

ON LEGAL REFORM: LEGAL STABILITY AND LEGISLATIVE QUESTIONS

The respective roles of courts and legislatures in reform of the common law is of continuing interest and importance. Philosophers, especially rule utilitarians,¹ frequently refer to the distinction between issues appropriate for judicial determination (judicial questions) and those more suitable for legislative resolution (legislative questions) as though it were clear, yet legal philosophers have not seriously examined the grounds for such a distinction. As used by philosophers and judges, the distinction frequently implies the discredited Blackstonian views that judges discover and apply law but do not make it. In his often cited statement of this distinction, even Justice Holmes, certainly no adherent to the Blackstonian view, employs the distinction:

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.²

The question of the role of courts vis-à-vis legislatures in law reform has increased in practical importance during the last fifteen years. In the United States at least, there has been a noticeable increase in judicial activism in both the Supreme Court and state courts of final review. Although it has abated somewhat in recent years, there has been an increased tendency for courts to overrule prior decisions.³ Yet, in many cases judges have insisted either that stare decisis prevents courts from making changes or that it is more appropriate for the legislature than the courts to make them. Judicial reluctance to depart from precedent is

¹Rule utilitarians claim that acts are to be morally evaluated by their conformity to those rules which, if adopted, would produce more net utility (happiness) than the adoption of any other rules. For use of the distinction between judicial and legislative questions in this connection, see Rawls, *Two Concepts of Rules*, in *UTILITARIANISM WITH CRITICAL ESSAYS* 177 (S. Gorovitz ed. 1971).

²*Prentis v. Atlantic Coast Line*, 211 U.S. 210, 226 (1908).

³With respect to tort law, see R. KEETON, *VENTURING TO DO JUSTICE* 169-70 (1969).

illustrated in *Maki v. Frelk*,⁴ a negligence action for personal injuries, in which the Supreme Court of Illinois had asked an appellate court to determine whether contributory negligence should continue to be recognized as a defense. The appellate court decided that it should not. Yet on rehearing, the Illinois Supreme Court reversed the judgment on the ground that abolition of the defense of contributory negligence should be left to the legislature.⁵

The main thesis of this article is that there is less reason for distinguishing between the proper roles of courts and legislatures in reform of the common law than is generally recognized. The doctrine of stare decisis has caused much confusion on this point. In particular, its use in cases raising the issue of overruling previous decisions often confuses two distinct questions: (1) Whether the law should be changed; and (2) who should change the law. The first section of this article analyzes stare decisis in order to clarify its status and to show how distinct considerations relevant to answering these two questions are confused in it. The second section analyzes the reasons for a principle against changing the law--the principle of stability--and demonstrates that it applies equally to both legislative and judicial change of the common law. The third section analyzes functional differences between courts and legislatures as a basis for a standard of legislative questions indicating which issues of change of the common law courts should leave to legislatures.

I. THE DOCTRINE OF STARE DECISIS

The doctrine of stare decisis or precedent (rarely are the two clearly distinguished) may be construed in several different ways. First, the doctrine may be understood either as a doctrine which specifies the kind of reasons relevant to judicial decision-making, or as a specific reason in itself.⁶ As a doctrine pertaining to the relevancy of reasons, stare decisis is the claim that the *only* relevant reasons for judicial decisions are precedents or analogies to precedents. So construed, stare decisis is a meta-doctrine

4239 N.E.2d 445 (Ill. 1968).

⁵Because a majority of states now have comparative rather than contributory negligence and three states adopted it by judicial decision, this controversy makes a good case study. Indeed, the courts in Florida and California adopted comparative negligence despite statutes arguably requiring contributory negligence. *Kaatz v. State*, 540 P.2d 1037 (Alas. 1975); *Li v. Yellow Cab Co*, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

⁶See R. WASSERSTROM, *THE JUDICIAL DECISION* 53 (1961).

concerning the underlying reasons courts give for decisions and not itself a reason. More often, stare decisis is considered to be one among a number of reasons for judicial decisions. So interpreted, it states that courts ought to adhere to or follow precedents, but other reasons may be given for not following precedents. Thus, according to the first interpretation, wherein stare decisis is construed as a meta-doctrine, all arguments for decisions must be based on precedents, whether in accord with or contrary to them. The second interpretation of stare decisis, however, is that while good reasons exist for basing decisions on precedent, reasons other than precedent may also exist which justify deviation for precedent. It is this latter conception which is relevant here. Of course, it is a difficult and controversial task to determine the holding of a previous case. Herein it will be assumed that this task has been performed. One cannot sensibly ask whether a precedent ought to be followed until one has determined what it is.

Second, one may distinguish between the precedents stare decisis requires a court to follow. In one version, it only requires courts to follow the precedents of higher courts of the same jurisdiction. In another version, it requires courts to follow their own precedents as well. Since the present concern is with courts of final review, only the claim that courts ought to follow their own precedents is relevant to the present discussion, there being no higher courts in the jurisdiction. Moreover, the claim that courts ought to follow their own precedents may take two forms: strict or liberal.⁷ The strict or English doctrine of stare decisis requires that courts always adhere to their own precedents, whereas the liberal or American doctrine permits departure from precedent in some cases. Although it is unclear whether any court ever really applied the strict doctrine, it has substantially been put to rest by a recent Practice Statement of the House of Lords which declared that courts may depart from precedent "when it appears right to do so."⁸ Consequently, only the liberal version of the doctrine will be considered.

