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## STARE DECISIS; A DISSENTING VIEW

By PETER L. SZANTON\*

Justice Herbert Kaufman set out his views of the doctrine of stare decisis, in the previous issue of this Journal,<sup>1</sup> in so candidly polemic a manner as to suggest an invitation to rebuttal. It is the purpose of this article briefly to attempt a rebuttal, urging, in sum, an only slightly less respectful but much more differentiated attitude toward precedent.

Stare decisis, to Justice Kaufman, is a stern and compelling rule. The essence of his view is presented in the statement, echoing that of an earlier writer in the field, that "Law, to be obeyed or followed, must be known; to be known it must be fixed; to be fixed, what is decided today must be followed tomorrow, and that is all stare decisis means."<sup>2</sup> A limitation to the doctrine is recognized, but only in Blackstone's words: "'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. . . .'"<sup>3</sup> To this, Justice Kaufman adds: "Thus, it can be seen that the exception to the rule is strictly limited and should be so limited because of the temptation on the part of judges to ascribe to themselves a superior knowledge or wisdom over their predecessors on the bench."<sup>4</sup> The full strictness of the limitation Justice Kaufman advocates is suggested in two further comments: that "Stare decisis in England has real meaning. The House of Lords has taken the position that once it has decided a point of law, that decision is conclusive, not only on all inferior tribunals, but binding on itself,"<sup>5</sup> and that:<sup>6</sup>

. . . Any growth of the law must be ordered growth, legislative in character, not judicial legislation. The legislature, acting for the people and directly responsive to the will of the people, is the logical and traditional agency through which error in announced law may be corrected or such law revised in accordance with public sentiment. The courts, with little or no public control over their determinations as to what is best for public wel-

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The author gratefully acknowledges the critical assistance of Thomas Schneider, of the California Bar. He wishes also to give evidence of his debt to Professor Henry M. Hart, Jr., of Harvard Law School, whose own views on the matters here discussed provided the stimulus if not the substance for the author's.

<sup>1</sup> Kaufman, *A Defense of State Decisis*, 10 HASTINGS L.J. 283 (1959).

<sup>2</sup> *Id.* at 284. See Chamberlain, *The Doctrine Of Stare Decisis As Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125, 130 (1889).

<sup>3</sup> Kaufman, *supra* note 1, at 289.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Id.* at 283.

<sup>6</sup> *Id.* at 288.

fare, are not designed for the democratic accomplishment of change—quite to the contra, the courts are the guardians of order, the protectors against disregard of the established rule of conduct. Public confidence in, and acceptance of, the judicial system demands careful attention to this judicial responsibility.

There will be no dispute here with the propositions that certainty is desirable in the law; that some discipline must be self-imposed on the private sentiments of judges; that there are important advantages to legislative rather than judicial solutions to problems of social policy; and that these reasons and others make imperative judicial respect for precedents.<sup>7</sup>

But—deferring the further problem of the distinctions necessary to an adequate weighing of precedent in particular cases—Justice Kaufman's position on the degree to which respect for precedent generally should control the courts seems to this writer to reflect highly questionable theories of the function of courts, of the nature of the common law, and of the relation of court to legislature. Additionally, it might be noted, that formulation ignores the terms of what would seem to be the most commonly accepted statement of the traditional scope of American reliance on precedent. As propounded in an essay awarded the prize of the New York State Bar Association in 1885, that statement is to the effect that a decision made, after argument, on a point of law necessary to the deciding of a case, is an "authority or binding precedent" in courts of equal or lower rank in the same jurisdiction when the same point is again presented,

but the degree of authority belonging to such precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary and inflexible.<sup>8</sup>

A compulsion necessarily moral and intellectual only—the supposed English rule scarcely to the contrary<sup>9</sup>—because of the extent of judicial

<sup>7</sup> For an outline of factors looking toward strict adherence to precedent, see HART & SACKS, *A GENERAL VIEW OF THE AMERICAN LEGAL SYSTEM* 554—556 (Temp. ed. 1956).

