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***STARE DECISIS* AND A CHANGING NEW YORK COURT OF APPEALS**

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INTRODUCTION

The judicial complement of the New York Court of Appeals has undergone dramatically greater changes in the recent past than at any other time in its 115-year history,¹ and the next two years promise even more change. In addition to the appointment of a new Chief Judge, the Court has seen three of its members retire and be replaced since April, 1983; within the next two years, two more of the sitting associate judges will retire. At present, for the first time, all members of the Court are serving by virtue of gubernatorial appointment rather than by election. This dramatic change in the Court's composition has led to speculation that the Court's position on legal issues may be subject to similarly dramatic change. The purpose of this Article is to allay that fear by explaining the importance of the doctrine of *stare decisis*,² which

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¹ See generally H. COHEN AND A. KARGER, POWERS OF THE NEW YORK COURT OF APPEALS § 4, at 18-22 (rev. ed. 1952). The present Court of Appeals was created by the Constitutional Convention of 1869 and first sat in July of 1870. From 1846 to that time, the Court had eight members. Four judges were elected for 8-year terms in statewide elections, and the other four were the Supreme Court Justices having the shortest remaining terms, each of whom would serve as an acting Court of Appeals Judge for 1 year. For the first several decades of New York history, the highest court of the state was composed of the Justices of the Supreme Court, the members of the State Senate, and the Chancellor, and it was known as the Court for the Trial of Impeachments and the Correction of Errors, modeled after the "Lord's Court" in the House of Lords in England. *Id.*

² The term *stare decisis* is actually a shorthand expression for the doctrine *stare decisis et non quieta movere*, which has been translated variously to mean "to stand by decisions and not to disturb settled points," Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501, 501-02

assures an element of stability in the Court, while providing a process by which orderly change may occur.³

I must confess that when I first came to the Court, after five years as a trial judge, I thought it would be both easy and desirable to bring my enlightened perspective to the law and clear out the dust bin of archaic legal thinking, thus bringing a renaissance to New York jurisprudence. After a few months, however, I came to appreciate the need to adhere to precedent in our common-law process. My notions regarding the significance of *stare decisis* changed drastically.

Although Blackstone stated that it was subject to exception,⁴ until recently, *stare decisis* has been a doctrine rigidly adhered to in the House of Lords.⁵ In contrast, a more moderate view has al-

(1945) (quoting J. KENT, COMMENTARIES 477 (Lacy's ed. 1889)), to "let the decision stand and do not disturb things which have been settled," A. GOLDBERG, EQUAL JUSTICE 74 (1971), to "stand by the precedents and do not disturb the calm," Reed, *Stare Decisis and Constitutional Law*, 9 PA. B.A.Q. 131, 131 (1938), and, somewhat less literally and more tongue-in-cheek, "the doctrine that teaches judges that it is often wise to let sleeping dogs lie," Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 1 (1983).

³ See Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735-36 (1949). In 1949, speaking at the eighth annual Benjamin N. Cardozo Lecture, Justice William O. Douglas stated that while *stare decisis* does bring forth security, such security is not achieved by a refusal to change, but rather "through constant change, through the wise discarding of old ideas that have outlived their usefulness." *Id.*

⁴ 1 W. BLACKSTONE, COMMENTARIES 69-70 (Cooley's ed. 1884). Blackstone proclaimed that:

[I]t is an established rule to abide by former precedents, where the same points come again in litigation. . . . Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. . . . The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration.

Id.

⁵ The rule of *stare decisis* is generally regarded as having been adopted by the House of Lords in *London St. Tramways Co. v. London County Council*, 1898 A.C. 375, 379. See Fairlie, *The Doctrine of Stare Decisis in British Courts of Last Resort*, 35 MICH. L. REV. 946, 953-54 (1937). The rigidity of the application of *stare decisis* in England can be seen in the comments of Lord Justice Buckley in *Olympian Oil Cake Co. v. Produce Brokers Co.*, 112 L.T.R. 744, 748 (1914): "I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion . . . I should say that it is wrong. But I am bound by authority. . . ." *Id.*; see Note, *Stare Decisis*, 34 HARV. L. REV. 74, 75 n.6 (1920).

