



1933

Judicial Law Making and *stare decisis*

F. R. Aumann
The Ohio State University

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Jurisprudence Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Aumann, F. R. (1933) "Judicial Law Making and *stare decisis*," *Kentucky Law Journal*: Vol. 21 : Iss. 2 , Article 3.
Available at: <https://uknowledge.uky.edu/klj/vol21/iss2/3>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

JUDICIAL LAW MAKING AND STARE DECISIS

BY F. R. AUMANN*

The Judge as Legislator In addition to their other activities, the courts of this country exercise important powers in connection with the law making process. For one thing, many courts have the power to make rules and regulations governing judicial practice and procedure.¹ The role of the courts in this connection in shaping the adjective law has an important effect on the successful disposition of judicial business in general.² As a matter of fact, the character of the rules adopted by the courts largely determines the character of the justice dispensed by the courts.³ Justice may be substantial, speedy, and inexpensive in form as a result of the exercise of this power, or it may be just the reverse.

The power of the courts to determine what the law is, if unwritten, or what it means, if written, vests in them an authority which in effect, if not in form, is a law-making one.⁴ In

* Francis R. Aumann, A. B. 1921, Ohio Wesleyan University; A. M. 1925, Ohio State University; Ph. D. 1928, University of Iowa; Instructor in Political Science, Ohio State University; contributor to various legal and social science periodicals.

¹ "In the middle of the last century, legislatures in a wave of exasperation at the disinclination of the legal profession to take up reforms of procedure, began to prescribe the minute details of the conduct of proceedings in the courts."—Pound, *Criminal Justice in America Today*, p. 208.

² "The process of legislative rule making is too dilatory, too cumbersome, too ill-informed, too subject to pressure from organizations representing but a fragment of the interests involved, to be suited to the needs of today. Judicial rule making, especially with the aid of judicial councils, is in the line of advance for procedure."—Pound, *Criminal Justice in America To-day*, pp. 208-209.

³ "There has been a definite tendency in recent years to enlarge the rule-making powers of the courts, and to withdraw from legislative departments the power to make the detailed rules under which the courts shall act. In Delaware, Washington, Colorado, New Jersey, and Michigan, and to a less extent in some other states, courts have been vested with direct authority to make the rules under which the judicial procedure shall be carried on."—Dodd, *State Government*, pp. 70, 217.

⁴ "All the law," says John C. Gray, "is judge-made law. The shape in which a statute is imposed upon the community as a guide of conduct is that statute as interpreted by the courts. The courts put life into the dead words of State."—Gray, *Nature and Sources of the Law*, Sec. 276. Justice Holmes strikes a similar note in the case of *Southern Pacific v. Jensen*, 244 U. S. 205. (1917), when he says: "Judges do and must legislate, but they can do so only interstitially. They are

Anglo-Saxon countries where the so-called common law prevails,⁵ the great body of private laws and obligations have been built up almost wholly by the courts without any formal legislative action.⁶ Even where legislative action has been taken, the meaning of the legislature is frequently not clear.⁷ When the

confined from Molar to Molecular motions. A common law judge could not say, 'I think the doctrine of consideration a bit of historical nonsense, and shall not enforce it in my court.' No more could a judge exercising the limited jurisdiction of admiralty say, 'I think well of the common law rules of master and servant and propose to introduce them *en bloc*.' Justice Cardozo agrees with this general thesis and elaborates it. "No doubt," he says, "the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art."—*The Nature of the Judicial Process*, p. 114. "However," he maintains, "within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found but made. The process being legislative demands the legislator's wisdom."—*Nature of the Judicial Process*, p. 115. There is nothing strange or revolutionary about this doctrine, he believes. Indeed he says, "It is the way the courts have gone about their business for centuries in the development of the common law."—*The Nature of the Judicial Process*, p. 116.

⁵ "Not only in our common law system has this conception made its way. Even in other systems, where the power of judicial initiative is more closely limited by statute, a like development is in the air. Everywhere there is a growing emphasis on the analogy between the function of the judge and the function of the legislator. I may cite Francois Geny, who has developed the analogy with boldness and suggestive power."—Cardozo, *The Nature of the Judicial Process*, p. 119. As a matter of fact the quantity of judge-made law in Continental European countries is considerable. In France, almost the whole body of administrative law has been built up by the decisions of the Council of State, the supreme administrative court of the country.

⁶ It has been estimated that about two-thirds of the fundamental rules of English law today is judge-made law. See article by Edward Jenks in *Harvard Law Review*, Vol. 30, p. 14. The judge-made law of England includes the greater part of the law of contract, almost the whole of the law of torts, all the rules of equity, and the body of law known as the "conflicts of law." It might also be mentioned that many important legislative enactments are little more than statutory declarations of the law which has already been built up by the courts. See Dicey, *Law and Public Opinion in England*, 1905, pp. 360, 484.

⁷ "Few statements of any rule or principle can be written out in such a way as to convey exactly the same impression to every mind. Thought is subtler than its expression. The meaning of written laws will therefore often be questioned."—Baldwin, *The American Judiciary*, p. 181.

