a trained pro-

33. Lewis, *History of Judicial Precedent*, 47 L.Q. Rev. 411, 422 (1931). Nevertheless, some of the statements in the Year Books are fairly emphatic on the subject of precedents in the modern sense. JENKINS, about 1661, in EIGHT CENTURIES OF REPORTS, (Barlow's Trans. 3d ed. 1777) quotes the Year Books: "We must not change ancient law. A counselor is not to be heard who speaks against precedents. . . . We will not judge according to the law at one day and otherwise at another day. . . . If we judge against prior judgments, it is a bad example to the Barristers and Students of Law. . . . They will not have any faith in or give any Credit to their Books." He quotes Sir John Priscot (C.P.) from 33 Henry VI, *Novatio non tam utilitate prodest, quam novitatio perturbat.*"

34. In *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (1609), Coke cites 140 cases, mostly from the Year Books. However, in 97 N.Y. counsel on both sides cited 285 cases in a single case, 125 from New York. In 88 N.Y. counsel cited 5,037 cases in the volume.

35. 7 Co. Rep. 1a, 28a, 77 Eng. Rep. 377, 410 (1609).

36. Bacon, Aph. 73, V Works (S. E. & H. ed.) 103.

37. *Robins v. Sanders*, Cro. Jac. 386, 79 Eng. Rep. 330 (1616); see also *Spicer v. Spicer*, Cro. Jac. 527, 79 Eng. Rep. 451 (1620).

38. *Bale v. Horton*, Vaughn 360, 383 (1673).

39. HALE, HISTORY OF THE COMMON LAW 65 (Runnigton ed. 1779).

40. Before the 18th century it may have been that equity required a precedent to be supported by a course of decision. See *Morris v. Hankey*, 3 P. Wms. 146, 147, 24 Eng. Rep. 1006 (1732). Lord Hardwicke in *Evelyn v. Evelyn* said two precedents were not necessarily binding. Amb. 191, 192, 193, 27 Eng. Rep. 130 (1753). In general, however, there is little difference between law and equity in the authority of precedents. See Winder, *Precedent in Equity*, 57 L.Q. Rev. 245 (1941).

41. There is no doubt that at various periods precedents made important contributions to Roman Law. Justinian's decree on imperial rescripts is a rule of stare decisis. Nevertheless, the Justinian Code, itself a compilation of judicial precedents enacted as a statute, forbids judges to found their decisions on other decisions. CODE LIB. I tit. XIV, 12. A similar provision is found in modern European codes.

fession.⁴² Judicial decisions and opinions are published on the Continent and have a considerable effect on the development of the law. The judicial decision—and it is a course of decisions rather than a single instance that is followed—is respected not because it has been made but because its wisdom commends it to other judges. Decisions enjoy no different influence in kind and perhaps not so much in degree as the writings of learned commentators. The different attitude toward precedent in the Continental system and our own is not fully explained by European codification. Our own law is codified in very considerable part. The difference is one of method. Each Continental judge has the duty to settle a case by an independent reference to the code. In a common-law jurisdiction the assumption is that a previous decision will be followed, whether on a matter covered by the unwritten law or statute. The civil law, at least apparently, is concerned with the verbal construction of the code rule, often expressed in fairly broad language. This difference not only affects judicial action, but also law study. The French and German student primarily studies the code and expositions of it. The study of cases is distinctly subordinate. With us study of cases is paramount, even in fields of statutory law.⁴³ The judicial system affects professional training. The methods of legal training in turn are reflected in the technique of judges.

Why does judicial precedent play a different role on the Continent than in England?⁴⁴ Perhaps the statesmanship of William I and his successors in their desire to pacify the English by retaining ancient customs is in part the explanation. Sir John Salmond attributes the unique eminence of common-law precedent to the powerful and authoritative position always occupied by English judges.⁴⁵ However, doctors of the civil law had judicial positions in Germany at an early date. Holdsworth thinks the supremacy of English case law is

42. See II GENY, *METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSTIF* 77 (2d ed. 1919); SALEILLES, *LA PERSONALITE JURIDIQUE*, 333 (1910).