Nevertheless, the strict adherence to precedent in English courts was repudiated in an announcement by Lord Chancellor Gardiner in 1966, the circumstances of which are recounted in Stone, *1966 and All That! Loosing the Chains of Precedent*, 69 COLUM. L. REV. 1162, 1162-63 (1969). For additional treatment of the rule in England, see generally R. CROSS, PRECEDENT IN ENGLISH LAW 103-22 (3d ed. 1977); 1 J. KENT, COMMENTARY 474 (14th

the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible.⁹

THE STABILITY ASPECT OF THE DOCTRINE

The approach to *stare decisis* employed by the Court of Appeals in recent years recognizes, as already suggested, the "conservative" goals of efficiency, predictability, and uniformity. Without a general policy of reliance on precedent, said Cardozo, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."¹⁰

If courts are not obliged to follow precedent, the everyday business affairs of men and women would be impossible to conduct. Acknowledging that the element of continuity is essential to protecting the interests of the diverse groups that make up society, Chief Judge Loughran cogently stated that: "[I]t is important to bear in mind that the overruling of a precedent may often cause more harm than good by the unsettling effect that it may have upon transactions concluded in reliance on the previously declared rules."¹¹ Indeed, it is common knowledge that every attorney who drafts a contract or will, or renders business advice of any kind, relies on the notion that, if litigation becomes necessary, the court will give the document or act the same effect it has given similar documents or acts in the past.¹²

A predisposition to follow precedent assures that like cases will be treated similarly, a precept that is the cornerstone of our judicial system of laws.¹³ Of equal importance, *stare decisis* guarantees uniformity by assuring that similar cases will be treated similarly, even if before different judges. This uniformity of treatment of different litigants is one of special concern in this time of

⁹ L. CHAMBERLAIN, *STARE DECISIS* 19.

¹⁰ B. CARDOZO, *supra* note 8, at 149.

¹¹ Loughran, *supra* note 8, at 4.

¹² See Douglas, *supra* note 3, at 735; von Moschzisker, *supra* note 8, at 410.

¹³ See Wachtler, *America—A Nation of Laws and of People*, 22 CATH. LAW. 101, 103 (1976).

ways prevailed in our own country,⁶ particularly in the New York Court of Appeals.⁷ This moderate approach serves two competing goals. On the one hand is a recognition that following precedent provides necessary stability in the law, thereby serving the goals of efficiency, predictability, and uniformity. On the other hand, however, this stability aspect is tempered by a recognition that change is, in some cases, necessary.⁸ As Lord Chamberlain aptly stated:

A deliberate or solemn decision of a court or judge made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where "the very point" is again in controversy; but

ed. 1896); Lewis, *The History of Judicial Precedent* (pts. I-IV), 46 LAW Q. REV. 207, 341 (1930), 47 LAW Q. REV. 411 (1931), 47 LAW Q. REV. 231 (1932).

⁶ See *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). In *Helvering*, Justice Frankfurter described the approach to *stare decisis* in the United States: "[s]tare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations." *Id.*

A complete bibliography of materials discussing this topic is beyond the scope of this Article; among the leading texts and articles are: E. BODENHEIMER, *JURISPRUDENCE* (rev. ed. 1974); K. LLEWELLYN, *THE BRAMBLE BUSH* (2d ed. 1951); Catlett, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should be Applied*, 21 WASH. L. REV. 158 (1946); Covington, *The American Doctrine of Stare Decisis*, 24 TEX. L. REV. 190 (1946); Douglas, *supra* note 3; Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Jones, *Dyson Distinguished Lecture: Precedent and Policy in Constitutional Law*, 4 PACE L. REV. 11 (1983); Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941); Stevens, *supra* note 2.

⁷ See, e.g., *Fleishman v. Eli Lilly & Co.*, 62 N.Y.2d 888, 890-91, 467 N.E.2d 517, 518, 478 N.Y.S.2d 853, 854-55 (1984) (Cooke, C.J., dissenting) (although *stare decisis* should be treated with respect, it is not inflexible); *Loschiavo v. Port Auth.*, 58 N.Y.2d 1040, 1043, 448 N.E.2d 1351, 1353, 462 N.Y.S.2d 440, 442 (1983) (Fuchsberg, J., dissenting) (*stare decisis* does not mean case may not be challenged).