<sup>8</sup> CHAMBERLAIN, *THE DOCTRINE OF STARE DECISIS* 19 (1885). The formulation is taken as a standard in Catlett, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 21 WASH. L. REV. 158, 161 (1946); von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924); Shroder, *The Doctrine of Stare Decisis—Its Application To Decisions Involving Constitutional Interpretation*, 58 CENT. L.J. 23, 24 (1904); *Cincinnati Conference on the Status of the Rule of Judicial Precedent*, 14 U. CIN. L. REV. 203, 262 (1940); Note, *Precedent And The Constitution*, 3 RACE REL. L. REP. 395, 397 (1958).

<sup>9</sup> In considering the "real meaning" of *stare decisis* in England, it should be noted, first, that prior decisions are taken as binding only by the House of Lords; the doctrine has never been accepted by the Privy Council, which hears all appeals originating outside the United Kingdom. See Fairlie, *The Doctrine of Stare Decisis in British Courts of Last Resort*, 35 MICH. L. REV. 946 (1937). Second, the doctrine is not inherent in English jurisprudence, having been

power and the nature of judicial responsibility. The legislature may well be the agency through which change in the law can most fittingly be announced. But because not all legal issues generate the kind of concern to which legislatures respond, or generate it soon enough to anticipate the needs of the first litigant, it often occurs that disputes brought into the courts are faced there with rules of law which, if mechanically applied, are inadequate to effect what the parties and the public generally would consider a fair result. Is it then the judge's role to apply the rules mechanically, appending, perhaps, a short homily to the effect that whatever injustice is thus done should be attributed to the legislature's failure to act? That might well be the proper judge's role were the only available alternative the creation of new law springing freely from whatever view of right or of expediency the court then entertained. But that is not the only alternative. Behind the judge, as authority and as guide, lies the greatness of the common law: its capacity, not freely to invent or capriciously to change, but, through the reasoned extension of principles already established, to give legal effect to rights and duties already rooted in the common conscience of the land.<sup>10</sup> Before him stands the challenge of his oath. Unlike the legis-

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adopted only in 1861, *Beamish v. Beamish*, 9 H.L.C. 274, 11 Eng. Rep. 735 (H.L. 1861), reaffirmed in *London Street Tramways Co. v. London County Council* [1898] A.C. 375 (Eng.), and being still criticized by those responsible for its application. See Lord Wright, *Precedents*, 4 U. TORONTO L.J. 247 (1942), reprinted in 8 CAMB. L.J. 118, 144-145 (1943). Third, the rule is more often stated than followed, it being "apparently a matter of general knowledge that the Lords avoid this rule by 'distinguishing' a case from the previous decision," citing as examples *Miller v. Hancock* [1893] 2 Q.B. 177 distinguished away in *Fairman v. Perpetual Inv. Bldg. Soc'y* [1923] A.C. 74 (Eng.). Note, *Precedent and the Constitution*, 3 RACE REL. L. REP. 395, 399 (1958). See also on English practice, Radin, *The Trail of the Calf*, 32 CORNELL L. Q. 137, 155-56 (1946). And finally, the English system can support a rigid high court in part because the Law Lords are not the litigant's last resort. Unlike Congress, Parliament is free to nullify a decision of the Law Lords even as to "constitutional" questions. And that power extends not only to the reversal of a rule in its prospective application, but to the result in the very case decided. See Fairlie, *supra* at 966, and cases cited.