43. An interesting theoretical problem is whether our system develops by induction while the Continental system proceeds by deduction. Redlich argues that the intellectual activity of our judges is deductive. Our case method, he asserts, is not induction but empiricism. *THE CASE METHOD IN AMERICAN LAW SCHOOLS*, Bull. No. 8, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (1914).

44. England was under Roman domination for over 400 years in a period when Roman precedents greatly influenced the development of law. In parts of Germany in the Middle Ages precedents seem to have had an authority beyond their intrinsic value. On the other hand the Code Justinian was known to the Norman conquerors of England. England separated from Rome before the Justinian codification. Perhaps because of geographical isolation the English were never attracted to the Roman idea of centralization of administration, law and religion, so glorified in Dante's *De Monarchia*, and which has always been popular in certain European areas. See Gray, *op. cit. supra* note 12, and German sources quoted, especially I STOBBE, *GESCHICHTE DER DEUTSCH RECHTSQUELLEN* (1860).

45. Salmond, *The Theory of Judicial Precedent*, 16 L.Q. REV. 396 (1900).

due to certain peculiar conditions, which he summarizes: (1) a centralized judicial system, (2) learned lawyers bound together by a common professional tradition, and (3) an independent Bench on the whole more able than the Bar.⁴⁶ Goodhart thinks the reason lies in the fact that on the Continent there was always the background of Roman law, with its developed doctrines and principles, even before the codes. The Continental judges had a ready-made framework into which to fit their decisions. In England the judges largely had to create this structure for themselves.⁴⁷ Subsequently both in maintaining the victories of revolution, as in France, or elsewhere in resisting revolution, centralized authority was reluctant to allow judges more than a very restricted creative function in the development of law. Whatever the weight of these explanations, they are characterizations rather than causes. Perhaps there is no single cause but numerous causes, cumulative and successive, becoming decisive at critical dates.

V.

ADVANTAGES AND DISADVANTAGES OF PRECEDENTS.

It would be easy to fill many pages with English and American encomia of the Anglo-American rule of judicial precedents. Judge Moschzisker asserts that it expedites the work of the courts by preventing the constant reconsideration of settled questions, enables lawyers to advise clients with a reasonable degree of certainty and safety, assures individuals that if they act on authoritative rules of conduct their contracts and other interests will be protected in the courts, makes for equality of treatment of all men before the law, and lends stability to the judicial arm of government.⁴⁸ He finds it especially appropriate in the United States, where the judges are largely elected, come from and often return to the active bar, and have no particular interest in law as a science.⁴⁹ He summarizes the advantages of stare decisis as certainty, stability, equality, and predictability. To this he might add, maintenance of public respect for and confidence in the judiciary.

American and English writers, with the exception of Bentham,⁵⁰ generally have preferred the English to the Continental theory of

46. HOLDSWORTH, *SOME LESSONS FROM OUR LEGAL HISTORY* 20 (1928).

47. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 62 (1934).

48. Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924).

49. Llewellyn, referring to uniformity of treatment of men in like conditions and other aspects of stare decisis, says: "All of which last . . . seems to me interesting rather than convincing." BRAMBLE BUSH 36 (1930).

50. Bentham said precedent was "acting without reason, to the declared exclusion of reason, and thereby in declared opposition to reason." RATIONALE OF JUDICIAL

judicial precedent, an opinion by no means shared by Continental jurists.⁵¹ Professor Goodhart lists twelve claimed advantages for the Anglo-American system of precedents.⁵² It translates custom into law; keeps the law's development in the hands of men learned in the law; respects traditions; bases law on practical experience; is flexible; convenient; scientific; protects the litigant from errors, partiality and prejudice of individual judges; and makes for certainty. About most of these alleged advantages he has an urbane skepticism. If custom may govern the first decision, subsequent custom cannot alter it. Following tradition is often a control by a dead hand.⁵³ Flexibility and certainty are mutually inconsistent. The mass of decisions makes necessary dependence on precedent inconvenient, a source of error, a means of concealing bias. Piecemeal development cannot be scientific. In statutory interpretation especially, it is unfortunate to compel judges to follow judicial precedents rather than to take a fresh view of the statute itself.