⁸ See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 393, 111 N.E. 1050, 1053 (1916). The flexible aspect of *stare decisis* is apparent in Judge Cardozo's *MacPherson* opinion. Judge Cardozo stated that although the concept of "imminently dangerous instrumentality" may once properly have been confined to "things whose normal function it is to injure or destroy," *id.* at 387, 111 N.E. at 1052, present conditions required that the concept be modified to include any item that could reasonably be expected "to place life and limb in peril when negligently made," *id.* at 389, 111 N.E. at 1053. Judge Cardozo added that "[p]recedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. . . . [The things subject to a principle] are whatever the needs of life in a developing civilization require them to be." *Id.* at 391, 111 N.E. at 1053.

Articles and texts discussing the doctrine as applied by the New York Court of Appeals include: B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 142 (1921); Loughran, *Some Reflections on the Role of Judicial Precedent*, 22 FORDHAM L. REV. 1 (1953); von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924). For a relevant discussion of the doctrine as applied by another leading state court of last resort, see Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966).

rapidly changing personnel on our Court of Appeals.¹⁴

Bearing in mind these "conservative" goals and principles, the question becomes in which types of cases does a relatively strict adherence to precedent outweigh a need for change? First, and perhaps foremost, are those cases in which the rule is one necessarily relied upon when structuring the transfer of property, such as cases involving wills, title to land, commercial transactions, and contracts.¹⁵ Second are those cases involving the construction of a statute, especially when the rule involved is long-standing, since the legislature is in a better position to change the statute if the court's interpretation is inconsistent with the legislative intent.¹⁶ Other cases in which it has been said that adherence to precedent should be closely followed are those in which, as Cardozo observed, "the commitment to an outworn policy is too firm to be broken by the tools of the judicial process."¹⁷

A recent case in which these three paradigms coalesced and compelled adherence to precedent is *In re Estate of Eckart*.¹⁸ In

¹⁴ See *People v. Hobson*, 39 N.Y.2d 479, 491, 348 N.E.2d 894, 903, 384 N.Y.S.2d 419, 427 (1976).

¹⁵ See, e.g., *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 388-89, 448 N.E.2d 413, 419, 461 N.Y.S.2d 746, 752 (1983) (Wachtler, J., dissenting); *City of Buffalo v. Cargill, Inc.*, 44 N.Y.2d 7, 17-18, 374 N.E.2d 372, 377-78, 403 N.Y.S.2d 473, 479 (1978); *People v. Hobson*, 39 N.Y.2d 479, 489, 348 N.E.2d 894, 901-02, 384 N.Y.S.2d 419, 425-26 (1976); see Douglas, *supra* note 3, at 735-36; Loughran, *supra* note 8, at 4.

¹⁶ See *People v. Green*, 56 N.Y.2d 427, 433-34, 437 N.E.2d 1146, 1150, 452 N.Y.S.2d 389, 393 (1982); Loughran, *supra* note 8, at 7.

¹⁷ B. CARDOZO, *supra* note 8, at 63. Perhaps the best modern example of the policy that some outworn approaches are not appropriately changed by the judiciary is the line of cases upholding the doctrine first recognized in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In *Seider*, the Court held that *quasi in rem* jurisdiction could be obtained over a non-resident defendant by attaching the defendant's liability insurer's contractual obligation to defend and indemnify the defendant, as long as the insurer was present or doing business in New York. *Id.* at 114, 216 N.E.2d at 315, 269 N.Y.S.2d at 102. The doctrine was upheld as constitutional in *Simpson v. Loehmann*, 21 N.Y.2d 305, 308-09 & n.2, 234 N.E.2d 669, 670 & n.2, 287 N.Y.S.2d 633, 635 & n.2 (1967). By 1976, however, the reaffirmance of the doctrine by the New York Court of Appeals was "on the ground of *stare decisis* alone," *Neuman v. Dunham*, 39 N.Y.2d 999, 1000, 355 N.E.2d 294, 294, 387 N.Y.S.2d 240, 240 (1976) (mem.), and, soon after, the Court restricted its scope by making it unavailable to non-resident plaintiffs, again recognizing the continued reliance on *stare decisis*, see *Donawitz v. Danek*, 42 N.Y.2d 138, 142, 366 N.E.2d 253, 256, 397 N.Y.S.2d 592, 595 (1977). Even after a strong warning from the United States Supreme Court that such jurisdiction might violate due process, see *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977), the Court of Appeals continued to uphold the *Seider* doctrine, see *Baden v. Staples*, 45 N.Y.2d 889, 891, 383 N.E.2d 110, 111, 410 N.Y.S.2d 808, 809 (1978) (per curiam). The final blow came in *Rush v. Savchuk*, 444 U.S. 320 (1980), in which the Supreme Court struck down the *Seider* rationale as violative of due process, *id.* at 332.