<sup>10</sup> Justice Kaufman quotes Justice Cardozo's words about the judge: "He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'" Kaufman, *supra* note 1 at 285; CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921). But this omits the succeeding sentence: "Wide enough in all conscience is the field of discretion that remains." How wide that field was to Justice Cardozo is indicated in a prior passage: "The constant insistence that morality and justice are not law, has tended to breed distrust and contempt of law as something to which morality and justice are not merely alien, but hostile. . . . Not for us the barren logomachy that dwells upon the contrasts between law and justice, and forgets their deeper harmonies. For us rather the trumpet call of the French 'code civil': ['The judge who shall refuse to give judgment under pretext of the silence' of the obscurity, or of the inadequacy of the law, shall be subject to prosecution as guilty of a denial of justice.]" "It is the function of our courts," says an acute critic, "to keep the doctrines up to date with the *mores* by continual restatement and by giving them a continually new

lator, free of the responsibility for particular cases, the judge is sworn to administer justice.<sup>11</sup> And if he fails in that, that failure, as to the parties before him, is final. Except through him, society is powerless to impose a settlement which is both orderly and fair. How absolute, then, can be the claim of a principle which, whatever its advantages in the maintenance of certainty and stability in the law, whatever its necessity in some degree, nonetheless precludes any consideration of the merits of a case, looking rather only to the question of whether there exists a precedent which is not so manifestly wrong as to appear "most evidently contrary to reason?" The jurist concerned with "public confidence in, and acceptance of the judicial system" might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.<sup>12</sup>

But the deferred question, that of the weight to be accorded precedent in particular cases, suggests even more serious objections to Justice Kaufman's position. Aside from the apparently random observation that "[O]f course, there is sound reason for applying the rule of stare decisis strictly in cases involving property rights, contracts, torts, probate and wills,"<sup>13</sup> Justice Kaufman discusses the requirement of certainty and stability in the law as though it applied with uniform force to all cases. But surely fundamental distinctions must be made. Perhaps the most essential is that marking off the situation where prior authority, directly in point, is explicitly contrary to a litigant's position from that in which no flatly applicable authority exists. If, as Justice Kaufman states, "Any growth of the law must be ordered growth, legislative in character not judicial legislation,"<sup>14</sup> a litigant in the latter position will be denied relief as summarily as one in the former; in neither case does the prior law establish the rule he advances. But clearly the reasons for the maintenance of a lack of law—though

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content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril." *Id.* at 134-35. The "acute critic" was Arthur Corbin, writing in 29 *YALE L.J.* 771-72 (1920).

<sup>11</sup> Curiously, this is not the case in California where the judge, like other major public officials, takes only the omnibus loyalty oath of CAL. CONST. art. 20, § 3. Compare the oath taken by all federal judges: "I, ..... do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ..... according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God." 28 U.S.C. § 453 (1952).

<sup>12</sup> For a suggestion that a failure to adhere strictly to precedent disturbs the bar, for reasons unrelated to public policy, far more than it does society at large, see Boudin, *The Problem of Stare Decisis In Our Constitutional Theory*, 8 *N.Y.U. L. Rev.* 589, 614-15 (1931).

<sup>13</sup> Kaufman, *supra* note 1, at 285.

<sup>14</sup> *Id.* at 288.

of some force—will generally be much less pressing than those for the continuance of law already explicitly established.

And within the area of established law, further lines must be drawn. One separates the litigant who seeks to enforce an established obligation with a new remedy from the party who asks the creation, against his opponent, of an obligation never recognized before. This is a distinction rooted in the fact that the reliance on precedent of a party who does what the law has declared to be a wrong, but who assumes, nonetheless, that certain remedies will not be available against him, must stand on a quite different footing from the reliance of a party whose acts had never been held wrongful. It is this distinction, of course, that largely accounts for the felt rightness of the *MacPherson* decision.<sup>15</sup> As Justice Cardozo has commented:<sup>16</sup> “The manufacturer did not say to himself, ‘I will not inspect these wheels, because that is not my duty.’ Admittedly, it was his duty, at least toward the immediate buyer. . . . The question is to what extent it shall entail unpleasant consequences on the wrongdoer.”

