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Errata

Errata in the article on *Stare Decisis and the Modern Trend*.

The word "on" in line 30, p. 177, should read "or".

The word "not" in line 21, p. 179, should be omitted.

After the word "opinion" in line 16, p. 184, the words "that many" have been omitted.

After the word "sense" in line 15, p. 186, the word "and" has been omitted.

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STARE DECISIS AND THE MODERN TREND

THOMAS P. HARDMAN*

A generation ago one of the world's eminent jurists said of law that "all the available materials of that science are contained in printed books."¹ And greatly under the influence of the historical school of jurisprudence, then still dominant,² the general judicial and juristic tendency was one of rigid adherence to the legal rules, principles and other general premise-elements³ therein contained. The law was stable, and stability was largely the end of law. A "mechanical jurisprudence",⁴ a sort of legal fundamentalism, was in vogue. A leader of the American bar, writing in 1905, said:⁵

"If we scrutinise the actual process which we employ today in ascertaining the law in any particular case, we find that if the point in question be * * * private law,

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¹ Langdell, Harvard Celebration Speech, 3 LAW QUAR. REV. 123, 124 (1887, delivered in 1886).

² See Beale, The Development of Jurisprudence During the Nineteenth Century, 1 Select Essays in Anglo-American Legal History, 558, 572; POUND, INTERPRETATIONS OF LEGAL HISTORY 10 (1923). Cf. Sir Frederick Pollock, A Plea for Historical Interpretation, 39 LAW QUAR. REV. 163, 164 (1923).

³ Rules and other premise-elements is the phrase which, for reasons hereinafter appearing, is commonly used in this paper to describe the various elements of which law is composed. In the last generation these several premise-elements were generally classed together as "rules". See Gray, Some Definitions and Questions in Jurisprudence, 6 HARV. L. REV. 21, 24 (1892); HOLLAND, JURISPRUDENCE, c. 3 (11th ed. 1910). As to the distinction between the various legal elements, see *infra* note 12 and the text in the paragraph beginning with note 46.

⁴ See Pound, Mechanical Jurisprudence, 8 COL. L. REV. 605 (1908).

⁵ JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION, 170, 171 (1907, written 1905).

we turn to the body of precedents * * * *. Where an apt precedent is found it is followed without further inquiry."^{5a}

This attitude was largely due to a widely accepted tenet of the historical school⁶ that the judges find, interpret, and apply, but do not make law. Of course, there were other causes. Even the progressive Mr. Justice Holmes, after he had broken with the historical school, said in the last year of the nineteenth century that it was not the province of the judges "to renovate the law".⁷ However, under the influence of the analytical and sociological schools of jurisprudence, and under the pressure of the twentieth-century demand for progress, this fictitious⁸ historical and philosophical tenet is today giving way to the view that, notwithstanding the constitutional separation of powers, judicial legislation not only is one of the existing realities in the legal world, but is, within its appropriate sphere, a proper function of the judicial process.⁹ The stability secured, or supposed to be secured, by the mechanical *stare decisis* of the last generation is, to a degree, giving way to the progress demanded by the present generation. And in this process, as a leader of the American bar of today tells us,¹⁰ there is emerging year by year to fuller recognition "the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth."

^{5a} Similarly, a generation ago the Supreme Court of Appeals of West Virginia said: The court "is bound by precedents * * * *. It is only safe to know the question has been settled, if settled at all, and then *not depart from the rule*; and if it has not been settled, to settle it after a thorough examination of the principles, upon which it must rest." *Clarke & Co. v. Figgins*, 27 W. Va. 663, 672 (1886). Of course, there were sporadic departures from precedents in those days, but that these quotations illustrate the general attitude a generation ago see further the history in West Virginia of a precedent established in *City of Wheeling v. Campbell*, 12 W. Va. 86 (1877). In *Forsyth v. City of Wheeling*, 19 W. Va. 318 (1882), the question was again presented and the court simply said: "I consider the case of the *City of Wheeling v. Campbell*, 12 W. Va. 36, as conclusive of this case." In *Tenns v. City of St. Albans*, 38 W. Va. 1, 17 S. E. 400 (1893), the question arose again and the court, in answer to a contention that the question should be decided differently, said, without considering the merits of the contention: "It is *settled* otherwise in this state. See *City of Wheeling v. Campbell*, 12 W. Va. 86." But at the beginning of the present generation—the beginning of what Pound and other commentators call the stage of the socialization of the law, see, POUND, *THE SPIRIT OF THE COMMON LAW*, 195 (1921)—the question arose in *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. 326 (1899), and the court, perhaps actuated by the spirit of the modern movement, reversed the precedent which it had previously "followed without further inquiry" because the law was "*settled*" in West Virginia by the doctrine of *stare decisis*.

⁶ The philosophical school had substantially the same tenet. See POUND, *THE SPIRIT OF COMMON LAW*, 155 (1921).

⁷ Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV., 443, 460 (1899).

⁸ See 2 AUSTIN, *JURISPRUDENCE*, 655 (4th ed. 1879); GRAY, *THE NATURE AND SOURCES OF THE LAW*, 220 (1909).

⁹ See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 10, 98 ff. (1921). In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221 (1917), Mr. Justice Holmes says: "I recognize without hesitation that judges do and must legislate."

¹⁰ CARDOZO, *THE GROWTH OF THE LAW*, 1 (1924).

The result is that within the last few years there has been in many quarters a perceptible change of judicial and juristic attitude toward the function of precedents—a tendency in the direction of conscious judicial renovation, judicial legislation or judicial restatement of the law. This tendency, which is justifiable in part and unjustifiable in part, is quite observable with respect to the chief functions of the judicial process.¹¹ (1) With respect to the function of finding the established or recognized legal precept, *i.e.*, rule, principle, or other premise-precept,¹² to be applied, or, if there is none or none approved, the function of establishing or recognizing one, there is in a number of courts an increasing tendency to overlook or otherwise overrule precedents or precepts which are out of harmony with settled modern ideas of social welfare, accepted social standards or the *mores* of the times.¹³ (2) With respect to the function of interpreting the apt precedents, the apt legal rules and other premise-precepts, there is in many jurisdictions a tendency, in effect at least, to construe the applicable statutes, constitutions and precedents, and to “distinguish precedents” along less rigid lines, along the lines of the *mores* of the times, so as to change the law—a change which probably would not have resulted from following the historical method of interpretation of

¹¹ Of course, in the actual adjudication of cases the functions of the judicial process are not always thus divided. Cf. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 100 (1922), where he says there are “three steps” involved in the adjudication of a controversy according to law.”

¹² Legal “precepts” in the present common law are: (1) “rules, that is definite, detailed provisions for definite, detailed states of fact”; (2) “principles,” *i.e.*, “general premises for judicial and juristic reasoning”, (3) “standards,” *i.e.*, legally defined measures of conduct. And, for present purposes, we may classify as legal “precepts”, (4) legal “conceptions”, *i.e.*, “more or less exactly defined types, to which we refer cases or by which we classify them, so that when a state of facts is classified we may attribute thereto the legal consequences attaching to the type.” See POUND, *op. cit. supra* note 11, at 115 ff. As to “conceptions” see further POUND, *op. cit. supra* note 4.