¹⁸ 39 N.Y.2d 493, 348 N.E.2d 905, 384 N.Y.S.2d 429 (1976).

Eckart, the testatrix was survived by a son and a daughter.¹⁹ Her will provided that, if the children survived her, they should each receive a legacy of \$50.00 and expressly stated that there was no further testamentary provision for either the children or any other relative.²⁰ The rest and residue of her estate was bequeathed to a charitable institution.²¹ The children contested the charitable disposition pursuant to former section 5-3.3 of the Estates, Powers and Trusts Law.²² Section 5-3.3 provided that an issue may contest a charitable disposition only if such issue were to "receive a pecuniary benefit from a successful contest."²³ Therefore, the determinative question was whether the children lacked standing because they would not receive a pecuniary benefit from a successful contest by virtue of the negative bequest in the will.²⁴

A precedent of the Court, *In re Estate of Cairo*,²⁵ had considered an attack to a charitable bequest similar to that in *Eckart*. The *Cairo* Court held that language in the will stating "I make no bequest to my grandson . . . for good and sufficient reason" constituted a negative bequest, or disinheritance, which barred the grandson from sharing in any property passing by intestacy.²⁶ Therefore, since he could not benefit from any successful contest, the grandson was held to have no standing to challenge the charitable bequest.²⁷

In *Eckart*, the appellate division had refused to apply *Cairo*.²⁸

¹⁹ *Id.* at 495-96, 348 N.E.2d at 906, 384 N.Y.S.2d at 430.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ N.Y. EST. POWERS & TRUSTS LAW § 5-3.3(a)(1) (McKinney 1981) (repealed 1981).

Former § 5-3.3 provided in part:

(a) A person may make a testamentary disposition of his entire estate to any person for a benevolent, charitable . . . or [other] purpose, provided that if any such disposition is contested by the testator's surviving issue or parents, it shall be valid only to the extent of one-half of such testator's estate, . . . subject to the following:

(1) An issue or parent may not contest a disposition as invalid unless he will receive a pecuniary benefit from a successful contest as a beneficiary under the will or as a distributee.

Id.

²⁴ *Eckart*, 39 N.Y.2d at 496-97, 348 N.E.2d at 906, 384 N.Y.S.2d at 430.

²⁵ 29 N.Y.2d 527, 272 N.E.2d 574, 324 N.Y.S.2d 81 (1971) (mem.).

²⁶ *Id.* at 527-28, 272 N.E.2d at 574-75, 324 N.Y.S.2d at 81-82.

²⁷ *See id.*

²⁸ *In re Estate of Eckart*, 48 App. Div. 2d 61, 64, 368 N.Y.S.2d 28, 30 (2d Dep't 1975) (mem.) (Christ, J., concurring), *rev'd*, 39 N.Y.2d 493, 348 N.E.2d 905, 384 N.Y.S.2d 429 (1976).

A concurring justice opined that *Cairo* was wrongly decided, since it looked to the testatrix's intention when, under the statute, such intention was immaterial.²⁹ The concurring opinion stated that, although the statute presumed that the testatrix intended to give more than one half of her estate to charity and to disinherit the issue or parent, the very object of the statute was to limit a testatrix's power to disinherit in such a manner.³⁰

The Court of Appeals held that the nominal bequests in the case were the functional equivalent of the disinheritance provision of the will in *Cairo*, thus rendering the precedent directly on point. After acknowledging the considerable criticism to which the *Cairo* decision had been subjected, the Court nonetheless decided to follow it.³¹ The Court based the decision on the three major considerations outlined above,³² finding that this was the type of case in which the need for change in the law was outweighed by the "conservative" policies of efficiency, predictability, and uniformity. In so doing, the Court favored the application of the doctrine of *stare decisis*.³³ First, the Court stated the general rule that "once the courts have interpreted a statute any change in the rule will be left to the Legislature, particularly where the courts' interpretation is a long standing one."³⁴ Of course, the Court acknowledged that "if a recent holding interpreting a statute is out of harmony with a long line of well-reasoned opinions, the courts need not wait for the Legislature to repair the damage" and that, "even when the error is made at the outset, in an initial decision interpreting a novel statute, the court may at a later date change direction."³⁵ These statements indicate that *stare decisis*, even in those classes of cases in which the reasons for adherence are most compelling, is not a rigid and inflexible doctrine.