Again, in the area where precedents do squarely apply, is there not a difference between those that establish a settled principle, and those which set out only, in the narrowest sense, a detailed rule of law? This is a distinction Dean Pound has drawn, commenting:<sup>17</sup>

Now, the fact is, so far as rules are concerned, the life of a rule of law in the strict sense is relatively short. I had occasion in 1924, at the request of a committee of the American Bar Association, to investigate the reports beginning in 1774, at intervals of fifty years, down to 1924, and the thing that struck me as I went on with that, and could be shown conclusively as I had finished it, was that the general run of rules of law . . . had a life of simply one generation. Fifty years is a long life for a rule, that is, a legal precept that attaches a definite detailed legal consequence to a definite detailed state of facts. And it is with rules, very largely, that this doctrine of *stare decisis* has its immediate application.

And Dean Pound went on to suggest that even where not simply a “rule,” but a general principle, *i.e.*, “an authoritative starting point for legal reasoning,” was being formulated in the cases, precedent should at first have very little weight.<sup>18</sup>

<sup>15</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>16</sup> CARDOZO, *op. cit. supra* note 11, at 146. For further discussion of the distinction see HART & SACKS, *op. cit. supra* note 7, at 415–18. It is there further noted that “If the new remedial doctrine serves simply to reinforce and make more effectual well-understood primary obligations, the net result of innovation may be to strengthen rather than disturb the general sense of security”—at 418.

<sup>17</sup> Spoken during the course of the Cincinnati Conference on *The Status of the Rule of Judicial Precedent*, 14 U. CIN. L. REV. 324, 329 (1940).

<sup>18</sup> *Id.* at 331.

[S]*tare decisis* does not mean that the first tentative gropings for the principle, what is said in the course of development of the principle by this process of judicial inclusion and exclusion are of binding authority. That explains a great deal. What is commonly spoken of as overruling of decisions, very often there is not an overruling of decision. When a principle has been worked out through this process of judicial inclusion and exclusion, as you look back over the course of development, you can see every case in that line would be decided exactly as it was by the principle finally formulated. But the reasoning may have been revised two, three, four times. What is overruled, therefore, is not a single decision in that line of cases, but the premature, the hasty generalization of a text writer or premature formulation on the part of a court in the beginning of this process.

And additional factors might well be considered before any flat application of the prior law: where the rule has been often stated, how broadly or narrowly the recent cases have read it; where the rule springs from only one or a small number of cases, how persuasive its reasoning, and how numerous and forceful the dissents from it.<sup>19</sup>

Some attempt must be made, in short, to weigh, in each case, all those considerations which test the inherent adequacy and justness of the old rule and the extent and legitimacy of reliance on it, and to measure against them the value of a rule apparently more adequate and more just. A rational determination of the respect due precedent would seem to require no less.<sup>20</sup>

What, then, of constitutional cases? Justice Kaufman's answer is clear. His doctrine of flat application relates to constitutional questions as to all others.<sup>21</sup> Indeed, it applies here even more strictly. "When the Court has once interpreted a provision of the Constitution, it has exhausted its jurisdiction under our constitutional system. If this be not true, then we have a government of men, and the Constitution itself will be a hollow shell to be changed as often as the members of the Court desire to change it."<sup>22</sup>

However deeply felt, that argument would seem to overlook a great deal. The policy behind adherence to precedent probably cannot be more

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<sup>19</sup> At least one appellate judge has suggested that the question of who wrote the prior opinion might be considered. "It has been the bottom theory of the American system that it is not every little jackanapes who has authority to make a precedent just because he comes jumping out of a bush and calling himself a judge. (Laughter.) The American theory is that when law has acquired a settled character through the considered decisions of men qualified to speak with authority, the decisions so settling it become precedents, especially if they are connected with rules of property." Judge Joseph C. Hutcheson, Jr. of the Court of Appeals for the Fifth Circuit, speaking at the Cincinnati Conference on *The Status of the Rule of Judicial Precedent*, 14 U. CINC. L. REV. 245-46 (1940).