¹³ No attempt is made in this article, particularly in this note and in notes 14, 15, 18 and 20, to cite all authorities in point or to be otherwise exhaustive in all respects. Space does not permit. And that method of treating such a comprehensive subject is beyond the scope of an article. A few of the authorities illustrating some of the aspects of (1) are: *Rosen v. United States*, 245 U. S. 467 (1918); *Terrall v. Furke Construction Co.*, 257 U. S. 529 (1922); *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U. S. 653 (1923); *Klein v. Maravelas*, 219 N. Y. 383 (1916); *Spiegel's House Furnishing Co. v. Industrial Commission*, 288 Ill. 442, 123 N. E. 606 (1919); commented upon by *Wigmore* in 14 *ILL. L. REV.* 325 (1919); *Adams Express Co. v. Beckwith*, 100 Oh. St. 348, 126 N. E. 300 (1919); *Perry v. Haritos*, 100 Conn. 476, 124 Atl. 44 (1924); *Mitchell v. Standard Repair Co.*, 275 Pa. St. 328, 119 Atl. 410 (1923); *Thurston v. Fritz*, 91 Kan. 468, 138 Pac. 625 (1914); *Hines v. Commonwealth*, 136 Va. 728, 117 S. E. 843 (1923); *Ashland Finance Co. v. Dudley*, 98 W. Va. 255, 127 S. E. 33 (1925). See also *Dillon v. Heiler & Bros.*, 99 N. J. L. 68, 122 Atl. 595 (1923), overlooking, or at any rate not citing, the inconsistent case of *State v. Snover*, 63 N. J. L. 382, 43 Atl. 1059 (1899); *Bunting v. Oregon*, 243 U. S. 426 (1917), not citing the inconsistent case of *Lochner v. New York*, 198 U. S. 45 (1905). But see *Ailkins v. Children's Hospital*, 261 U. S. 525 (1923). A legal periodical recently published an editorial entitled: “Does the Rule of Stare Decisis Any Longer Apply in the Supreme Court of the United States,” 8 VA. L. REC. (N. S.) 143 (1922). But *Adkins v. Children's Hospital*, *supra*, is on its facts a too emphatic yes.

a generation ago.¹⁴ (3) 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,¹⁵ so as to do justice in the individual case or in that class of cases. (4) Frequently, as Mr. Justice Holmes has well said,¹⁶ "General propositions [rules, principles and other premise-precepts] do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." That is to say, in addition to legal *precepts* (articulate major premises), and interpretations and applications thereof, the judicial process often uses more or less inarticulate elements.¹⁷ And with respect to this innominate and more or less inarticulate function of the judicial process, there is perceptible in many courts a somewhat sub-surface tendency, through the conscious or subconscious use of these elements, to put increasing emphasis upon social interests and in so doing to depart from the individualistic method of approach and adjudication, and the individualistic law, of the last generation.¹⁸ As an eminent English jurist has just observed with reference to recent changes in the English law—an observation

¹⁴ The extent or actuality of such change in a given case is often disputable. For examples illustrating some of the aspects of (2), see *Oppenheim v. Kridel*, 236 N. Y. 156, 140 N. E. 227 (1923); *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922), discussed in Comments, 32 *YALE L. J.* 59 (1922); *Carroll v. United States*, 267 U. S. 132 (1925); *United States v. Railway Employees etc. Federation of Labor*, 283 Fed. 479 (1922), discussed in Comments, 32 *YALE L. J.* 166 (1922); *Brown v. Brown*, 88 Conn. 42, 89 Atl. 889 (1914); *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9 (1923), discussed in Comments, 33 *YALE L. J.* 315 (1924). *Atkins v. Coal Co.*, 76 W. Va. 27, 84 S. E. 906 (1915), distinguishing *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285 (1889); *The Western Maid*, 257 U. S. 419 (1922), distinguishing *The Siren*, 7 Wall. 162 (1863), though the result actually reached in *The Western Maid* is perhaps not socially desirable. See Hough, *Admiralty Jurisdiction—of Late Years*, 37 *HARV. L. REV.* 529, 541 ff. (1924).

¹⁵ In practice these functions merge somewhat. The tendency to pay lip service to precedents, to purport to apply a precedent but in fact not to apply it, is best considered under (3). For example, see *United States v. Grimaud*, 220 U. S. 506 (1911), in fact permitting delegation of legislative power. See also Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12 (1910); and *Hynes v. New York Central R. R. Co.*, 231 N. Y. 229, 131 N. E. 898 (1921); discussed in this article. As to (3), and also (1) and (2), in England, see W. Jethro Brown, *Administration of Justice in England*, 1906 v. 1923, 33 *YALE L. J.* 838 (1924).

¹⁶ *Lochner v. New York*, *supra* note 13, at 76.

¹⁷ Cf. *CARDOZO*, *op. cit. supra* note 9, at 12.

¹⁸ The due-process cases illustrate this tendency. The courts cannot, or at any rate do not, define due process. *Davidson v. New Orleans*, 96 U. S. 97, 104 (1877). Therefore, in such cases we have no *articulate* precepts that are sufficient premises for the adjudication of such cases. Cf. Kales, "Due Process", *The Inarticulate Major Premise and the Adamson Act*, 26 *YALE L. J.* 519 (1917). See *Muller v. Oregon*, 208 U. S. 412 (1908) which, in that type of cases at any rate, is the turning point in this respect. Professor Frankfurter in his valuable article on *Hours of Labor and Realism in Constitutional Law*, 29 *HARV. L. REV.* 353 (1916), illustrates this tendency with citation of authorities.

which is equally true in American law,¹⁹ there have been in the present generation a “waning in the importance of precedent,” and “a more evident desire and / or ingenuity in distinguishing a precedent from the complexus of facts before the Court if the application of precedent might lead to inconvenient consequence * * * * *”. In my opinion, there has been a quite observable tendency, during the last two decades, for the British Bench to interpret and apply justice with reference to ‘the merits of the case.’ ”²⁰ In short, while there were sporadic examples of this sort of thing in the past generation, within the last few years there has developed, on the lines and between the lines, a perceptible tendency in Anglo-American jurisdictions to divorce the old mechanical jurisprudence and to espouse a new jurisprudence—a tendency, with respect to the chief functions of the judicial process, to depart from precedents, *i.e.*, previously decided rules and other premise-elements, and interpretations and applications thereof, where upon a balancing of all the interests involved, including the social interest in the stability secured by adherence to precedent and the social interest in progress secured by departure from precedent, the interests to be secured by departure from precedent outweigh the interests to be secured by adherence to precedent.

The general aspect of this modern tendency is admirably illustrated in a comparatively recent Connecticut case in which Mr. Justice (now Chief Justice) Wheeler took the right attitude:²¹

“That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fulness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth have found its health and life. It is not and it should not be

¹⁹ W. Jethro Brown, *op. cit. supra* note 15, at 838-839.

²⁰ And the learned jurist added, “without an adequate consideration of the effects of decision upon an already chaotic body of law.”

²¹ *Dwy v. Connecticut*, 89 Conn. 74, 99, 92 Atl. 883, 891 (1915). This was a concurring opinion, but see further illustrating this tendency the later majority opinion by the same judge in *Perry v. Haritos*, *supra* note 13.

stationary. Change of this character should not be left to the legislature."

This tendency toward conscious judicial renovation or restatement of the law is strikingly illustrated by a recent progressive opinion of the New York Court of Appeals. In that decision, which expressly departs from the common law in order to secure the social interest in progress, the court declared:²²

"Courts exist for the purpose of ameliorating the harshness of ancient laws [precedents] inconsistent with modern progress when it can be done without interfering with vested rights * * *. The common law is not a compendium of mechanical rules written in fixed and indelible characters, but a living organism which grows and moves in response to the larger and fuller development of the nation."

Not long since the United States Supreme Court said:²³

"The rule of *stare decisis* * * * is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided."

Still more recently the Supreme Court, in departing from precedent characterized the disapproved precedent as "the dead hand of the common-law rule of" a past generation.²⁴ And last year the Supreme Court of Appeals of West Virginia, in reversing a prior decision, said of the precedent that it had "become a judicial pariah in our reports."^{24a} A more extreme illustration of this tendency is found in a recent unanimous opinion of the Supreme Court of Ohio in which the following rather ultra-modernist attitude is taken:²⁵

"Precedents are valuable for information, admonition, and as milestones in the nation's progress. But they do not necessarily imply the last word of wisdom. They are not always to be adopted. They are quite frequently to be avoided. They are worth exactly what they weigh in right and reason when applied to the particular circumstances of each particular case."