"It has generally been regarded as axiomatic in the law that it is beyond human ingenuity or talent to frame statutes or rules suited to every contingency, expressed in language concerning the interpretation of which no controversy of substance may arise."—Thomas J. Walsh, *Reform of Federal Procedure*, Sen. Doc. No. 195, 69th Cong. 1st Sess. at page 3.

courts are called upon to apply them, they must decide what the legislature intends to mean.⁸ This duty also invests an important power in the courts.⁹ It is in this fashion that the law adjusts itself to a changing environment.¹⁰ The agency making the change is the judicial office.¹¹ The process involved in making the adjustment is creative in character;¹² and the result is new, living law that attains the end desired.¹³

Where a written constitution has been adopted, the work of the courts in this connection becomes even more considerable.¹⁴ The principles which require judicial interpretation of

⁸Occasionally a question is raised in connection with a statute, which has not occurred to the legislature in the drafting process. Since the legislature had not intended to deal with the matter in question, the court must determine not what the legislature meant, but must "guess what it would have intended on a point not present, if the point had been present." See Gray, *The Nature and Sources of the Law*, 1909, p. 165.

⁹Note the frequently quoted remarks of Bishop Hoadley who said, "whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law Giver to all intents and purposes and not the person who first wrote and spoke them." See Gray, *The Nature and Sources of the Law*, Sec. 276.

¹⁰"Modification implies growth. It is the life of the law."—*Washington v. Dawson*, 264 U. S. 219, 236 (1924), See Carter, *Law, Its Origin, Growth and Function*, (1907)

¹¹"I came to see that instinct in the very nature of the law itself is change, adaptation, conformity, and that the instrument for all this change, this adaptation, this conformity, for the making and nurturing of the law as a thing of life, is the power of the brooding mind, which in its very brooding makes, creates and changes jural relations, establishes philosophy, and drawing away from the outworn past, here a little, and there a little, line after line, precept after precept, safely and firmly bridges for the judicial mind to pass between the past and the new future."—Judge Joseph E. Hutcheson, *The Judgment Intuitive—The Function of the "Hunch" in Judicial Decisions*, Cornell Law Quarterly, Vol. 14, No. 3, p. 276, April, 1929.

¹²"Repeatedly when one is hard beset, there are principles and analogies which may be pressed into the service of justice, if one has the perceiving eye to use them. It is not unlike the divinations of a scientist. His experiments must be made significant by the flash of a luminous hypothesis. For the creative process in law, and indeed in science generally, has a kinship to the creative process in art. Imagination, whether you call it scientific or artistic, is for each the faculty that creates."—Cardozo, *Paradoxes of Legal Science*, (1928), pp. 59-60.

¹³"The law has its piercing intuitions, its tense apocalyptic moments. We gather together our principles and precedents and analogies, even at times our fictions, and summon them to yield the energy that will best attain the jural end. If our wand has the divining touch, it will seldom knock in vain. So it is that the conclusion, however deliberate and labored, has often the aspect of a lucky find."—Cardozo, *Paradoxes of Legal Science*, (1928) pp. 59-60.

¹⁴"A Constitution is the garment which a nation wears. Whether written or unwritten, it must grow with its growth."—Baldwin, *The American Judiciary*, p. 84.

legislative enactments is inevitably extended with equal force to constitutional provisions. The people who adopt written constitutions for their government put their work in a form which must often give rise to questions as to what they intended to express. In the application of the constitution, the courts must decide what it understands its meaning to be. Accordingly the growth and development of a written constitution is largely in the hands of the courts of the land.¹⁵ This has certainly been the case in the United States.¹⁶

Disregarding all of this important work of the courts in the legislative field is a group of jurists who maintain that judges do not "make" the law in any proper sense, but "find it", that is, they simply determine what the existing custom is with regard to a point at issue and officially stamp it with their approval. This was the orthodox point of view of an older day and was firmly adhered to by such commentators as Coke, Hale, and Blackstone.¹⁷ This theory assumed that the Common Law was nothing but the customary law and the function of the judge was merely to find it, not make it.¹⁸ The re-

¹⁵ "Human affairs being what they are, there must be a loop-hole for expansion or extension in some part of every scheme of government; and if the Constitution is Rigid, Flexibility must be supplied from the minds of the Judges."—Bryce, *Studies in History and Jurisprudence*, p. 197.

The Constitution of the United States adopted in the Eighteenth Century has continued to fulfill its purpose because the courts of the country have been able to develop it by judicial interpretation sufficiently fast enough to answer the needs of a rapidly changing world. A recent expression of the nature of this responsibility was made in the case of *Euclid Village v. Ambler*, 272 U. S. 365, (1926), where the court said: "Regulations, the wisdom, necessity and validity of which are applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, would probably have been rejected as arbitrary and oppressive in a changing world it is impossible that it should be otherwise."

¹⁶ C. G. Haines, *The American Doctrine of Judicial Supremacy* (1914).