<sup>20</sup> For general statements by justices of U.S. Supreme Court about the considerations necessary to an adequate decision on whether to follow prior case-law, together with the judgment that they are not helpful, see Catlett, *supra* note 8, at 165.

<sup>21</sup> "Decisions on constitutional questions should be dealt with in the same manner as any other decision under *stare decisis*." Kaufman, *supra* note 1, at 284.

<sup>22</sup> *Id.* at 287.

broadly stated than in these words: "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."<sup>23</sup> But how often will the value of stability outweigh the importance of being right when what is drawn into question is the meaning or effect of the fundamental law? If it is important that anything be read aright it is surely vital that the Constitution be so read. It may be that in specific cases interests worthy of consideration will have grown up under the old law. But it would appear that few constitutional precedents do generate the kind and degree of reliance which might properly bind the Court. No survey of that question is possible here, but test cases are suggested by a recent article on another subject. Frederick B. Wiener has noted that:<sup>24</sup>

It is less than thirty years ago that my class at the Harvard Law School learned constitutional law from the late Professor Thomas Reed Powell, in a course that was divided into three parts. The first considered the due-process clause, concentrating on *Adkins v. Children's Hospital*; the second dealt with the commerce clause emphasizing principally *Hammer v. Dagenhart*; the third covered the reciprocal immunity of governmental instrumentalities under *Collector v. Day*.

The cases cited have each been specifically overruled since then, by, respectively, *West Coast Hotel Co. v. Parrish*, *United States v. Darby*, and *Graves v. New York ex rel. O'Keefe*.

The interests abandoned by the latter three cases were those, respectively, of employers to be totally free of minimum wage legislation imposed by the states; of the same class to be unaffected by federally-enacted wage and hour standards applicable to all goods manufactured for shipment in inter-state commerce; and of employees of the federal government to be beyond the reach of nondiscriminatory taxation by the states. In none of these cases would any expectation created by the precedents seem, when measured against the need to rightly determine the extent of the vital powers involved, to deserve such respect as to preclude the Court from ever coming to that determination.<sup>25</sup>

And apart from the question of the simple importance of the issues in constitutional litigation, the very nature of the Constitution as the written and organic law would seem to free it from the effect of any reading which

<sup>23</sup> Brandeis, J., dissenting in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932).

<sup>24</sup> Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 304 (1958).

<sup>25</sup> The question of whether the previous cases could reasonably support firm expectation is a separate one. The *Adkins* and *Hammer* cases, each resting on inherently tenuous distinctions, had been decided by 5-3 and 5-4 divisions, respectively, and each had contained powerful dissents. The doctrines of all three cases had been deeply undercut by later opinions. See generally the overruling opinions: *United States v. Darby*, 312 U.S. 100 (1941); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 46 (1939); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

reflection and experience cast doubt upon. "[T]he doctrine of *stare decisis* can never be properly applied to decisions upon constitutional questions. However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."<sup>26</sup> So wrote Charles Warren in 1922, and the same view had been expressed by a member of the Supreme Court at least as early as 1854.<sup>27</sup> Here the decided cases are not the only evidence of what the law is; there is an underlying document and one which, by definition, controls. It is meaningful and necessary to consider that, as to persons not themselves empowered to interpret the Constitution, the decided cases stand as part of it and speak with its authority. But as to the Justices charged with interpreting it, and doing so rightly, those cases can have no authority higher than their own. It would seem necessary that the Constitution, of its own force, override the effect of any interpretation which the high Court, on due consideration, should deem wrong.