Third, one may distinguish the doctrine's application to different kinds of law. The justification for the doctrine of stare decisis and the strength of the reason it provides for adherence to precedent may vary depending upon the type of law involved. The most significant distinctions here are between (1) court-made rules (common law), (2) statutory interpretations, and (3) constitutional interpretations. The role of courts as

⁷*Id.* at 50; see also Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043, 1045 (1975).

⁸[1966] 1 W.L.R. 1234, 3 All E.R. 77 (H.L.).

concerns their ability to decide constitutional matters largely depends upon considerations peculiar to specific forms of government, *e.g.*, whether there is a written constitution and judicial review. In statutory interpretation also, the respective roles of courts and legislatures are more clearly delineated than in common law. It is in the area of common law, the focus of this article, that the most difficult and general issues arise.⁹

Thus far, *stare decisis* has been referred to as a doctrine. In this context, the term "doctrine" has no clear meaning. It is thus useful to introduce the more precise terminology of standards, principles, and rules.¹⁰ Standards such as good faith, due care, and fair rate provide a basis for evaluations which admit degrees and may be used to establish rankings. Such evaluations are frequently stated in terms of good, better, best, bad, worse, and worst. Principles, on the other hand, present the criteria (good- and bad-making characteristics) used in applying standards and may themselves refer to characteristics which admit degrees, *e.g.*, the ripeness of an apple in grading it. Rules are used in making evaluations which do not admit degrees; they are either complied with or not. Such evaluations are usually expressed in terms of right or wrong, correct or incorrect. Thus, rules apply in all or none fashion, whereas principles do not, since the various principles constituting a standard may be weighed against one another. For example, it is a rule that one who is contributorily negligent cannot recover for damages. The requirement that liability ought to be based on fault, on the other hand, is a principle because it may be balanced against other considerations.

Determining whether the law should be changed requires consideration of the factor of the stability of the law. In particular, a decision to change the law cannot be made solely on the basis of the merits of the existing and the proposed rules but must also include consideration of the disadvantages or costs of legal change.¹¹ In this context, the liberal

⁹Moreover, within the common law, the weight of the reason provided against change by the doctrine of *stare decisis* may vary depending upon whether tort, contract, property, or criminal law is involved.

¹⁰On the difference between legal standards, principles, and rules, *see generally* Bayles, *Legal Principles, Rules and Standards*, 14 *LOGIQUE ET ANALYSE* 223 (1971). Dworkin, *The Model of Rules*, 35 *CHI. L. REV.* 14 (1967); and Dworkin, *Social Rules and Legal Theory*, 81 *YALE L.J.* 855, 822-90 (1972).

¹¹R. Wasserstrom, *supra* note 6 at 173; *see also* W. SHAEFER, *PRECEDENT AND POLICY* 9 (1956).

doctrine of stare decisis cannot be treated as a rule.¹² This conclusion is predicated upon the theory that to be construed as a rule against change, it would be necessary for the liberal doctrine to consist of one of the following forms: (a) Precedents ought to be followed unless . . . ; or (b) precedents ought usually or generally to be followed.

When given form (a), however, the doctrine often reduces to a tautology as in the House of Lords formulation that one ought to adhere to precedent unless it appears right to depart from it.¹³ If, on the other hand, the “unless” clause is formulated so as not to reduce to a tautology, then the rule provides no reason at all against change whenever a case falls within the excepting “unless” clause. Yet, stare decisis always provides a reason for adhering to precedent, notwithstanding the fact that other factors may outweigh the factor of adherence to precedent. Consequently, stare decisis cannot be a rule of type (a).

Nor can stare decisis be treated as a rule of type (b). As such, stare decisis is a mere summarization of the results of considering the advantages and disadvantages of legal change in particular cases. Without explicitly so stating, Wasserstrom, in his utilitarian theory of judicial decision, treats stare decisis as a rule of this type.¹⁴ He requires that to justify a judicial decision “the rule upon which its justification depends must be shown to be desirable, and its introduction into the legal system itself desirable.”¹⁵ This view considers only the disadvantages of change of the particular law in question.¹⁶ Hence, whenever in a particular case the advantages of change outweigh the disadvantages, a new rule should be introduced. Yet in focusing upon the disadvantages of change of a particular rule, Wasserstrom has omitted consideration of the disadvantages of a practice of frequent change. However, as D. H. Hodgson has argued at length, Wasserstrom’s view would make the law quite uncertain.¹⁷ Lawyers would not be able to predict when a court might decide that it would be useful to change a rule. Yet certainty in the law (as discussed more fully in the next section) is one of the main reasons for stare decisis or stability. Thus, because it is essential to have one settled rule, a reason is provided for adhering to a previously settled rule although it is no better than another

¹²*Contra*, R. WASSERSTROM, *supra* note 6, at 53-54. On the basis of quite different considerations, Wise also claims stare decisis is not a rule. Wise, *supra* note 7, at 1043.

¹³[1966] 1 W.L. R. 1234, 3 All E.R. 77 (H.L.).

¹⁴R. Wasserstrom, *supra* note 109.

¹⁵*Id.* at 173.

¹⁶In essence, this is an act utilitarianism view.

¹⁷D. HODGSON, CONSEQUENCES OF UTILITARIANISM 104-08 (1967).



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