¹⁷ "The theory of the older writers was that the judges did not legislate at all. All that the judges did was to throw off the wrappings and expose the statute to view. (Cf. 33 Pound, Harvard L. R. 731, 733.) Since the days of Bentham and Austin, no one, it is believed, has accepted this theory without deduction or reserve, though even in modern decisions we find traces of its lingering influence."—Cardozo, *The Nature of the Judicial Process*, p. 125, Cardozo, *The Nature of the Judicial Process*, (1921), pp. 114-115, Cardozo, *Paradoxes of Legal Science*, (1928), pp. 59-60; Max Radin, *Theory of Judicial Decision*, (1925) 2 Am. Bar. Assn. Journ., p. 359.

ported decisions of the courts were not the sources of the law itself, but mere evidences of the customs and of the law derived therefrom.¹⁹

The notion that judicial decisions are only evidence of a pre-existing law was opposed vigorously by John Austin and many others.²⁰ Today it may be safely asserted that the weight of juristic opinion holds that judges (Anglo-American at least), do make law by means of the precedents which they establish through their decisions.²¹ To this group judicial legislation is a necessary factor in the development of the common law.²² To others, however, it is a usurpation on the part of the judiciary of a function properly belonging to the legislature.²³

Another group has gone to the opposite extreme. "From holding that the law is never made by judges, the votaries of the Austinian analysis have been led at times to the conclusion that it is never made by anyone else. Customs, no matter how firmly established, are not law, they say, until adopted by the courts. Even statutes are not laws because the courts must fix their meaning."²⁴ That is the view of John C. Gray²⁵ and Jethro Brown.²⁶

¹⁸ James C. Carter, *The Ideal and the Actual in the Law*, American Law Review, Vol. 24 pp. 752 ff., for a criticism of this point of view see Gray, *The Nature and Sources of the Law*, Secs. 495, 496, 497, 498, 499, 500.

¹⁹ See Blackstone, *Commentaries*, 68-71, and Gray, *The Nature and Sources of the Law*, Secs. 468-469. Savigny, the German jurist, accepted the older theory also.

²⁰ Austin criticized "the childish fiction, employed by our judges that 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 judges." 2 *Jurisprudence*, (4th Ed.)

²¹ Salmond, *The Theory of Judicial Precedents*, Law Quarterly Review, Vol. 16, (1900), pp. 376 ff.

²² Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, Harvard Law Review, Vol. 5, (1891-92), pp. 172 ff.

²³ See Gray, *The Nature and Sources of the Law*, pp. 210-220; and Dicey, *Law and Public Opinion in England*, (1905), p. 359.

²⁴ Cardozo, *The Nature of the Judicial Process*, p. 125.

²⁵ "The true view, as I submit, is that the law is what the Judge declares; that statutes, precedents, the opinions of learned experts, customs, and morality are the sources of Law."—Gray, *The Nature and Sources of the Law*, Secs. 276, 366, 369.

²⁶ Jethro Brown holds that a statute is not real law till it is construed. It is only "ostensible" law. Real law, he asserts, is not found anywhere except in the judgment of a court. See *Law and Evolution*, 29 Yale Law Journal, 294. According to this view Judge Cardozo says:

Although judicial precedents have exercised great influence in all systems of law, the degree to which they have been openly recognized as authoritative simply because they are judicial decisions has varied widely in different systems. In the Anglo-American legal system the influence of precedents has been especially great.²⁷ In this system a precedent has authority²⁸ "It is not merely evidence of the law, it is a source of the law, and the courts are bound to follow the law that is so established."²⁹ Although precedents of an authoritative character are generally binding on the judges, they may depart from them when in the opinion of the judges they are wrong because contrary to law or reason.³⁰ In practice, however, this has been

"Men go about their business from day to day, and govern their conduct by an *ignis fatuus*. The rules to which they yield obedience are in truth not law at all. It is realized only when embodied in a judgment, and in being realized expires. There are no such things as rules or principles; there are only isolated dooms."—Cardozo, *The Nature of the Judicial Process*, p. 126.

²⁷ Sir Frederick Pollock compares the system of case law to the methods of a natural science: "As science grows and develops with each new experiment, so are decisions in each case a step in the growth of the law." See *Essays in Jurisprudence and Ethics*, p. 237; *First Book of Jurisprudence*, (2nd ed.) pt. 2, ch. 6.

²⁸ Chief Justice Black of Pennsylvania in discussing the system of precedents said: "When a point has been solemnly ruled by the tribunal of last resort, after a full argument and with the assent of all the judges, we have the highest evidence which can be procured in favor of the unwritten law. It is sometimes said that this adherence to precedent is slavish; that it fetters the mind of the judge and compels him to decide without reference to principle. But let it be remembered that *stare decisis* is itself a principle of great magnitude and importance.

A palpable mistake, violating justice, reason, and law must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention that they demand reconsideration. There are some which must be disregarded, because they cannot be reconciled with others. There are old doctrines of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. "Tempora mutantur." We change with the change of the times as necessarily as we move with the motion of the earth. But in ordinary cases, to set up our mere notions above the principles which the country has been acting upon as settled and established is to make ourselves not the ministers and agents of the law, but the masters of the law and the tyrants of the people."—*McDowell v. Oyer*, 9 Harris' Reports, 423.

²⁹ Statement of Sir John Salmond quoted in Holland's *Jurisprudence* (7th ed.) p. 187.

³⁰ In England a precedent "is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established.

Absolute authority exists in the following cases: (a) Every court is bound by the decisions of all courts superior to itself. A court of first instance cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow the judgment of the House of Lords. (b) The House of Lords is absolutely

done infrequently in Anglo-American countries, where the doctrine of "stare decisis" has been a fundamental principle of jurisprudence.³¹

In continental European countries a different view of the matter has been taken.³² Jurists applying the Civil Law³³ have insisted and still insist that a decision by a court has, apart from its intrinsic merit, no binding force on a judicial tribunal.³⁴ The practice of the courts does not become a source

bound by its own decisions. (c) The Court of Appeal is, it would seem, absolutely bound by its own decisions and by those of older courts of co-ordinate authority, for example, the Court of Exchequer Chamber."—Holland, *Jurisprudence*, (7th ed.) 137.