Professor Goodhart's criticisms are salutary in reminding us that we may possibly find something of merit outside our countries. A weakness in his analysis is that he takes little account of the variety of precedents. Precedents of real property and contracts, for example, may produce a desirable certainty. Precedents of torts may result in a flexibility as applied to changing conditions. Holmes did not regard the number of precedents in a given situation as inconveniently large. If our law is not a scientific whole, at least it is more apt to be adjusted to the community than if it were set down complete on the basis of a priori abstractions.

One point of great importance largely overlooked by Professor Goodhart is the retrospective effect upon our law when precedents are

EVIDENCE, Book VIII, c. 111, par. 4. (1827). "How should lawyers be otherwise than fond of this brat of their own begetting? . . . It carries in its hand a rule of wax, which they can twist about as they please—a hook to lead the people by the nose, and a pair of shears to fleece them with." Other remarks of Bentham are equally violent.

51. See, as typical SCHWARTZ, *DAS ENGLISCHE RECHT UND SEINE QUELLEN*, IN *DIE ZIVILGESETZE DER GEGENWART* 25 (Bensheimer ed. 1931). "Vor allem ergibt sich aus dem Grundsatz der bindenden Kraft der precedents eine weitgehende Starrheit der Case-law."

52. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40 (1934). Professor Goodhart might have made an ironic comment about the certainty of our law by examining some typical volumes of American reports. For example, in 97 N.Y. there are 79 decisions, of which 38 were reversals, *i.e.*, of lower court decisions.

53. Cf. HOLMES, *COLLECTED LEGAL PAPERS*, 187 (1920). "It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV." Lord Mansfield could introduce the custom of the law merchant into common law. His successors could not accept new commercial customs if they contravened Lord Mansfield's precedents. Lord Mansfield himself lost a bout with precedent on the subject of consideration. See *Pillans v. Van Mierop*, 3 Burr. 1663, 97 Eng. Rep. 1035 (1765) which was overruled by *Rann v. Hughes*, 4 Bro. 27, 2 Eng. Rep. 18 (1778).

ignored or overruled.⁵⁴ American constitutions have condemned ex post facto legislation. This fundamental principle of justice can scarcely be disregarded by judges. When a decision overrules a precedent or disregards it, the law thus made is the law not only for the case but for all similar situations, and it sets in motion a train of reasoning by analogy. While our law affords protection for interests vested in reliance upon decisions (for example, purchasers of municipal bonds after a state supreme court has held them valid do not lose their rights if the court overrules its decision), this protection has only a limited application.⁵⁵ The rule of the Montana Supreme Court⁵⁶ that it will apply an unsatisfactory precedent to the case before it but announce that in the future the precedent will be overruled not only makes dictum a precedent but is unjust to the present litigant who may be in the same situation as others who can take advantage of the court's announcement. Legislation, much more readily than decision, can make law as from a particular date. Even where individual interests can be protected, amendment of the law by decision may result in confusion in the administration of justice.

The argument concerning retrospective application can be pressed too far. Net social advantage may even justify some individual inconvenience. The mere existence of certain precedents may have little effect on conduct. For example, if a court should overrule the precedent that a surety is discharged by an extension of time to the principal by the creditor irrespective of damage to the surety, unless the creditor goes through the ritual of a formal reservation of rights against the surety, the harmful consequences would be negligible. The overruling of a tort precedent would in the nature of things have practically no retrospective effect. When the Court of Appeals of New York imposed liability on a motor car company for the injury to a car-owner on account of the latent defects of a wheel,⁵⁷ there was no procession

54. See Freeman, *Retroactive Operation of Decisions*, 18 COLUM. L. REV. 30 (1918); Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 421 (1924). Professor Kocourek has suggested a uniform statute dealing with retroactive consequences of decisions. 17 A.B.A.J. 180 (1931).