A third factor inevitably pressing on the Court in constitutional cases is the knowledge that, in this domain, error can only rarely be followed by legislative correction.<sup>28</sup> Justice Kaufman has taken the position that the amendatory process is available, and that its powers were not granted to the Court.<sup>29</sup> But changes in the express terms of the Constitution, where concededly amendment alone would be competent, are not at issue here. The essential problem is that of the construction to be given fixed constitutional language. That, it is settled, is a judicial responsibility. The question, then, is whether it is a responsibility the Court is or is not to be permitted to perform on the basis of accumulated discussion and experience. Justice Kaufman has asked, "Is it not presumptuous of the members of a high court to refuse to follow the rule of *stare decisis* and thus be at the mercy

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<sup>26</sup> 3 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 470-71 (1922). Justice Douglas has made the point in similar language: "The place of *stare decisis* in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsion to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). See also Boudin, *supra* note 13, at 595.

<sup>27</sup> "[The rule of *stare decisis*] can never be appealed to in derogation or for the destruction of the supreme authority, of that authority which created and which holds in subordination the agents whose functions it has defined." Justice Daniel, dissenting in *Marshall v. Baltimore & O. RR.*, 57 U.S. (16 How.) 314, 343 (1854).

<sup>28</sup> The language of Justice Brandeis on the policy behind *stare decisis* quoted above was followed by these words: "This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning. . . ." 285 U.S. at 406.

<sup>29</sup> Kaufman, *supra* note 1, at 286-87.

of latter day members of the same court who again refuse to follow the rule and overrule the last decision of their own court"?<sup>30</sup> But if presumptuousness is involved at all, it is a failure at least one past Chief Justice looked on with favor. In *The Passenger Cases*,<sup>31</sup> Chief Justice Taney wrote:

I . . . am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

And finally, within the constitutional area, there are key determinations which require the greatest freedom from precedent. Justice Brandeis described them as problems of the application, rather than the interpretation, of the Constitution, in which the question is essentially one not of law, but of fact. They arise most clearly under the due process and equal protection clauses. Here the problem, like that of due care entrusted to a jury, is that of reasonableness, as to which, within broad limits, precedent can rarely be helpful and has never been thought binding. Referring to due process, but in language relevant also to equal protection, Dean Pound has said:<sup>32</sup>

That brings me to one of the things that has made more trouble for *stare decisis* than anything else in American law, and that is the constitutional standard of due process of law. . . . [W]e know that means historically, and it has been settled to mean judicially, that official action shall not be arbitrary and unreasonable.

But what defines the reasonable or unreasonable? It is not possible to define it for all time, for all places, for all men in all actions universally. . . .

It follows, therefore, that *stare decisis* is very much misapplied if you try to apply it to the application of a standard in that kind of case, . . .

Here, clearly, the impossibility of fixed definition is the strength of the clause. Written to operate not as a detailed regulation, but as part of a living Constitution, it forces the interpreter to standards outside itself. It demands of him no less than adherence to his own time's sense and knowledge of justice.

Is there then no certainty in the law? Can there be no sound advice to clients? Justice Kaufman writes, "Lawyers, in advising their clients and trying to practice law intelligently, use their talents to looking up precedents. . . . Thus, the lawyer clings with all his heart to the rule of *stare decisis*—without the rule he is lost."<sup>33</sup> But can that search for precedent

<sup>30</sup> *Id.* at 283.

<sup>31</sup> 48 U.S. (7 How.) 282, 470 (1849).

<sup>32</sup> Pound, *supra* note 17, at 332-33.

<sup>33</sup> Kaufman, *supra* note 1, at 284.

ever alone fulfill the lawyer's obligation, either to his client or to the larger community he serves? Let the lawyer cling to what he may, society changes, and case-law, as it must, responds to that change. The certainty, then, and the worth in the rules of decided cases can only be gauged by bringing to them something better than deference, some sense of the direction and the necessity for their growth. Justice Cardozo wrote:<sup>34</sup>

As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation . . . in which principles that have served their day expire, and new principles are born.

That is a creation in which the lawyer, along with the judge, can share.

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<sup>34</sup> CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166-67 (1921).