³¹The doctrine of "stare decisis" tends to sacrifice the rational development of the law to the maintenance of certainty. It has been believed in Anglo-Saxon countries that it is essential for the law to be certain, and that in securing such certainty some sacrifices are justifiable. The Earl of Halsbury in discussing this general question said: "Of course, I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment is erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there is no real final Court of Appeal."—*London Street Tramways Co. Ltd. v. London County Council*. (1898), A. C. 375, 380.

³²The European view is that the disadvantage of following an out-worn precedent or one which was wrong from the first is much greater than the occasional inconvenience or injustice which may result from disregarding it. In their opinion, the development of the law should proceed along the lines of rational principles and abstract justice rather than upon the strict rule of "stare decisis." Referring to the case system as "la superstition du cas," the European turns with confidence to the methods of the Civil Law. See Kotze, *Judicial Precedent*, (1918), *Law Times*, 349. There will probably always be a difference of opinion and practice in the matter. In Dicey, *Law and Public Opinion in England*, (1905), pp. 393 ff. there is a discussion of both sides of this question. See also *Democracy in America*, Vol. 2, Ch. 16, in which De Tocqueville criticizes American lawyers for investigating what has been done rather than what might be done; and for engaging in the pursuit of precedent rather than reason.

³³The present systems of Civil Law found in France, Italy, Spain, Portugal, Belgium, and in nearly all of the Latin American states are based upon the Code Napoleon. The civil codes of Germany, Japan, Greece, and many other countries have also drawn heavily upon this code of law. Indeed it has had a wider influence than the common law of England. It contains many of the best provisions found in the civil law of ancient Rome. See Munro, *The Governments of Europe*, pp. 515, 516.

³⁴A number of writers have asserted that the distinction between the civilian and common law systems is greater in theory than in practice. Thomas Erskine Holland is one writer who has taken this view. In his volume on *Jurisprudence*, (13th ed., 1924), p. 70, he says: "There have been of late some symptoms of approximation between the two theories." Roscoe Pound has made a similar expression. He says: "In fact our practice and the practice of the Roman-law

of the law until it is definitely fixed by the repetition of precedents which are in agreement on a single point. Consequently decided cases affect the law only in so far as they create a practice or body of doctrine.³⁵ "An individual case, even if decided by the highest court has only a limited persuasive authority, unless the situation is exceptional."

In France, however, while the judicial precedent has never had any formal recognition,³⁶ there is nevertheless a judicial consensus on many fundamental questions.³⁷ The courts have found that it is easier and better to maintain a reasonable consistency in their interpretations of the law. As a result, the written provisions of the codes are gradually being supplemented by a small body of judge-made law, which fills the open

world are not so far apart as legal theory makes them seem."—*The Theory of the Judicial Decision*, Harvard Law Review, Vol. 36, (1923), p. 646. Judge Henry of the Mixed Tribunals of Egypt who has had a wide experience with the Common Law system in the United States before taking up his duties under the Civil Law does not agree with this opinion, however. He says: "But from my experience in the actual application of the Civil Law, including of course my observation of the work of counsel before the court, I have come to the conclusion that such indicia may be misleading. It is clear that the divergence in attitude as to precedents between the Civil Law and the Common Law is still great, and that there is little likelihood of its becoming substantially less for a long time to come."—Henry, *Jurisprudence Constante and Stare Decisis*, (1929), 15 A. B. A. J. II.

³⁵ Arthur L. Goodhart, *Case Law in England and America*, Cornell Law Quarterly, Vol. 15, Feb. 1930, p. 174.

³⁶ It should be pointed out perhaps, that Administrative law in France is not embodied in a code, like the civil law. It is made up of case law which is formed almost entirely of precedents. Some of the rules have been established by the issuance of decrees, but in large part they have been accumulated by the decisions of the administrative courts. To understand the rules of administrative law on any point, you must study the decisions of the administrative courts. In this respect it somewhat resembles the common law system. See Munro, *The Governments of Europe*, p. 539; James W. Garner, *French Administrative Law*, Yale Law Journal, Vol. 33, (1924), p. 579 ff., *The French Judiciary*, Yale Law Journal, Vol. 18, (1917), pp. 349 ff.

³⁷ "In France, the judicial precedent does not, *ipso facto*, bind either the tribunals which established it nor the lower courts; and the Court of Cassation itself retains the right to go back on its own decisions. The court of appeal may oppose a doctrine proclaimed by the Court of Cassation, and this opposition has sometimes led to a change of opinion on the part of the higher court. The practice of the courts does not become a source of the law until it is definitely fixed by the repetition of precedents which are in agreement on a single point."—Lambert and Wasserman, *The Case Method in Canada and the Possibilities of Its Adaptation to the Civil Law*, Yale Law Journal, Vol. 39, (1929), pp. 1-14.

spaces in the law and clears up the obscurities.³⁸ It should perhaps be emphasized that this in no way resembles the great body of controlling decisions which has been built up in England and America.³⁹ In other European countries, while precedent is of even less weight than in France, it nevertheless counts. While in theory they have no more legal authority than the opinions of textbook writers and commentators, in practice respectful attention is shown them and they are often followed.