²² Oppenheim v. Kridel, *supra* note 14, at 164-165.

²³ Hertz v. Woodman, 218 U. S. 205, 212 (1910).

²⁴ Rosen v. United States, *supra* note 13 at 471.

^{24a} Ashland Finance Co. v. Dudley, 98 W. Va. 255, 127 S. E. 33 (1925).

²⁵ Kintz v. Harriger 99 Oh. St. 240, 245, 124 N. E. 168 (1919).

Even the conservative English courts have recently shown a tendency to sacrifice precedent to settled modern ideas of social justice. Thus, in a comparatively recent House of Lords case which departed from the common law, a dissenting judge, reflecting the tendency of the last generation, said:²⁶

“We have to deal not with a rule of public policy which might fluctuate with the opinions of the age, but with a definite rule of law * * *. *The opinion of the age* may influence the application of this rule but *cannot affect the rule itself.*”

But what this dissenting judge says “cannot” be done is in effect what all the other judges held could be done and permitted to be done. And one of England’s most eminent jurists, Sir Frederick Pollock, has said of this dissenting opinion that it has no worse fault than that of being “out of date”.²⁷ According to this tendency, then, if “the opinion of the age” with respect to a “rule” of the common law is sufficiently settled and preponderant, it not only can but often does “affect the rule itself”, *i.e.*, the rule, principle, standard or other general premise-element, namely, the law. In this connection Professor Corbin has well said:²⁸

“If the open acknowledgment of the fact that there are many sources of law other than statute and precedent is heresy in the legal profession, so much the worse for the legal profession. Heresy or not, it is the fact.”

As a New York court has recently expressed it:²⁹

“Precedent is not our only guide in deciding these disputes, for many are worn out by time and made useless by the more enlightened and humane conception of social justice. That progressive sentiment of advanced civilization, which has compelled legislative action to correct and improve conditions which a proper regard for humanity would no longer tolerate, cannot be ignored by the courts. Our decisions should be in harmony with that modern conception and not in defiance of it.”

And there are numerous other recent, or comparatively

²⁶ *Bowman v. Secular Society*, A. C. 406, 432 (1917), per Lord Finlay, L. C. *Italica ours.*

²⁷ 33 *LAW QUAR. REV.* 300, 302 (1917).

²⁸ Corbin, *The Law and the Judges*, 3 *YALE REV.* (N. S.) 234, 245 (1914).

²⁹ *Schlesinger v. Quinto*, 192 N. Y. S. 564, 569 (1922).

recent, judicial decisions, *dicta* and juristic pronouncements to much the same effect.³⁰ It must be admitted, then, whether or not we like it, that there is a marked tendency in the present generation to relax the theoretically fundamental doctrine of *stare decisis*, to re-examine supposedly settled rules, principles and other premise-elements, and in some jurisdictions to treat precedents somewhat after the manner of the earlier common law and after the manner of the civil law,³¹ if not merely as evidence of the law, at least as not binding, rather than after the general manner of the common law of the last generation as law in and of themselves.³² Hence, another prediction of our great legal prophet is now being fulfilled, for nearly a generation ago Mr. Justice Holmes said:³³

"We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds * * *. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Thus, there is a judicial and juristic tendency in the present generation to do what the great Biblical jurist extrajudicially advised, *viz.*, to "prove all things; hold fast that which is good [and that only]."³⁴ A philosophy of practical rationalism³⁵ and of social utilitarianism is coming in vogue.

³⁰ For examples, in addition to the authorities cited *supra* in notes 13, 14 and 15, see Cuthbert W. Pound, Some Recent Phases of the Evolution of Case Law, 31 YALE L. J. 361 (1922); and Moschizker, Stare Decis in Courts of Last Resort, 87 HARV. L. REV. 409 (1924). See Brannon, J., in *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446 (1900): "No legal principle is ever settled until it is settled right." Compare *Falconer v. Simmons*, 51 W. Va. 172, 179, 41 S. E. 193 (1902).

³¹ See Borchard, Some Lessons From the Civil Law, 64 UNIV. OF PA. L. REV. 570, 571; Gray, Judicial Precedents,—A Short Study in Comparative Jurisprudence, 9 HARV. L. REV. 27, 40 (1895).

³² See, *e.g.*, *Harris v. Jex*, 55 N. Y. 421 424 (1874). But see *Paul v. Davis*, 100 Ind. 422, 426 (1885); and *Whitney*, The Doctrine of Stare Decis, 8 MICH. L. REV. 89, 91 (1904).

³³ Holmes, The Path of the Law, 10 HARV. L. REV. 457, 468-469 (1897).

³⁴ PAUL, THE BIBLE, 1 THESSALONIANS, c. 5.

³⁵ Not a rationalism based on "pure reason" but one based also on "practical reason", a rationalism that insists upon reasons which will justify law or legal doctrine as a means for securing a maximum of human wants with a minimum sacrifice of other wants. The philosophy of the sociological school is a "fusion" of philosophies. See, Charmont, 7 MODERN LEGAL PHILOSOPHY SERIES, 65-66, 115-116 (1916). *Cf.* Charmont, *op. cit. supra* at 145: "There is an element of Pragmatism in this conception, but it is a mitigated Pragmatism, subjected to the control of reason." *Cf.* WIGMORE AND KOCOUREK, Editorial Preface, RATIONAL BASIS OF LEGAL INSTITUTIONS XX (1923).

Lest it be thought that the position taken in this article overemphasizes some tendencies, the writer wishes to insert the caution that, of course, those courts which have shown these tendencies in certain cases cannot always be relied upon to show uniform tendencies even in the same class of cases. To err is still human. Thus, each of the leaders in the modern trend, the United States Supreme Court and the New York Court of Appeals, has handed down a recent noteworthy decision³⁶ which runs rather counter to the prophecies of what these courts would do in this respect. But just as a few sporadic departures from *stare decisis* do not create a tendency, so a few sporadic deviations from the modern trend do not destroy the tendency.

An extensive excursus upon the nature of law is, of course, beyond the scope of this paper. Nevertheless, as the proper function of a precedent in modern Anglo-American law depends largely on what is considered as constituting law, it is necessary in such a discussion to have in mind some definite conception of what is meant by law. What, then, is law, *i.e.*, for present purposes, the common law? In the first place, modern law, according to leading jurists, consists of four elements: *viz.*, rules, principles, standards and conceptions.³⁷ These four elements are for immediate purposes, called precepts or precept-elements. But how do we determine what precepts are law? Where there are apt precedents, is the common law, as is so often asserted, only such precepts as are to be found in or deduced from the apt precedents? Is it true, as Langdell said of law in the last generation, "that all the available materials of that science are contained in printed books?"³⁸ If the common law is to be found solely in or deduced solely from the apt precedents, a court, if it decided cases according to law, could not overrule a precedent which is found to be out of harmony with the preponderant settled opinion or accepted standards of society, the *mores* of the times. But all common-law courts, except perhaps one or

³⁶ The United States Supreme Court in *Adkins v. Children's Hospital*, *supra* note 18, Taft, C. J., Holmes and Sanford, JJ., dissenting, Brandeis, J., taking no part in the decision; the New York Court of Appeals in *Crowley v. Lewis*, 239 N. Y. 264, 146 N. E. 374 (1925), as to which see Comments, 34 YALE L. J. 782 (1925).

³⁷ Described *supra* note 12.

³⁸ Langdell, *op. cit. supra* note 1.

³⁹ The House of Lords considers itself bound by its own decisions. See *London Street Tramways Co. v. London County Council*, A. C. 375, 379 (1898). But even the House of Lords has occasionally "effected a complete change of front * * * without overruling" its own decisions. See Sir Frederick Pollock, *op. cit. supra* note 2, at 163.

two,³⁹ reverse themselves, and many of them without much hesitation and with increasing frequency. Therefore, the common law is, in part at least, something more than those precepts which are found in or deduced from precedents. What, then, is that something which constitutes the common law? Mr. Justice Holmes gives us the key to the correct answer. He says:⁴⁰

“The prophecies of what the courts [or court-like tribunals⁴¹] will do in fact, and nothing more pretentious, are what I mean by the law.”

