COMMENTS
A PRACTICAL APPROACH TO STARE DECISIS

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Somewhere between worship of the past and exaltation of the present, the path of safety will be found.[1]

There is, of course, a great deal to gain by order. The opposite of order is chaos and all but a few would agree that society can not function unless some basic and peaceful methods of resolving disputes are readily available. There is no singular way to accomplish this and indeed within the framework of our own society, numerous methods of resolving disputes have been evolved. But what is required if order is to be maintained is that the method chosen be dependable. It is not requisite that it be dependable in the sense that it always achieves perfect justice, but simply that it gives those who must make use of it a sense of security, a feeling of order. The security desired is the security that tomorrow things will be done substantially the same way that they were done today and yet, order necessitates some degree of change and it thus becomes vital that our security does not become so complete that things will always be done tomorrow exactly as they were done today. Flexibility must exist side by side with rigidness.

In providing for change a balance must be struck between the security of the past and the uncertainty of the future. Not only is it necessary that those who have relied upon the faith of yesterday not be put into a state of chaos by the decisions of today, but it is equally necessary that those planning for the future be assured that the designs of today will not be cast asunder by the decisions of tomorrow. Equally important is the necessity of the existence of the belief that the error of the past will be corrected by the reason of the present. This is nothing more than a faith in the idea that the wisdom of the present is in the best position to evaluate the mistakes of yesterday in the light of today's added knowledge.

These qualities of certainty, order and dependability, this recognition of the need and desire for change, are all inherent in the doctrine of stare decisis. Indeed, isn't the doctrine merely a conven-

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[1] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 160 (1921).

ient summary expression of the basic common law technique of decision? This technique as Pound has pointed out has never regarded all authority on the same level and indeed a "single decision has never been regarded as absolutely binding at all events."[2] Yet, to permit courts to reject what is being urged upon them as "binding precedent" there is necessary an overriding conviction that the prior precept is as Blackstone put it "flatly absurd or unjust."[3]

Courts do not and cannot rely upon stare decisis as a rule of law; they cannot and do not apply stare decisis as other than another reason for reaching a stated decision. A strict application of stare decisis would necessitate a court to maintain that it would not have reached its particular conclusion except for the rule, and that its present decision is not one which the court would morally approve and one which can be rested on conscience, equity or public welfare.[4] Courts seldom rest decisions upon such grounds; judges are not content only to rely on the past. When a prior precedent is questioned and followed, it is seldom sufficient to say that the controlling decision is adhered to because it is a controlling decision. If a court states, as frequently happens in this area, that it might have reached a different decision had the question been originally presented to it for decision, there is no slavish adherence to stare decisis as a rule of law, but rather there is a judicial recognition that the interests of society do not then necessitate a change. Stare decisis is not such a doctrine as makes further reason irrelevant.[5]

These thoughts are better illustrated by reference to the recent Arizona case of *White v. Bateman*.[6] The controversy involved the right of a candidate for the office of sheriff to have his name placed upon the ballot by the Pinal County Board of Supervisors after having been defeated in the primary. The candidate was subsequently elected and his election was being challenged. In so placing his name upon the ballot, the Board had relied upon the previous Arizona case of *Cavender v. Board of Supervisors*[7] and the Supreme Court felt that the case was sufficiently determinative of the issue to rest its present decision upon the basis of stare decisis. The doctrine is most frequently applied to property and vested rights, but the court felt that it was equally applicable where the rights of the public

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[2] III POUND, JURISPRUDENCE 562 (1959).
[3] BLACKSTONE, COMMENTARIES *69.
[4] Radin, *Case Law and Stare Decisis: Concerning Prajudizienrecht in Amerika*, 33 COLUM. L. REV. 201 (1933).
[5] See *Ibid.*
[6] 89 Ariz. 110, 358 P.2d 712 (1961).
[7] 85 Ariz. 156, 333 P.2d 967 (1958).

were involved. In following the prior case the court did state that it was the doctrine of stare decisis which compelled the court to adhere to the previous decision. Yet the court was quick to point out that it would follow its previous decisions "unless the reasons of the prior decisions have ceased to exist or the prior decision was clearly erroneous or manifestly wrong."[8] The course of judicial statement on stare decisis in Arizona compels the conclusion that the court was not using stare decisis as the basis for the decision. The previous case was followed not because of the existence of a doctrine of stare decisis but because the court felt that the prior decision was one that at this time it was salutary to follow. Justice Jennings in another case decided shortly before *White v. Bateman* has clearly stated the trend of judicial feeling in Arizona when he observed that "the true purpose of the doctrine of stare decisis is thwarted when precedent is unrealistic or based on poor reasoning or expediency."[9]

Arizona has definitely recognized the flexible nature of the doctrine.[10] Consider, for example, the important statement in *O'Neil v. Martin*:[11]

> A court has the prerogative in a new case of going against the settled law of a previous case, and to secure the benefit of a fresh review of the law and to meet changing conditions it is well that the doctrine of stare decisis is but a doctrine of persuasion and not an iron chain of necessary conclusion.