The Nature of Precedent in Our System. The decisions of the courts which make or declare the law are known as precedents.⁴⁰ The underlying principle of a decision which constitutes the precedent is the "ratio decidendi," that is, the legal proposition which furnishes the logical basis for the decision that is rendered. Any doctrine that the court might have stated which is not required to support the decision is an "obiter

³⁸ Raymond Poincare, *How France is Governed*, (New York, 1914), p. 241.

³⁹ Judge Henry in referring to his experience with the civilian system in the Mixed Tribunals of Egypt has said: "The codes are supposed to contain the whole of the law, and such theory is by no means so far from the truth as a Common Law legalist might suppose. In actual practice certainly 99 per cent of the cases coming before the courts are disposed of by the broad general principles to be found in the codes."—Henry, *Jurisprudence Constante and Stare Decisis*, (1929), A. B. A. J. 11, 12.

⁴⁰ Roscoe Pound, *The Theory of the Judicial Decision*, 36 Harvard Law Review, (1923), pp. 641 ff., Gray, *The Nature and Sources of the Law*, pp. 187-243; Baldwin, *The American Judiciary*, pp. 54-71.

"The word 'established' is often used," writes Simeon E. Baldwin, "to describe the kind of precedent to which the courts are bound to adhere. What serves to establish one? Long popular usage, repeated judicial affirmations, and general recognition by approved writers on legal topics. Of these, in fact, the last is probably the most powerful. Lawyers and courts, in countries without codes, get their law mainly from the standard textbooks. Such authors as Coke, Blackstone, Kent, and Cooley are freely cited and relied on as authorities by the highest tribunals. (See for instance *Western Union Telegraph Co. v. Call Publishing Co.*, 181 United States Reports, 101, *Louisville Ferry Co. v. Kentucky*, 188 United States Reports, 394, 397.) It is by the writings of such men that judicial precedents are sifted and legal doctrines finally clothed in approximate terms and arranged in scientific order."—*The American Judiciary* (1905), pp. 59-60.

There are precedents which create law for the future and precedents which merely declare the pre-existing law. Precedents have also been classified as *authoritative* and *persuasive*. An *authoritative* precedent is one which the judges in future cases must follow whether they approve of it or not; a *persuasive* precedent is one which is not obligatory but will be taken into consideration and given such weight as in the opinion of the court it seems to deserve.—Sir John Salmond, *The Theory of Judicial Precedent*, Law Quarterly Review, Vol. 16, (1900), pp. 376 ff.

dictum" and without the force of law. This being true, it is not binding upon the courts in the future.⁴¹

The view that the law is never made by the judges is objectionable, the view that it is never made by anyone else is equally objectionable. The correct view would seem to be somewhere between the two, in the theory that the power to declare the law carries with it the power to make the law when none exists.⁴² "Everywhere," says an eminent American jurist, "there is a growing emphasis on the analogy between the function of the judge and the function of the legislator."⁴³

It is the duty of the courts to keep the law up to date by a continual restatement. In our rapidly changing world this task of judicial renovation is necessarily increased. That the courts have met this responsibility and are continuing to meet it is quickly apparent when one contemplates the tendency in American courts to disregard the theory of "*stare decisis*" in determining what the law is. In other words, the courts are engaged in the process of adjusting the law to new conditions. In so doing they are creating a new system which will presumably be more in keeping with the principles of social welfare than the one it displaces.

An analysis of the nature of the "precedent" in the American legal system and the changing attitude of Bench and Bar to its proper position will throw considerable light on the growing practice of judicial law-making. For as the force of "precedent" declines, the law-making function of the judges will become wider in scope. As long as the declining prestige of "precedent" fails to lead to an active movement for codification of the law, the law-making role will continue to be greater than before.

The Future of Precedent in Our System. At the present time there are many indications that the doctrine of "stare decisis" is undergoing a marked decline in its influence and practical application in this country ⁴⁴ Authority for this

⁴¹ Gray, *The Nature and Sources of the Law*, Sec. 555.

⁴² Cardozo, *The Nature of the Judicial Process*, pp. 124-126.

⁴³ Cardozo, *The Nature of the Judicial Process*, p. 119.

⁴⁴ There does not seem to be such a trend in England. Justice Cardozo in comparing the position of the doctrine in this country and in England said. "The House of Lords holds itself absolutely bound by its own prior decisions. (Gray, *supra*, Sec. 462; Salmond, "*Jurisprudence*", p. 164, Sec. 64; Pound, "*Juristic Science and the Law*," 31

statement may be found in many places.⁴⁵ We can turn to the utterances of the courts and in the printed reports find support for this statement;⁴⁶ or we can turn to the leading legal publications of the country and find expressions which are similarly indicative of a changing attitude toward the doctrine of "stare decisis." Expressions from both Bench and Bar would lead one to believe that a modification of the doctrine,⁴⁷ if not its complete abandonment, would find favor in many quarters.⁴⁸

Harvard L. R. 1053; *London Street Tramways Co. v. London County Council*, 1898, A. C. 375, 379.) The United States Supreme Court and the highest courts of the several states overrule their own prior decisions when manifestly erroneous. (Pollock, "*First Book of Jurisprudence*," pp. 319, 320; Gray, "*Judicial Precedents*," 9 Harvard L. R. 27, 400.) Pollock in a paper entitled, "*The Science of Case Law*," written more than fifty years ago, spoke of the freedom with which this was done, as suggesting that the law was nothing more than a matter of individual opinion. (*Essays in Jurisprudence and Ethics*, p. 245.) Since then the tendency has if anything increased.—Cardozo, *The Nature of the Judicial Process*, p. 158. Arthur L. Goodhart gives a very reasonable explanation as to why the doctrine of "Stare Decisis" is losing prestige in this country and not in England. "*Case Law in England and America*," Cornell Law Quarterly, Vol. 15, Feb. 1930 pp. 189 ff.