That is to say, the law today is what the courts or similar tribunals would decide today, is the legal rules and other general premise-elements which such tribunals would recognize or establish today, and is not solely what the precedents say. One modern writer has said:

“The ‘law’ governing a particular state of facts which happens today is the rule which will tomorrow be applied to the state of facts by the executive, administrative or judicial officers engaged in administering justice. The ‘law’ is not the decisions made * * * before the state of facts happened. Existing decisions * * * are simply some of the stimuli, among many others, which are available to secure from the executive, administrative or judicial officer, the response which will be the rule applying to the state of facts.”⁴²

The Supreme Court of California has said:⁴³

“A lawyer who would have advised a client to rely upon the Berson Case⁴⁴ [a case in that jurisdiction which was considered wrong] * * * would show his incapacity.”

As the court correctly stated in a recent case in which it was essential to decide what the then existing law was in a given jurisdiction:⁴⁵

“The question to be determined * * * is not wholly what has been held [in that jurisdiction] * * but what would be held * * * [today] in that jurisdiction * * * It

⁴⁰ Holmes, *op. cit. supra* note 33, at 461.

⁴¹ Modern administrative tribunals which decide cases according to legal rules, principles or other general premise-elements must, in this respect, be classed with courts.

⁴² Statement of an unnamed member of the faculty in Columbia Law School, quoted in Wood, Measurement of Law School Work, 24 *COL. L. REV.* 224, 232 (1924).

⁴³ *Alferitz v. Borgwardt*, 126 Cal. 201, 208, 58 *Pac.* 460 (1899).

⁴⁴ *Berson v. Nunan*, 63 Cal. 550 (1883).

⁴⁵ *Hansen v. Grand Trunk Ry. Co.*, 78 N. H. 518, 523, 102 *Atl.* 625 (1917).

might be that the precedent [in that jurisdiction] was palpably erroneous, and that there was every probability that it would be overruled, if the present case were taken there for final decision."

It is commonly said or assumed that law in the modern jurisdiction consists exclusively of articulate precepts. Thus, it has been said that "all law consists of norms, and whatever cannot be reduced to a norm does not in reality belong to the law."⁴⁶ But is there another element which, though not such a precept, is, like such precepts, *essentially* a "major-premise" element which performs the same sort of function as such precepts with respect to "the prophecies of what the courts will do in fact?" For sometimes, to quote Holmes again,⁴⁷ "General propositions [articulate precepts] do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." That is to say, we cannot always articulate a major-premise precept that is a sufficient premise for deciding a case. At any rate in due-process cases, the premises, in general, are not and apparently cannot be fully enunciated in the form of such articulate premise-precepts.⁴⁸ But in such cases, the trained, though inarticulate, "judgment or intuition" of the judges (together with such articulate precepts as are more or less applicable) may lead to as *just and uniform* results as where the judges can adjudicate according to articulate, but sometimes conflicting, rules and other premise-elements. From this demonstrable and predictable general method of deciding cases, we can, to a reasonable degree of probability, make "phophecies of what the courts will do in fact", though perhaps not always to the same degree as where the courts can adjudicate according to articulate legal precepts. Therefore, as a practical matter, and "law is [or should be] a practical matter",⁴⁹ does the law in some cases consist also of the more or less inarticulate elements involved in the predictable general method or methods of adjudicating according to a trained

⁴⁶ See 2 MODERN LEGAL PHILOSOPHY SERIES 386 (1912).

⁴⁷ *Lochner v. New York*, *supra* note 13, at 76.

⁴⁸ See *Davidson v. New Orleans*, *supra* note 18; Hough, *Due Process of Law—Today*, 32 HARV. L. REV. 218 (1919). Cf. Kales, "Due Process", *The Inarticulate Major Premise and the Adamson Act*, 26 YALE L. J. 519 (1917).

⁴⁹ Pound, *Juristic Science and Law*, 31 HARV. L. REV. 1047, 1058.

judgment or intuition?⁵⁰ Or are these elements less than law? Of course, much of our judicial administration of justice is not, and rightly is not, "an administration of justice by law", but is an "administration of justice by the more or less trained intuition of experienced magistrates". That is to say, sometimes there is, on the particular point, no major-premise precept to guide the magistrates; the decision is left to their discretion"; it is an administration of "justice without law."^{50a} But is a court's major premise less than law simply because the court leaves the major premise inarticulate or largely inarticulate? Perhaps it should be added parenthetically that still other elements commonly play an important part in "the prophecies of what the courts will do in fact", *viz.*, the purely personal elements (such as the personal predilections of the judges of the time being) that give direction to the decisions of the particular judges. But these factors are not legal elements, for they are not *general* elements, and law involves, *inter alia*, the idea of generality. To this extent, Holmes' definition of law involves a non-legal element.

A definition of law which would be accurate for all times and places is perhaps impossible.⁵¹ For present purposes, however, law in the modern jurisdiction may be summarily defined as the totality of rules, principles, standards and / or other general premise-elements⁵² which are, or would be, sanctioned today by the politically organized community (acting through its approved method of procedure) for the purpose of securing such interests, *i.e.*, wants, claims or desires, as such community, through its method of expression, thinks should be secured by authoritative action.⁵³ For the sake of convenience, however, law is hereinafter frequently referred to simply as "rules and other premise-elements."

With this conception of law in mind let us briefly con-

⁵⁰ Compare Dean Pound's pronouncement that "the common law * * * is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules." POUND, *THE SPIRIT OF THE COMMON LAW*, 1 (1921).

^{50a} See POUND, *op. cit. supra* note 11, at 111 ff.

⁵¹ See Swan, *Reconstruction and the Legal Profession*, 28 *YALE L. J.* 784, 789 (1919): "The law is a * * * * * changing thing which must keep pace with the changing ideals and *mores* of the community."

⁵² Conceivably the law in a given jurisdiction may not include all of the above-mentioned general premise-elements. Therefore, the "and / or" form of definition is used.

⁵³ Compare Young, *The Law as an Expression of Community Ideals and the Lawmaking Functions of Courts*, 27 *YALE L. J.* 1 (1917); and POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* 68 (3rd ed. 1920).

sider some aspects of the modern trend. In the first place, it is beginning to be recognized that, broadly speaking, the whole field of law is undergoing a fundamental change which Dean Pound with other commentators has aptly characterized as the socialization of the law.⁵⁴ That is to say, although during the last generation the law was largely individualistic, generally considering the contestants in a case as isolated individuals with little or no regard for the interests of society, the tendency in the present generation is to consider that the community, the social group, rather than the individual, is the important element in modern civilization and that, therefore, the contestants in a case should be considered also as an inseparable part of society. This thought or mode of thinking has attained considerable vogue on the continent.⁵⁵ Mr. Justice Holmes enunciated this idea in America, in somewhat embryonic form, as early as 1881.⁵⁶ And under his able leadership the modern tendency is, in a measure at least, to socialize the law, *i.e.*, to emphasize the interests of society—to insist upon securing the wants of the community, the social interests, rather than the interests of the individuals, when these social and individual interests conflict so that it is necessary to sacrifice one or more of these interests, to some extent at least, in order to satisfy the other interest or interests, but, of course, to sacrifice the individual interests only when the social interests outweigh the individual interests. As the United States Supreme Court rather recently said:⁵⁷

“There must be progress, and if in its march private interests are in the way they must yield to the good [*i.e.*, the interests] of the community.”