55. *Muhiker v. Harlem R.R.*, 197 U.S. 544 (1905); *Gelpke v. Dubuque*, 63 U.S. 175 (1863); cf. *Allen v. Allen*, 95 Cal. 184, 30 Pac.213 (1893). Without too great regard to theory, courts attempt to avoid retroactive effect of decisions on criminal law. *State v. O'Neil*, 147 Iowa 513, 126 N.W. 454 (1910); see *Stare Decisis, The Montana Doctrine*, 13 MONTANA L. REV. 74 (1952).

56. *Great Northern Ry. v. Sunburst Oil Co.*, 91 Mont. 194, 7 P.2d 919 (1931). The Supreme Court held that there had been no denial of due process. 287 U.S. 358 (1932); see also *Donovan v. Russell*, 264 Mich. 217, 249 N.W. 830 (1933); *Holt v. Weber*, 252 Mich. 198, 233 N.W. 159 (1930); *Kavanaugh v. Rabor*, 222 Mich. 68, 192 N.W. 623 (1923); see further, *Hodges, Stare Decisis in Boundary Disputes*, 21 TEXAS L. REV. 241 (1943).

57. *MacPherson v. Buick Motor Car Co.*, 217 N.Y. 382 (1917). For an overruling decision where the court points out that no one has relied to his detriment on the former rule (relating to discharge in bankruptcy), *McLain v. Lance*, 146 F.2d 341 (5th Cir. 1944).

of victims waiting the next morning to file suits for similar antecedent injuries. No business practices were dependent upon the continuance of a contrary rule.

VI.

PRECEDENT AND THE JUDICIAL FUNCTION.

A law may be conveniently regarded as a rule of external human conduct enforced by a sovereign political authority. Legislation has an official textual form. The rules of case law are the by-product of the continuous process of judicial settlement of particular controversies. The latter rules are not embodied in official textual form. Digests, indices and annotations are useful tools to the user of case law. The Restatements of the American Law Institute are scholarly formulations of the precedents of common law and equity. Some of these rules, such as that a promise without consideration is unenforceable, are precise, though even here literal application is dangerous. Others, such as that "no man can profit by his own wrong," or against arbitrary spoliation, or that due care or good faith is required, are standards of the broadest flexibility. As stated in the introduction, in this field of judge-made law there is infinite scope for analysis and interpretation of precedents. It is a narrow conception of logic to say that law is not a matter of logic. The quarrel is not with logic but with the formulation of the premises from which a rule is to be adduced for application to the instant case. A point already emphasized is the latitude the judge would enjoy even under a rule of binding precedent.

Whatever the flexibility permitted by our rule of precedent, there are occasions when the court of last resort must decide whether or not to follow a precedent of which it disapproves. Where vested property interests not raising broad issues of economic and social policy are concerned, or where remedial legislation is practicable, a court should follow precedent. Certainty is preferable to perfection. If the court believes that maintaining a law it has once made does more harm than good and legislative change is unlikely, for example, where the precedent is one of constitutional interpretation, what should the court determine? If the court overrules a precedent, it must make a new one. The challenge is essentially the same as that faced by a legislature. The answer should be a new rule approved by the court's conscience.

When Mr. Antrobus, in Thornton Wilder's *The Skin of Our Teeth*, returns in the last act from the war and contemplates the historic catastrophes of human mammals, he seeks a guide to a better world in the books of the philosophers. Some of our greatest judges, notably

Holmes and Cardozo, have sought enlightenment from the same sources.