⁴⁵ "In such matters we can only speak of averages, of tendencies. And it is, I think, safe to say that in most American jurisdictions today a more rational theory as to the binding force of precedents generally obtains than that held by the British House of Lords. The very multiplication of authority tends to impair to some extent its force, especially where the decisions in various jurisdictions are inconsistent and conflicting. The better class of modern lawyers and judges have in part from the very copiousness of authority come to regard precedent as their servant and not their master, as presumptive evidence of what the law is rather than as absolutely conclusive evidence."—Orin McMurray, *Changing Conceptions of Law*, (1915) Calif. L. R. 441, 446.

⁴⁶ In *Washington v. Dawson & Co.*, 264 U. S. 21, 238, 44 Sup. Ct. 302, 309, (1904) Mr. Justice Brandeis cites twelve instances in which the Supreme Court has reversed itself.

⁴⁷ Judge Cardozo says: "I think adherence to precedents should be the rule and not the exception. But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years."—Benjamin Cardozo, *The Nature of the Judicial Process*, (1921), pp. 149, 150, 151.

⁴⁸ Professor Herman Oliphant takes a very advanced position in the matter. "Not the judges' opinions, but which way they decide cases will be the dominant subject-matter of any truly scientific study of law. This is the field of scholarly work worthy of best talents, for the work to be done is not the study of vague and shifting rationalizations, but the study of such tough things as the accumulated wisdom of men taught by immediate experiences in contemporary

These expressions do not come from unimportant persons or places. Quite the contrary, they emanate from sources which call for attention and respect from the legal profession at large. Members of the United States Supreme Court,⁴⁹ the Supreme Court of Kansas,⁵⁰ the Supreme Court of Ohio,⁵¹ and the New York Court of Appeals⁵² are included in the list of those persons who have expressed the view that the doctrine may and should be modified when circumstances require it.

Members of the Bar and legal publicists who have expressed the opinion that the doctrine should be modified to a greater or lesser extent would make a distinguished company indeed. Included in its membership is a group of eminent law school

life,—battered experiences of judges among brutal facts.”—*A Return to Stare Decisis*, 14 A. B. A. J. 71, 159, (1928).

⁴⁹ “The Circuit Court of Appeals was obviously not bound to follow its prior decision. The rule of “stare decisis,” though one tending to consistency and uniformity of decision, it not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is called upon to consider a question once decided.—Mr. Justice Lurton in *Hertz v. Woodman*, (218 U. S. 205, 212, 30 Sup. Ct. 621 (1910).

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

⁵⁰ “The doctrine of “stare decisis” does not preclude a departure from precedent established by a series of decisions clearly erroneous, unless property complications have resulted, and a reversal would work a greater injury and injustice than would ensue by following the rule.—*Thruston v. Fritz*, 91 Kan. 625 (1914), 194. In this case the Supreme Court of Kansas departed from the common law rule concerning dying declarations.

⁵¹ “A decided case is worth as much as it weighs in reason and righteousness, and no more. It is not enough to say, “thus saith the court.” It must prove its right to control in any given situation by the degree in which it supports the rights of a party violated and serves the cause of justice as to all parties concerned.”—*Adams Express Co. v. Beckwith*, 100 Ohio St. 348, 351, 352, 126 N. E. 300, 301, (1919). In this case the court overruled a doctrine which had been the law of Ohio since 1825.

⁵² “In fact, there has been no objection raised anywhere to the right of the wife to maintain the action for criminal conversation except the plea that the ancient law did not give it to her. Reverence for antiquity demands no such denial. Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress when it can be done without interfering with vested rights.”—*Oppenheim v. Krüdel*, 236 N. Y. 156, 165, 140 N. E. 227, 230 (1923.)

deans. Dean Roscoe Pound,⁵³ Dean Henry H. Wigmore,⁵⁴ Dean Leon Green,⁵⁵ Dean Orin MacMurray,⁵⁶ and Associate Justice Harlan Stone of the United States Supreme Court,⁵⁷

⁵³ "We have developed so minute a jurisprudence of rules, we have interposed such a cloud of minute deductions between principles and concrete cases, that our case-law has become ultra-mechanical, and is no longer an effective instrument of justice if applied with technical accuracy."—*Law in Books and Law in Action*, (1904), 44 Am. L. Rev. 12, 20; *Mechanical Jurisprudence*, 8 Col. L. Rev. pp. 605, 614, (1908).

"If we actually set as much store by single decisions as we purport to do in legal theory, the path of the law would lie in a labyrinth. In truth, our practice has learned to make large allowance for both of these features of decisions which are inseparable from judge-made customary law. The tables of cases distinguished and overruled tell a significant story."—*The Theory of Judicial Decision*, (1923), 36 Harvard Law Rev. 940, 943.