Under this method of reasoning it is conceived that the subject-matter of law is interests; that law is, as Jhering says, “a means to an end”⁵⁸—a means to secure interests; and that, since all the interests involved in a controversy cannot be secured, inasmuch as they conflict, the end of law today is to secure as many interests as possible and sacrifice as few interests as possible, and, in balancing the

⁵⁴ See POUND, *op. cit. supra* note 50, at 195.

⁵⁵ See CHARMONT, 7 MODERN LEGAL PHILOSOPHY SERIES 65 (1916); BEROLZHEIMER, 2 MODERN LEGAL PHILOSOPHY SERIES 351 ff. (1912).

⁵⁶ HOLMES, THE COMMON LAW, 43, 44, 48 (1881).

⁵⁷ *Hadacheck v. Sebastian*, 239 U. S. 394, 410 (1915).

⁵⁸ JHERING, 5 MODERN LEGAL PHILOSOPHY SERIES, (1914), transl. of her “Der Zweck im Recht” (1877).

interests to determine which interests should be secured and which sacrificed, to secure the more important interests and sacrifice the less important interests.⁵⁹ As an eminent French jurist has expressed it:⁶⁰

“This principle, which one may call that of the equilibrium of the interests concerned, must be the guide of the courts * * *. The object held in view by this principle is nothing but that of giving the greatest possible satisfaction to the wishes of the various parties consistent with the realization of the social purposes of mankind. The general method of accomplishing this purpose is to recognize all the conflicting interests concerned, to estimate their respective force, to weigh, them, as it were, in the scales of justice so as to give the preponderance to the most important of them tested by some social standard, and finally to bring about that equilibrium between them which is so greatly to be desired.”

Of course, the difficult problem under this mode of thinking is how to decide which of the conflicting interests outweigh the others. But, like justice, interests cannot be equitably weighed (as they have been weighed) on a balance with Procrustean bowls mechanically filled with facts. Here, as elsewhere in the law, the scales of justice must often be not only “general propositions” but also a more or less trained “judgment or intuition.” As Mr. Justice Holmes has well said:⁶¹

“In the law we only occasionally can reach an absolutely final and quantitative determination, because the worth of the competing social ends which respectively solicit a judgment for the plaintiff or the defendant cannot be reduced to number and accurately fixed. The worth, that is, the intensity of the competing desires, varies with the varying ideals of the time, and, if the desires were constant, we could not get beyond a relative decision that one was greater and one was less. But it is of the essence of improvement that we should be as accurate as we can.”

Dean Pound, pursuing this method of reasoning in an article published in 1914, described seven noteworthy changes in the law in the present generation, which, he

⁵⁹ See POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW*, 89-99 (1922); GMELIN, 9 *MODERN LEGAL PHILOSOPHY SERIES*, 130-131 (1917), transl. of his *Quouque* (1910).

⁶⁰ François Gény, “Méthode D’interprétation et sources en droit privé positif” (1899), transl. 9 *MODERN LEGAL PHILOSOPHY SERIES* 1, at 35 (1917).

⁶¹ HOLMES, *COLLECTED LEGAL PAPERS*, 231 (1920);

says, illustrate the twentieth-century legal development known as the socialization of the law.⁶² In his valuable book on the Spirit of the Common Law, published in 1921, he catalogued eight such changes.⁶³ And now that there are other wide-spread changes tending mainly in the same general direction, it would seem that those eight changes and these other socializing changes have developed into what we may call a tendency in the present generation to sacrifice precedent to social justice,—a tendency, consciously or subconsciously, to emphasize social interests and in so doing to sacrifice precedents where the interests to be secured by departure from precedent outweigh the interests to be secured by adherence to precedent,—a tendency, in effect, toward the legal recognition, at least to a far greater extent than in the past generation, of not only the social interests catalogued in this connection by Dean Pound, but also, among others: (1) the social interest in progress, particularly, (a) the social interest in legal progress, *e.g.*, the social interest in a rationalization and practicalization of the law which will make law a more workable means for satisfying the wants of society, (b) the social interest in what we may call environmental progress, the social interest in the environmental betterment and beautification of the community; (2) the allied social interest in satisfying the *mores* of the times—the social interest in satisfying the accepted standards and the preponderant settled opinion or moral sense of society as to what is justice; (3) the closely connected social interest in securing respect for and obedience to law, for law that is not reasonably up to date with modern conceptions and standards of justice on the *mores* of the day is conducive to disrespect for and disobedience to such law.⁶⁴

In many quarters this tendency directly or indirectly to sacrifice precedent to justice is observable, broadly speaking, in most branches of the law, even, to some extent, in

⁶² Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 226 (1914). These seven changes are outlined thus: (1) Limitations on the use of property and the so-called anti-social exercise of rights, (2) limitations on freedom of contract, (3) limitations on the *jus disponendi*, (4) limitations on the power of the creditor or injured party to exact satisfaction, (5) imposition of liability without fault, particularly in the form of responsibility for agencies employed, (6) change of *res communes* and *res nullius* into *res publicae*, and (7) insistence upon the interest of society in dependent members of the household."

⁶³ At 185-189, outlining the additional change thus: "An increasing tendency to hold that public funds should respond for injuries to individuals by public agencies."

⁶⁴ Compare, Pound, *A Theory of Social Interests*, 15 PUBLICATIONS OF THE AMERICAN SOCIOLOGICAL SOCIETY 16 (1920).

real property law, though the tendency in that branch of the law, because of the important social interest in stability and in the security of property, is much less marked than in those branches of the law, *e.g.*, the law of evidence, the law of public utilities, administrative law or constitutional law, where the social interest in progress frequently outweighs the social interest in stability. Therefore, this tendency to subordinate precedent to justice supplies a means to "mediate between the conflicting claims of stability and progress",⁶⁵ a means "to make effort more effective in achieving the purposes of law",⁶⁶ and thereby to satisfy two of the chief objectives of the modern jurists.

In recently referring to the "tendency to subordinate precedent to justice", Judge Cardozo says:⁶⁷

"How to reconcile that tendency, which is a growing and in the main a wholesome one, with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day. We shall have to feel our way here as elsewhere in the law. Somewhere between worship of the past and exaltation of the present, the path of safety will be found."

But where is that "somewhere"? And what philosophy will guide us in "feeling our way" to and along "the path of safety"? It is submitted, and Cardozo has practically admitted,⁶⁸ that the path-of-safety guide is to be found in a simple fundamental of sociological jurisprudence. Expressed in the terminology of the sociological jurists, the answer may be stated as follows:

Whether or not a court or court-like tribunal should in a particular case adhere to or depart from a precedent, established or recognized by such tribunal or by any tribunal other than one of higher rank in or for that jurisdiction, depends on whether departure from such precedent or adherence to such precedent will secure a maximum of interests with a minimum sacrifice of other interests—whether, upon a balancing of all the interests involved, including the social interest in the certainty and stability secured by adherence to precedent, departure from precedent or adherence to precedent will secure the more important inter-

⁶⁵ See CARDOZO, *op. cit. supra* note 10, at 1.

⁶⁶ See POUND, *op. cit. supra* note 53, at 37.

⁶⁷ CARDOZO, *op. cit. supra* note 9, at 160.

⁶⁸ *Ibid.*, at 112-113.

ests and sacrifice the less important interests. Whether a departure will secure such maximum satisfaction must be determined by considering, *inter alia*, whether the proposed rule or other premise-element *will work better in practice* than did the rule or other premise-element previously sanctioned, or whether the proposed interpretation or application of an admittedly sound rule or other premise-element will work better in practice than did the interpretation or application approved by the previous decision.