When the judge asks what the legal philosophers can teach him, he is apt to be overwhelmed by their prolixity and confused by their disagreements.⁵⁸ Is law imposed upon society by a sovereign will? Does it develop within society of its own vitality? Shall the judges follow Descartes and John Locke in the assumption that law is an emanation of a natural rule of reason? Is individual liberty the essence of law, or is the individual only the passive recipient of benefits? Can one believe with Savigny that environmental conditions impel societies along predetermined paths to a preordained end? Was Herbert Spencer right in his analogy between the biology of animal organisms and human society? How far must the judge take account of theories of evolution, psychology and relativity? Is he to be guided by Gierke and seek for a group will? What weight shall the judge give to objective phenomena as opposed to subjective will and purpose? Does he agree with Ehrlich that legal science is the observation of social facts and that nonlegal social rules may be as important as legal ones? Will he reaffirm with Ihering the primacy of an ethical ideal of justice as the criterion of law? Will he seek with Stammler, as influenced by Kant, some categorical imperatives of law considered as a form of human volition, and attempt to shape a rational method by which the rightness of law can be determined in any given circumstances?

Stammler asks the judge to add a transcendental element to utilitarian aims, to formulate as a student of social science, the ideal relationship between rules of conduct and the edict of an epoch. This gives scope to the intuition of the judge based on his own ethical sense and intelligence, but in thinking of man-in-association he may be tempted to forget man-as-individual. Kelsen, telling the judge that legal science is concerned only with the norms of compulsion, that law has no gaps, is neither just nor unjust, and that it can be formulated from norm to norm, may give the judge a sense of repose and a delusion that he can be again merely the logician. The Realists clamor that the world is in ferment. They demand that the judge inform himself about what happens after he makes a decision, and invite him to evaluate precedents by studying the digestion, gout and personal foibles of the judges who created the precedents. Then they tell him to follow

58. See ALLEN, *LAW IN THE MAKING* 1-60 (3d ed. 1939); POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923); *INTRODUCTION TO THE PHILOSOPHY OF LAW* (1924); *The End of Law as Developed in Juristic Thought*, 27 HARV. L. REV. 605 (1917); *The Theory of Judicial Decision*, III, 36 HARV. L. REV. 940 (1923); Jones, *The Aims of Legal Science*, 47 L.Q. REV. 61 (1931); Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474 (1931), 51 L.Q. REV. (1932).

his hunches, while inconsistently intimating that he and his predecessors are bound by social and economic prejudices. While the Realists,⁵⁹ although somewhat tainted with collectivist vagaries, are too much in ferment to agree on anything (C. K. Allen is perhaps unkind in calling their teachings a "jazz jurisprudence") a judge, after reading their intemperate calls on him to abandon his favorite legal words for their variegated verbal novelties, may well exclaim with Hans Sachs, *Wahn, Wahn, Ueberall Wahn*.

In Roscoe Pound, himself once a judge, the judge has a mentor who is both a philosopher in his own right and a learned and honest interpreter of the writings of other philosophers. Moreover Pound is a true liberal not only in the accurate political sense of one who believes in the liberty of the individual but also of one who is open-minded. Pound's great contribution in acquainting American lawyers with the doctrines of such men as Savigny, Ihering, Kohler, Stammer, Duguit and others, makes it easy to overlook that he has a philosophy of his own. He has not founded a cult because he is sceptical of all dogmatism. He is willing to learn logical method from analytical jurists, he appreciates the helpfulness of historical jurisprudence, he is sympathetic to the ethical ideals which take account of the dignity of the individual, and he interprets with understanding the teachings of the sociological jurists, with whom he is often numbered. He is discontented with any sterile legal science that has no ideal that the end of law is justice. If his metaphor of law as social engineering is not altogether happy, it emphasizes the experimental aspect of his philosophy, the recognition of the dynamic nature of truth, of the need for testing institutions in operation. He asks the judge to build with materials at hand, improving and perfecting step by step, rather than suddenly reaching for the millenium by destruction and a making of a new world on the blueprint of a revealed abstraction. To Pound the common law has a technique of precedent based on experience, developed by reason, and tested constantly both by reason and experience.⁶⁰ Because he is con-

59. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1222 (1931); Pound, *Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). The character and learning of our judges is sufficient answer to the charge that they deal only with the mythology and superstition of law. This is not to say that occasionally complex questions of law and fact may not leave them in a quandry. There is a familiar judicial yarn of the state supreme court judge who happened to enter the conference room of an appellate division as they were reaching a decision by tossing a quarter. He chided them for their cheapening of justice. In his court, he asserted, they used a silver dollar for such purpose.