⁵⁴ "Is the judge to be bound by his precedent? This part of the question ought not to trouble us overmuch. *Stare decisis*, as an absolute dogma, has seemed to me an unreal fetish. The French Civil Code expressly repudiated it; and, though French and other Continental judges do follow precedents to some extent, they do so presumably only to the extent that justice requires it for safety's sake. *Stare decisis* is said to be indispensable for securing certainty in the application of the law. But the sufficient answer is that it has not in fact secured it. Our Judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which *stare decisis* concededly involves,—the government of the living by the dead, as Herbert Spencer has called it."—*Problems of Law*, (1920), p. 79.

⁵⁵ "This doctrine (*stare decisis*) has never been needed, it can be obviated in any case, but it is sometimes embarrassing and frequently requires subtlety in order to avoid its effects. It creates infinitely more difficulties than it renders benefits. For one thing, a court's scheme of things may become so ponderous in the course of time that the succeeding judges cannot possibly know what their predecessors have done. Courts unwittingly reverse themselves more often than otherwise, and doubtless they spend more time trying to maintain a consistency of decision than on any other one problem. Moreover, this feeling that a court must drag along the dead part of itself creates a psychological dead weight of tremendous import."—*The Duty Problem in Negligence Cases* (1928), 28 Col. L. Rev. 1014, 1036.

⁵⁶ *Changing Conceptions of Law*, (1915), Calif. L. Rev. 441, 446.

⁵⁷ "A generation ago the suggestion that we should seriously consider any substitute for the traditional system of developing and systematizing our law by judicial decisions, corrected or supplemented by occasional, more or less hap-hazard legislation, would have been accorded the scant courtesy of mildly derisive opposition. But what seemed impossible or improbable has already been transferred into the realm of the probable and those who appraise the tendencies which give substance and direction to our legal development and who view the future with discerning eye see the problem of law simplification as one which is not only inevitable but immediate.

But every new citator, every new digest, every new compilation which we eagerly seize upon to lighten our labors comes like Banquo's ghost, to comfort us with the disquieting reality that the common law system of precedent which our forbears have cherished for some ten centuries cannot continue to develop solely through the

formerly Dean of the Columbia Law School. All of these men have criticized the practice of following the principle of "stare decisis" too closely. Dean Wigmore has been particularly emphatic in his criticism of the doctrine.

A group of able jurists, including Justice Clarke,⁵⁸ Justice Lurton,⁵⁹ Justice Cardozo,⁶⁰ Justice Pound,⁶¹ and Judge Von Moschzsker,⁶² have advanced somewhat similar ideas, as have such distinguished lawyers as John W. Davis⁶³ and Lindley L. Garrison.⁶⁴ An impressive group of legal scholars and publicists have taken the same general position. Included in this group are such men as Arthur L. Goodhart,⁶⁵ of Cambridge University, England, Editor of the *Law Quarterly Review*, Arthur

medium of reported decisions."—*Some Aspects of the Problem of Law Simplification*, (1923), 23 Col. L. R. 319, 320.

⁵⁸ Supra, note 49.

⁵⁹ Supra, note 49.

⁶⁰ Supra, note 47.

⁶¹ Case law is not wholly bound by the rules of past generations. It is a myth of the law that "stare decisis" is impregnable or is anything more than a salutary maxim to promote justice. Although "certainty is the very essence of the law," the law may be changed by the courts by reversing or modifying a rule when the rule has been demonstrated to be erroneous either through failure of adequate presentation of proper consideration, or consideration out of due time of the earlier case, or when "through changed conditions it has become obviously harmful or detrimental to society"—Cuthbert W. Pound, *Some Recent Phases of the Evolution of Case Law*, (1923), 31 Yale L. J. 361, 363.

⁶² "If, after thorough examination and deep thought, a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlling precedent, where departure therefrom can be made without unduly affecting contract rights or other interests calling for consideration."—*Stare Decisis in Courts of Last Resort*, (1924), 37 Harvard L. R. 409, 413.

⁶³ "To make precedents the fount and origin of the law is to compel their study; to compel their study is to put a premium upon the knowledge so acquired; and to put a premium upon this knowledge is to encourage its over-exhibition by the over-zealous. We should think of the case lawyer at least with the charity due to one who has been led into temptation."—*The Case for the Case Lawyer*, 3 Mass. L. J. 99, 102, (1916).

⁶⁴ "If this system had resulted in an unbroken line of unanimous decisions, even though it might be admitted that error had crept in and that many principles had been distorted, and some denied, there would be much to be said in favor thereof, and great caution would be proper before attempting to alter the system even for the purpose of reaching and curing those instances in which error had intruded. In all, except the simplest matters, there is a great contrariety of decision and precedent."—*Blind Adherence to Precedents*, (1907), 51 Am. L. R. 251, 252.

⁶⁵ *Case Law in England and America*, Cornell Law Quarterly, Vol. 15, p. 186, Feb., 1930.