Of course, a subordinate court or subordinate court-like tribunal should not depart from an apt precedent laid down by a higher tribunal in or for that particular jurisdiction, except perhaps in an undefined type of cases, one example of which is where the majority of the present members of such higher tribunal have in their recent and latest expressions unequivocally shown by *obiter dicta* that they will overrule that precedent if the opportunity ever presents itself. Not only the ordinary reasons underlying *stare decisis* but other reasons require this more rigid rule for subordinate tribunals. A contrary rule for such tribunals would not be conducive to legal chaos and official insubordination. But these additional reasons for the rule do not apply in this type of cases. Therefore, in such cases, may we apply a sort of *cessante ratione cessat et ipsa lex*? In the absence of the reasons for this more rigid rule and in the absence of a contrary statutory or constitutional requirement, should there be an exception in this undefined type of cases, if we are convinced that, beyond a reasonable doubt, such exception will secure a maximum of interests with a minimum sacrifice of other interests? Indeed, if "law" is as Mr. Justice Holmes defines it, "the prophecies of what the courts will do in fact", then may we generalize that, where upon a balance of probabilities, we can prophesy that, beyond a reasonable doubt, such higher tribunal would, in a given case, not adhere to such precedent,—where, as it were, there is no room for two reasonable opinions upon the questions whether and to what extent such higher tribunal would depart from such precedent if the case in hand were carried there for adjudication, the only reasonable opinion being that there would be a departure at least to such and such an extent, then, to that extent, it would be justifiable and socially desirable for

such subordinate tribunal (with due deference to such higher tribunal) to depart from such precedent by the same reasoning as that provided for higher tribunals? If Holmes' definition of law is correct, would not such departure by the subordinate tribunal be a decision of the case *according to law*, *i.e.*, according to "the prophecies of what the courts [or court-like tribunals] will do in fact"? If the lower tribunal did not thus depart from such precedent, there might be a gross miscarriage of justice, for the party against whom such erroneous precedent would operate might, for financial or other reasons, not carry the case to such higher tribunal. Furthermore, would not adherence to such a palpably unsound precedent secure the socially undesirable result of promoting popular disrespect for and disobedience to such "law"? But be such exception, if any, as it may, whenever it is proper to depart from a previous decision, the guide to determine the question and course of departure should be the securing of a maximum of interests with a minimum sacrifice of other interests. As the Supreme Court of Illinois has recently said (per Mr. Justice Carter):⁶⁰

"Where the error of a previous decision is recognized, the question whether the rule of *stare decisis* shall be followed becomes a simple choice between relative evils."

What, then, in general are the interests to be secured or sacrificed by adherence to or departure from erroneous precedent? What are the "relative evils" and advantages between which we are to choose? Sufficiently for present purposes, there is on the one hand the social interest in "stability", the social interest in uniformity of decisions and certainty in the law—interests which would sometimes be better secured by rigid adherence to precedent. But today precedents are frequently so conflicting, or so uncertain or so voluminous that they or their effect are practically unascertainable and, in practice, frequently are unascertained. And, therefore, the stability, certainty and uniformity secured by mechanically attempting to adhere to conflicting, uncertain or practically unascertainable precedents are often illusions. Dean Pound has pointed out that, in the civil-law system where precedents are not considered

⁶⁰ Prall v. Burckhardt, 299 Ill. 19, 41, 132 N. E. 280 (1921).

binding, the certainty in the law is probably as great as it is in the common-law system.⁷⁰

In this connection Dean Wigmore has made the following interesting observations:⁷¹

“Certainty is the third supposed virtue of *stare decisis*. The theoretical value of certainty, and the best feasible method of securing it, are interesting questions. But it is difficult to reflect on this part of the question without emphasizing the pragmatic element. For the inquiry presses, how far indeed has certainty been secured by our practice? Would a less frequent invocation of *stare decisis* have given the community less certainty in justice? Is the degree of the present obvious lack of certainty due to other causes, or to the inherent impotency of *stare decisis* for that purpose? In countries like France, which started a century ago with the negation of that principle, but gradually came to recognize it to a degree, has there been adequate certainty?”

One reason, why, in present-day practice, the doctrine of *stare decisis* is not more conducive to certainty and uniformity, or stability, is that today, because of the overcrowded court calendars, it is practically impossible for the judges to investigate all apt precedents, even if all apt precedents were available. And, therefore, the judges, as they sometimes admit,⁷² in practice commonly investigate only a part of the apt precedents, thus often deciding *contra* to precedent without realizing it. Generally one can find precedents to support either side of a controversy. And as one of America's greatest living jurists has recently observed:⁷³

“Many courts today are suspected of ascertaining what the equities of a controversy require, and then raking up adjudicated cases to justify the result desired.”

However, we must not become greatly alarmed over this tendency, for, prior to the more mechanical stage of the last generation, one of the greatest judges America has ever produced admitted, after he had retired from the bench, he did exactly what many present-day judges are

⁷⁰ Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 943 (1923).

⁷¹ 9 MODERN LEGAL PHILOSOPHY SERIES XXXVIII (1917).

⁷² See Orrin N. Carter, *The Supreme Court and Its Method of Work*, 1 ILL. L. REV. 151 (1906).

⁷³ POUND, *op. cit. supra* note 11, at 121.

suspected of doing. As Kent put it:⁷⁴ "I might once and a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case."

A still further reason why the doctrine of *stare decisis*, as generally interpreted and applied a generation ago, has lost much of its usefulness for present and future purposes is that not only is it often impractical today for any lawyer or judge to investigate all the numerous apt precedents, but also, if the volume of precedents continues at its present rate of growth, it will soon be quite impossible in many, if not most, cases for any lawyer or judge to investigate all apt precedents. Thus, it has been recently calculated that, if precedents continue to increase as in the past, a complete law library which today comprises about 18,500 volumes of precedents, not to mention statutes, would a century hence contain 1,850,000 volumes of precedents.⁷⁵ It is quite impractical, therefore, to endeavor indefinitely to administer law on the theory that, in order to determine what the law is on a given point, it is necessary to investigate all the multitudinous apt precedents and then follow the "law" there found. As Mr. Justice Stone has recently stated in this connection:⁷⁶

"Can it be supposed that in the next century or fifty years or twenty-five years from now, lawyers and judges will be able by individual or indeed by any effective cooperative effort to extract day by day from such a mass of legal literature, the rules and principles which shall guide the conduct of clients and litigants; or if such a laborious process were possible, that the result of it would be a system of law adequate to the needs of a progressive and enlightened people? To hope that such a mass of precedent can be penetrated even with the aid of digests and glossators or that there could be extracted from it any harmonious and workable legal doctrine is to disregard the teachings and experience and to indulge, Micawber-like, in the illusion that something, we know not what, will turn up to remedy the growing difficulties of our situation."

But let us concede that in general the social interest in stability and the social interest in certainty and uniformity

⁷⁴ In a letter quoted by Corbin, *op. cit. supra* note 28, at 244-245.

⁷⁵ See Stone, *Some Aspects of the Problem of Law Simplification*, 23 *COL. L. REV.* 319, 320 (1923).

⁷⁶ *Ibid.*, at 320.

in the law are, and will hereafter be, somewhat better secured by the mechanical *stare decisis* of the last generation than by the present-day tendency. Yet there are other important social interests which undoubtedly are far more satisfactorily secured by assigning a less mechanical and a more sociological function to precedents. And these other interests frequently outweigh the social interests in certainty and stability, and any other interests that would be better secured by rigid adherence to precedent.

The first of these social interests which is, in effect at least, better secured by this tendency to sacrifice precedent to justice is the social interest in progress, *e.g.*, the social interest in legal progress. A generation ago an eminent judge, reflecting the tendency of his time, said:⁷⁷

“There has been a great searching for reasons for these [legal] rules; but it does not signify what the reasons for them are, if they are well recognised rules which have existed from time immemorial.”