60. Pound, *What of Stare Decisis*, 10 FORDHAM L. REV. 1 (1941); see also Chamberlain, *The Doctrine of Stare Decisis*, N.Y. STATE BAR ASS'N BULL. 69 (1885); Flanigan, *Stare Decisis*, 11 U. KAN. CITY L. REV. 129 (1943); Lile, *Some Views on the Rule of Stare Decisis*, 4 VA. L. REV. 95 (1916); Oliphant, *A Return to Stare*

fidest that the bulk of the law is just, he is willing to take the comparatively radical position that the first objective of the judge should be to attain justice in the particular case, but nevertheless, to attain it within the pattern of law. The legal order is always a system of compromises. It is the duty of the judge to satisfy a maximum of human wants with the minimum of sacrifice of other human wants.

Pound refuses to believe that we must choose between tying down the courts by absolutely binding rules and allowing them unfettered discretion. He is willing to trust the informed intuition of the judge. He is not willing to make judicial action synonymous with official executive action. He recognizes the dangers in the idea that judges appointed or elected because of affiliation with some current political or social movement be allowed to intrude these ideas into the law by a judicial absolutism in individual cases, particularly where such ideas have not sufficiently commended themselves to public opinion so as to win the support of legislative action. Instead of making administrative action and judicial action synonymous, administrative tribunals in their judicial functions should give certainty and predictability to their actions by adopting the rule of precedents. Their rule-making power is a complete protection from any rigidity in this procedure. We may properly also work toward the development of international law by extending the doctrine of precedents to the decisions of the Permanent Court of International Justice.

"The judge," in the words of Judge Flanigan, "stands at the end of the processes of justice. He must decide." To quote Mr. Justice Cardozo:

"[He should] draw his inspiration from consecrated principles,— he is not to yield to spasmodic sentiment, to vague and unregulated benevolence, [but must] exercise a discretion tempered by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life.⁶¹

"Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which these concep-

Decisis, 14 A.B.A.J. 159 (1928). Oliphant, while apparently expounding *stare decisis*, is really suggesting devices for escaping precedents. His essay contains acute observations on the analysis of decisions and their classification. Oliphant's picture of a golden age of *stare decisis* when precedents were precise because of the formality of procedure overlooks the historical fact that the great development of our theory of precedent occurred after considerable progress had been made in relaxing procedural technicalities. See also Judge Bleckley's famous declaration of judicial independence, in which he said his motto was in certain situations not *stare decisis* but *fiat justitia ruat coelum*. *Ellison v. Ga. R.R.*, 87 Ga. 691, 696. 13 S.E. 809, 810 (1891).

61. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).

tions had their origin, and which, by a process of interaction, they have modified in turn.⁶²

“Logic and history, and custom and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of those forces shall dominate in any case must depend largely on the comparative importance of the social interests that will be thereby promoted or impaired.”⁶³

62. *Id.* at 19.

63. *Id.* at 112. To leave the more abstract for current issues, see the “Segregation Cases”: *Brown v. Board of Education*, 349 U.S. 294 (1955), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Bolling v. Sharpe*, 347 U.S. 487 (1954); *Brown v. Board of Education*, 347 U.S. 483 (1954); see also *McLaurin v. Oklahoma State Regents*, 339 U.S. 629 (1950); *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938) and *Shelley v. Kraemer*, 334 U.S. 1 (1948) which foreshadowed the decisions in the later segregation cases. See Byrnes, *The Supreme Court Must Be Curbed*, U.S. News and World Report, May 18, 1956.