L. Corbin,⁶⁶ John E. Young,⁶⁷ Edward B. Whitney,⁶⁸ Frederick G. McKean, Jr.,⁶⁹ Robert S. Hall,⁷⁰ Thomas P. Hardman,⁷¹ Clarence G. Skelton,⁷² Samuel B. Clarke,⁷³ and C. E. Blydenbaugh.⁷⁴

In short, there is a considerable body of legal opinion in this country, emanating from respectable sources, which believes that noticeable modification of the doctrine of "stare decisis" is now taking place in our system. This relaxation of the

⁶⁶"The legal profession is now on the defensive largely because of its having put over-emphasis upon one of the sources of declared rules—the decisions in former cases—to the exclusion of other sources. Had the judges ever adhered strictly to the doctrine that precedents are the only sources of the common law and are binding in effect, surely those precedents would have been overthrown in short order and the judges along with them. But precedents have been forgotten, have been disregarded and evaded, have been flatly disapproved and overruled. We must not forget this fact, even though at times the judges did not move as fast as other people. These processes have kept the declared judicial rules within hailing distance of advancing civilization, although occasionally it is obliged to send out a loud hail."—*The Law and Judge*, (1914), Yale Review, pp. 234, 242.

⁶⁷*Law as an Expression of Ideals* (1917), 27 Yale L. J. 1, 29.

⁶⁸"Yet I believe not only that the doctrine of stare decisis," unless some strictly novel and radical legislation can be devised to save it, must disappear through the inevitable course of human progress—and progress does not always lead from a worse to a better system—but that its hold, in the more crowded Federal and State courts at least, has already to a considerable extent been weakened."—*The Doctrine of Stare Decisis*, (1904) 3 Mich. L. Rev. 89, 94.

⁶⁹*The Rule of Precedents*, (1927), U. of Pa. L. Rev. 481, 487, 488, 494, 496.

⁷⁰*Precedents and Courts*, (1917), 51 Am. L. Rev. 833, 855.

⁷¹"The result is that within the last two years there has been in many quarters a perceptible change of judicial and juristic attitude toward the functions of precedents—a tendency in the direction of conscious judicial renovation, judicial legislation or judicial restatement of the law.

With respect to the function of applying such apt precedents or precepts to the facts of the case, where the logical or historical application after the manner of the last generation would defeat the social justice desired, there is in many localities a growing tendency toward a less mechanical application, so as to do justice in the individual case or in that class of cases."—*Stare Decisis and the Modern Trend*, (1926), 32 W. Va. L. Q. Note 33, at p. 165-6.

⁷²"The exceptions sanctioned by the sponsors and advocates of the rule have consumed it. As a means of promoting stability and certainty "stare decisis" is a wretched failure.

"Stare Decisis" requires us to assume the unbelievable, that all precedents have been correctly decided for all time, or else to conclude that, in its futile attempts to promote stability, its sole justification is to perpetuate error."—*The Common Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence*, (1918), 23 Dick. L. Rev. 37, 50, 51.

⁷³*What May Be Done to Enable the Courts to Allay the Present Discontent with the Administration of Justice*, (1916), 50 Am. L. Rev. 161, 163.

⁷⁴*Stare Decisis*, (1918), 86 Central L. J. 388, 389.

ancient dogma is looked upon by this group as a necessary and wholesome tendency, one which should be encouraged to the degree that it becomes necessary to adapt our law to the living present. Indeed there are some who would go so far as to predict a day when precedents, and especially the precedent of a single case, will no longer be considered a binding source of law which judges must accept under all circumstances.⁷⁵ Whether we go that far or not, the tendency to relax the force of precedent in our judicial process is bound to give the judge a larger role in determining what the law is which shall be applied.⁷⁶ The ultimate outcome of this trend is difficult to predict. In some quarters the belief is held that the final result will be a condition approximating the civil law.⁷⁷ Other observers are unable to see such a far-reaching change. Whatever the final state of affairs may be, it would seem safe to say that in the meantime our judges will enjoy a period in which they will be given a much freer hand in determining the law, unfettered by precedent. In other words, for a time at least, it would seem that the scope of judicial law-making will be a wide one.

⁷⁵ "Precedents, and especially the precedent of a single case, will no longer be considered a binding source of law which judges must accept under all circumstances. Only if decided cases have created a practice upon which laymen have relied will the American courts feel that they are bound to follow them. This, as I have attempted to show, is the doctrine of the civil law and directly contrary to that of the English law with its insistence upon the need for certainty. I therefore believe that, as concerns the fundamental doctrine of precedent, English and American law are at the parting of the ways."—Goodhart, *Case Law in England and America, Essays in Jurisprudence and the Common Law*, p. 74.

⁷⁶ Under the present system our judges have a difficult time in adjusting the law to the rapidly changing social and economic conditions of the country. "Where a rule has once been decided, even though wrongly, it is difficult or impossible to depart from it. I do not agree with those who think that *flexibility* is a characteristic of Case Law. The binding force of precedent is a fetter on the discretion of the judge; but for precedent he would have a much freer hand."—Geldart, *Elements of English Law*, p. 28.

⁷⁷ "It is, I think, therefore safe to say that the present American doctrine is strongly away from the strict English doctrine of "stare decisis." But is this merely a temporary step to be followed by the reaction which so frequently succeeds legal innovations, or is it likely to be accentuated in the future? I believe that the latter is the fact, and that in no distant time the American doctrine will approximate the civil law. This will be due in large part to five reasons: (a) the uncontrollable flood of American decisions, (b) the predominant position of constitutional questions in American law, (c) the American need for flexibility in legal development, (d) the method of teaching in the American law schools, and (e) the restatement of the law by the American Law Institute."—Goodhart, *Case Law in England and America, Essays in Jurisprudence and the Common Law*, p. 65.