As a result of such a judicial attitude the law of today, or at any rate the law as laid down in the precedents, still contains many ancient rules and doctrines that will not stand the test of reason or practicality, and are out of harmony with modern conceptions of justice, *e.g.*, the rule in most jurisdictions that an undisclosed principal cannot be sued on a sealed instrument. And, therefore, to follow such precedents without considering “the reasons for them” may, under present conditions, totally or largely prevent progress. But society has an interest that there shall be progress,—that the law of yesterday shall be improved so as to mete out better social justice today and tomorrow,—that in this age of practical rationalism⁷⁸ the impractical irrational legal “rules” and interpretations and applications of legal “rules” of a generation ago, if incapable of adequately securing the various interests involved in the existence of modern civilized society, shall be changed into practical rational legal rules and other premise-elements and interpretations and applications thereof which, under changed and changing conditions, will promote progress and achieve the ends of justice.

⁷⁷ Lord Esher, M. R., in *Mexborough (Earl of) v. Whitwood etc. Council L. R.*, 2 Q. B. 111, 115, (1897).

⁷⁸ See *supra* note 35.

For some time leading jurists have been emphasizing the importance of having legal rules and other legal elements, and interpretations and applications thereof, which will work well in practice.⁷⁹ Eminent laymen have frequently emphasized this need. Indeed there is voluminous evidence that the opinion of civilized society today preponderates in favor of more extensive legal progress. Witness the recent formation of the American Law Institute for the improvement of the law by a juristic restatement which would rid the law of its numerous antiquated doctrines.⁸⁰ Witness also the many recent suggestions by persons in high places for the formation of ministries of justice to aid in effectuating the improvement of the law.⁸¹ In a recent report of an important national committee on the establishment of a permanent organization for the improvement of the law, it is stated that "the opinion of * * * [the law's] rules do not work well in practice, and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions."⁸² And ultimately, unless the preponderant opinion in favor of such progress changes, the law will in all probability secure such interest in progress, for, as Mr. Justice Holmes has said, "every opinion tends to become a law."⁸³ In the long run the law is, or tends to be, an expression of the preponderant settled opinion or moral sense of society, the *mores* of the times, as understood by the courts and court-like tribunals. Therefore, since the preponderant settled opinion or moral sense of society is in favor of more extensive legal progress, many courts today are consciously or subconsciously changing the rigid rule of *stare decisis* into a more or less flexible doctrine, are judicially renovating or restating the law so as to be able to satisfy this social interest in particular and the social interest in progress in general.

An interesting illustration of how the courts are tending to secure the social interest in the progress of the law is the recent Virginia Case of *Harris v. McKay*,⁸⁴ in which the court, in departing from the rigid common-law rule, said:

⁷⁹ See EHRlich, 9 MODERN LEGAL PHILOSOPHY SERIES, 77-79 (1917).

⁸⁰ See 1 AMERICAN LAW INSTITUTE, PROCEEDINGS, 18 (1923).

⁸¹ See, e.g., Cardozo, A Ministry of Justice, 35 HARV. L. REV. 118 (1921).

⁸² See 1 AMERICAN LAW INSTITUTE, PROCEEDINGS, 1 (1923).

⁸³ *Lochner v. New York*, *supra* note 13, at 76.

⁸⁴ 138 Va. 448, 122 S. E. 127 (1924).

"The tendency of the courts is to ignore in large measure the technical distinctions between sealed and unsealed instruments which were so jealously guarded by the common law [of past generations] * * * * . The reason for the rule that an undisclosed principal cannot be held liable upon a contract under seal, executed by his agent in his own name, no longer exists, and we know of no sufficient reason why the protection of the rights [i.e., interests] of litigants requires that doctrine to be longer maintained."

The salutary doctrine of the common law, emphasized by Blackstone and others, *cessante ratione cessat et ipsa lex*,⁸⁵ though nearly forgotten in the last generation, is being revived and revised in the twentieth-century tendency toward practical rationalism. This tendency places vast power in the hands of the judges of the time being, a power which, of course, may be, and sometimes is, wielded for worse. But after all, as Ehrlich says,⁸⁶ "there is no guaranty of justice except the personality of the judge." And on the whole the good accomplished and accomplishable by this recent tendency far outweighs, and in all probability will hereafter far outweigh, the few attendant evils.

The significance of this movement away from the mechanical jurisprudence of the last generation is admirably illustrated by the recent New York Case of *Hynes v. New York Central R. R. Co.*,⁸⁷ a case which falls within that comprehensive category of cases where the decision turns not so much upon the question, what is the legal rule or other premise-element applicable, as upon the proper interpretation or application of an admitted rule or other premise-element. In that case a springboard, attached to a railway company's land, projected over a river where the public had a right to bathe. A, who was on the end of the springboard, was injured through the negligence of the company. As this springboard was a fixture, A was *technically* a trespasser, and, therefore, by a mechanical interpretation or application of the law, the railway company did not owe him a duty of due care. And the majority of the lower court, and three of the seven judges of the appellate court, apparently by a mechanical interpretation and application of pre-

⁸⁵ 2 BLACKSTONE, COMMENTARIES 390, 391 (4th ed. 1770).

⁸⁶ "Freie Rechtsfindung und freie Rechtswissenschaft" (1908), transl. 9 MODERN LEGAL PHILOSOPHY SERIES 47, at 65 (1917).

⁸⁷ *Supra* note 15.

cedents, said the railway company was not liable. But the majority of the Court of Appeals, in an able opinion which aptly expounds the sociological method, held otherwise. Said the court (per Cardozo, J.):⁸⁸

“This case is a striking instance of the dangers of ‘a jurisprudence of conceptions’ (Pound, *Mechanical Jurisprudence*, 8 *Columbia L. Rev.*, 605, 608, 610), the extension of a maxim or a definition with relentless disregard of consequences to ‘a dryly logical extreme’ * * * . Here * * * the fields [of immunity and privilege and of liability and duty⁸⁹] are brought together. In such circumstances, there is little help in pursuing general maxims to ultimate conclusions. They have been framed *alio intuitu*. They must be reformulated and readapted to meet exceptional conditions * * * . In one sense, that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still on public waters in the exercise of public rights. The law must say whether it will subject him to the rule of the one field or of the other * * * . We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant’s immunity and exemption and place him in the field of liability and duty.”

Under the dogmatizations of the last generation an appellate common-law court in dealing with such a case would, in all probability, have espoused a mechanical jurisprudence such was espoused by the lower court and apparently by the three dissenting judges in the Court of Appeals. But the majority of the appellate court wisely observed that “rights and duties in systems of living law are not built upon such quicksands.” An administration of law that will secure a maximum of interests with a minimum of sacrifice of interests requires a practical, not a technical, interpretation and application of legal rules and standards or other premise-elements. Therefore, the New York court rightly buried the mechanical “dead hand of the common-law” interpretation or application of the last generation and revived the hand of the living law of today, by interpreting the law in a way “that realists⁹⁰ will accept

⁸⁸ At 235, 236.

⁸⁹ Cf. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 16, 30 (1913).

⁹⁰ As to realism in the modern movement see Frankfurter, *op. cit. supra* note 18.

more readily", by practicalizing the applicable law or rather the interpretation and application of the applicable law, so as to make the law a more workable means to "satisfy at all times as many demands as we can."⁹¹

In this general direction, the Supreme Court of Appeals of West Virginia, in two recent practicalizing decisions, said:

"We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric [legal] theory."⁹²

"Courts must here cease to be pedantic and endeavor to be practical."⁹³

Thus, the modern movement in the law is, among other things, a progress toward what we may call an "equitable" rationalization and practicalization of the law and of the interpretation and application of law. As the New York Court of Appeals recently said in this general connection:⁹⁴

"Those who think more of symmetry and logic in the development of legal rules [and other premise-elements] than of *practical adaptation to the attainment of a just result* will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. *The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier.*"

A different aspect of the social interest in progress which is more adequately secured in the present generation and which in one important respect has been secured only in the present generation is the social interest in the environmental betterment and beautification of the community. This interest includes much more than the social interest in purely aesthetic surroundings which, though legally unrecognized until recently, many courts of late are, in effect at least, tending to recognize. The attitude of the law in the last decade toward so-called zoning ordinances and other regulations designed to give society a better gen-

⁹¹ See JAMES, *THE WILL TO BELIEVE*, 205 (1915).