Not only is this a recognition that changing social conditions may necessitate a change in the law, but it is also clear that a court which could make a statement such as the one just set forth could not be content with resting its decisions upon previous cases without feeling that those previous cases were based upon justice. The Arizona court has never hesitated to assert its right to review prior holdings and change them where the interests of society demanded a change. Not only is such review a right of the court, but as stated in *Crane Co. v. Arizona State Tax Comm'n*,[12] it is a *duty* of the court. And at least where private rights are not involved, the court has stated its willingness to review matters of public interest as follows:

> This court has not hesitated to review its prior opinions upon questions of public interest and to overrule the former holdings.[13]

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[8] White v. Bateman, 89 Ariz. 110, 358 P.2d 712, 714 (1961).

[9] State Tax Comm'n v. Ryan-Evans Drug Stores, 89 Ariz. 18, 357 P.2d 607, 608 (1960) (dictum).

[10] See White v. Bateman, 89 Ariz. 110, 358 P.2d 712, 714 (1961).

[11] 66 Ariz. 78, 84, 182 P.2d 939, 943 (1947).

[12] 63 Ariz. 426, 163 P.2d 656 (1945).

[13] Garvey v. Trew, 64 Ariz. 342, 350, 170 P.2d 845, 850 (1946). See also State *ex rel.* LaPrade v. Cox, 43 Ariz. 174, 30 P.2d 825 (1934).

This practical approach to stare decisis does not mean that every point of law is open to constant review in Arizona. Indeed, in spite of the statements of willingness to reconsider problems, Arizona has achieved a remarkable degree of stability and instances of the overruling of prior precedent are rare. For one thing, it is the rare case that calls upon the court to chart a new course in the law. Most decisions involve the process of application of law to facts and nothing more. Of course this can involve close and perplexing problems, but it does not involve the balancing of social interests that are necessary when a new problem is presented or an old rule changed. Another factor making for stability of case law is the reproductive power of a prior decision. As Cardozo has put it:[14]

> In the life of the mind as in life elsewhere, there is a tendency toward the reproduction of kind. Every judgment has a generative power. . . . If we seek the psychological basis of this tendency, we shall find it, I suppose, in habit. Whatever its psychological basis it is one of the living forces of our law.

I suppose that judges, as others, find security in doing and saying as others have done. To depart from what has already been said is always more difficult than to reaffirm the past.

From time to time courts considering the problems of stare decisis approach it from the view point of estoppel. Indeed one court has expressed itself that "The doctrine of stare decisis . . . is nothing more than the application of the doctrine of estoppel to court decisions . . . ."[15] and one of the leading articles on the subject states that most of the reasons given by the courts for stare decisis are "some forms of estoppel."[16] This consideration of estoppel with stare decisis should help chart the "path of safety" between worship of the past and exaltation of the present that Justice Cardozo seeks. Any application of estoppel must involve the element of reliance and therefore, a restriction of stare decisis to cases where there has been reliance upon prior precedent would achieve those ends which courts in talking about stare decisis deem desirable. It is recognized that not every decision has the same effect. Certainly the element of reliance is more prevalent in cases of land conveyancing[17] than in, say, the tort field. The important point is that in a great many cases the exact same controversy would have arisen had the law been settled

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[14] Cardozo, *supra* note 1, at 21.
[15] Hendrickson v. Commonwealth, 259 S.W.2d 1 (Ky. 1953).
[16] Radin, *supra* note 4, at 200.
[17] See Blackman v. Blackman, 45 Ariz. 374, 43 P.2d 1011 (1935).

in advance; the same parties would have acted the same way whether they thought the court would adhere to old precedent or adopt a new rule, or, indeed, whether there was any rule in existence at all. It is, perhaps, the rare case where parties regulate their conduct upon the basis of a known court interpretation. In cases where reliance is not a factor, courts should hesitate less in adopting a course contrary to old precedent.

The application of stare decisis depends upon the nature of the case before the court. There has been a tendency to state that in matters of constitutional law, the courts will more readily change their prior views than where strictly private property rights are involved. It is a settled proposition, states Pound, that in such cases it is "better that the law be settled than that it be settled right."[18] While this statement can find support in the Arizona decisions, it is the same quality of social interests that prompts a court to change the law when public rights not involving property are concerned as will compel the court to follow precedent when private property rights are involved. That is to say, that we have recognized the social importance of security as involves the acquisition of property and the importance that commercial transactions should be secure as well as the security that when rights are involved there is a social interest in change and that such change in itself is the foundation of stability. In each case, it is order that concerns the court and in each case it is the social basis of the decision that dictates the outcome. And this is a very practical approach.

[18] Pound, *supra* note 2, at 296.