⁹² *Jones v. Cook*, 90 W. Va. 710, 717, 111 S. E. 828 (1922).

⁹³ *West Va. Architects & Builders v. Stewart*, 68 W. Va. 506, 515, 70 S. E. 113 (1911), quoting with approval from WIGMORE, *EVIDENCE*, §1530 (1st ed. 1904).

⁹⁴ *Jacob and Youngs v. Kent*, 230 N. Y. 239, 242-243, 129 N. E. 889 (1921). Italics ours.

eral and aesthetic environment in which to live a fuller life is too well known to justify further discussion.⁹⁵

Another social interest which is better secured by the recent relaxing of *stare decisis* is the want or interest of society that society shall be made to realize that it is getting justice. As one of England's ablest judges once said:⁹⁶

"Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it."

Therefore, a legal doctrine should not be too esoteric. Whatever a lawyer may think about the justice of following a precedent, where the precedent admittedly works a "grave hardship" in the particular case, (and there are many lawyers who think that it is not always just), it is reasonably certain that society in general cannot see the justice of it. And, as Elihu Root has aptly said:⁹⁷

"The law is made not for lawyers but for their clients, and it ought to be administered, so far as possible, along the lines of the laymen's understanding and mental processes."

Hence, the recent tendency to subordinate precedent to prevailing conceptions and standards of social welfare more adequately secures what we may call the social interest in the satisfaction of the preponderant settled opinion of society as to what is justice—another aspect of the more extensive legal recognition of the accepted social standards or the *mores* of the times.

Another social interest that is better secured by the tendency to keep the law and the interpretation and application of law up to date with the *mores* is the pressing social interest in securing respect for and obedience to law. There is no doubt that current disrespect for and disobedience to much of the law is largely engendered by the fact that much of the law and much of the interpretation and application of law are seriously in conflict with the prevailing views of justice, not the unsettled views of a

⁹⁵ See *Town of Windsor v. Whitney*, 95 *Comm.* 357, 111 *Atl.* 354 (1920), discussed in *Comments*, 30 *YALE L. J.* 171, 174 (1920); *Lincoln Trust Co. v. Williams Bld. Corp.*, 229 *N. Y.* 313, 128 *N. E.* 209 (1920). But see *Fruth v. Board of Affairs*, 75 *W. Va.* 456, 34 *S. E.* 102 (1915). See Chandler, *The Attitude of the Law Toward Beauty*, 8 *A. B. A. JOUR.* 470 (1922); *Comments*, 32 *YALE L. J.* 833 (1923); Alfred Bettman, *Constitutionality of Zoning*, 37 *HARV. L. REV.* 834 (1924).

⁹⁶ Lord Herschell, quoted in 2 *ATLAY*, *THE VICTORIAN CHANCELLORS* 460.

⁹⁷ *The Layman's Criticism of the Lawyer*, 39 *AM. BAR ASSN. REP.* 386, 397.

momentary majority (for, among other reasons, stability would be unduly sacrificed if the laws should change with such views), but the settled prevailing views of justice, the accepted social standards, the *mores* of the times. Also, there is no doubt that, if the law and the interpretation and application of law are in harmony with such prevailing views of justice, society will have more respect for law and will be more inclined to obey the law. Hence, the recent tendency to sacrifice precedents in order to keep the law reasonably up to date with the *mores* more satisfactorily secures the important social interest in promoting respect for and obedience to law.

Of course, in some classes of cases, *e.g.*, cases relating to titles to real property where transactions have been entered into, and titles have become vested, in reliance upon judicial decisions, now admittedly erroneous, the courts should seldom depart from precedent, for the simple reason that in such cases adherence to admittedly erroneous precedent rather than departure from precedent will almost always secure a maximum of interests with a minimum sacrifice of other interests.⁹⁸ In these classes of cases an erroneous old doctrine will almost invariably work better in practice than will a new and theoretically better one. Furthermore, the doctrine of *stare decisis*, when properly interpreted and applied, is, in the great generality of cases, a useful means for securing a maximum of interests involved in controversies with a minimum sacrifice of other interests. For, among other reasons, in the recent words of an American judge:⁹⁹

“It expedites the work of the courts by preventing the constant reconsideration of [properly] settled questions; it [generally] enables lawyers to advise their clients with a reasonable degree of certainty and safety; it [generally] assures individuals that in so far as they act on authoritative rules of conduct, their contract and other rights will be protected in the courts; and, finally, it makes for equality of treatment of all men before the law.”

Therefore, precedents should not be lightly disregarded merely to prevent some hardship in the individual case.

⁹⁸ See *Laclede Land & Improvement Co. v. Schneider*, 177 S. W. 388, 390 (1915, Sup. Ct. Mo.)

⁹⁹ *Moschzisker, op. cit. supra* note 30, at 410.

Even the continental doctrine of "*libre recherche*" or "*freie Rechtsfindung*", so ably advocated by Gèny,¹⁰⁰ Ehrlich¹⁰¹ and others, does not sanction unscientific judicial freedom of decision. Hence, those modernist judges who pay but little attention to precedents,¹⁰² like the fundamentalist judges who pay attention only to precedents, too often sacrifice far more important interests than they secure. Also those modernist judges who depart from precedents because of their purely personal ideas as to what constitutes social justice commonly commit a similar error.¹⁰³ But it does not follow that a precedent dealing with any class of interests, if it is out of harmony with the *community's* accepted ideas of social welfare or the *mores* of the times, should be adhered to when, upon a balancing of all the interests involved,—when upon considering whether the proposed rule or other premise-element or the proposed interpretation or application thereof will in practice work better than the old one, it appears that, beyond a reasonable doubt, a departure from precedent will in the long run secure more interests and more important interests, will secure a greater "general satisfaction"¹⁰⁴ by awakening a less sum of dissatisfactions.

Summarily stated, the modern movement has among its purposes what we may call an "equitable" rationalization and practicalization of the law and of the interpretation and application of law, by laying less stress on the technical, the dogmatic and the mechanical, and more stress on the rational, the pragmatic and the merits of the case, by laying more stress on the problem whether the law, and interpretations and applications thereof, will work well in practice, and, within the path-of-safety limits, by judicially renovating or restating the law so as to accord with prevailing practical ideas and the *mores* of the times, thereby making legal rules and other premise-elements more workable instruments for securing today and tomorrow the various interests involved in civilized society, including the interests more adequately secured by departure from erroneous precedents. With these purposes, among others,

¹⁰⁰ *Op. cit. supra* note 60.

¹⁰¹ *Op. cit. supra* note 86.

¹⁰² See Judge Robinson's reply, 88 CENTRAL L. J. 155 (1919), and Notes, 88 HARV. L. REV. 972 (1920).

¹⁰³ Cf. STONE, LAW AND ITS ADMINISTRATION, 46-47 (1915).

¹⁰⁴ See Corbin, *op. cit. supra* note 28, at 248: "The aim of any legal system is general satisfaction."

a sociological philosophy, either as a conscious or subconscious force, is today, with an increasing number of judges and jurists, tending to "give coherence and direction to thought and action".¹⁰⁵ Under the influence of this philosophy and its associated forces, there has developed a tendency to sacrifice precedent to justice, with the result that, the law is tending to be not only more and more plastic and allied to life, but also more and more a rational and a practical science rather than a theoretical one. And under this modernization of law and of the interpretation and application of law, the rigid rule of *stare decisis* of a generation ago is, in many jurisdictions, changing into a flexible workable doctrine, thus satisfying a great objective of the modern jurists by becoming an efficient means "to make effort more effective in achieving the purposes of law." Only some such tendency—only some such philosophy—will "mediate between the conflicting claims of stability and progress, and supply a principle of growth."

¹⁰⁵ Cf. CARDOZO, *op. cit. supra* note 9, at 12: "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action."