Second, and even more influential to the *Eckart* decision, was the nature of the question at issue.³⁶ The Court stated that cases involving transfers of property generally result in reliance, and therefore stability is to be favored over finding the "correct" rule

²⁹ 48 App. Div. 2d at 64, 368 N.Y.S.2d at 30 (Christ, J., concurring).

³⁰ *Id.* (Christ, J., concurring).

³¹ 39 N.Y.2d at 502, 348 N.E.2d at 910, 384 N.Y.S.2d at 434.

³² See *supra* text accompanying notes 15-17.

³³ See 39 N.Y.2d at 502, 348 N.E.2d at 910, 384 N.Y.S.2d at 434.

³⁴ *Id.* at 499-500, 348 N.E.2d at 908, 384 N.Y.S.2d at 432.

³⁵ *Id.* at 499, 348 N.E.2d at 908, 384 N.Y.S.2d at 432.

³⁶ *Id.* at 500, 348 N.E.2d at 908, 384 N.Y.S.2d at 432.

of law."³⁷ Thus, the Court noted that the policy of strict adherence to precedent in cases involving land titles, commercial transactions, and contracts should apply equally to the law governing wills.³⁸

Finally, in declining to upset settled precedent, the Court deferred to the principle that the legislature is capable of constructively changing a statute if necessary.³⁹ This principle was clearly present in *Eckart*, since it appeared that even overruling *Cairo* would not achieve the desired result of limiting the negative bequest. An examination of the legislative history of the statute revealed that while *Cairo* created an exception to the statute by allowing the testator expressly to disinherit any potential challengers of the will, "the statute itself permits the same result if the testator simply creates a gift over to one not qualified to contest."⁴⁰ The Court concluded that the legislative purpose of section 5-3.3 was frustrated not by the *Cairo* opinion but by the statute itself. "Adoption of a new rule by this court would not alter the net result, and thus there is no compelling reason to change the established rule."⁴¹

THE FLEXIBILITY ASPECT OF THE DOCTRINE

There are, of course, cases in which the doctrine of *stare decisis* should not be adhered to so rigidly. In any of these types of cases, the basic prerequisite to be satisfied before abandoning *stare decisis* is that the necessity for change in a particular area of the law outweighs the conservative policies that underly the promotion of adherence to the doctrine. This approach to the application of *stare decisis* in New York indicates that the doctrine is "moral and intellectual, rather than arbitrary and inflexible."⁴² Chief Judge Cardozo similarly stated:

that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . There should be greater readiness to abandon an untenable position when the rule to be discarded may

³⁷ *Id.*

³⁸ *Id.*, 348 N.E.2d at 908-09, 384 N.Y.S.2d at 432.

³⁹ *Id.* at 502, 348 N.E.2d at 910, 384 N.Y.S.2d at 434.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² L. CHAMBERLAIN, *supra* note 9, at 19.

not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.⁴³

In which types of cases should the doctrine of *stare decisis* be adhered to less rigidly? As mentioned in *Eckart*, courts more readily reexamine rules they themselves have promulgated, for example common-law rules of tort liability.⁴⁴ Interpretations of constitutional, as opposed to statutory, provisions are also more properly changed by the judiciary, in light of the far greater difficulty of securing a corrective amendment of a constitution.⁴⁵ In the realm of procedural, as opposed to substantive law, courts have overruled precedent with perhaps the least reservation, for the policies that compel strict adherence to *stare decisis* are simply not as strong when substantive rights are not involved.⁴⁶ In criminal cases, any change in rule or statutory interpretation that would be detrimental to a defendant should be avoided, and may indeed violate due process, but changes favorable to a defendant should be, and frequently are, made.⁴⁷

A recent example in the Court of Appeals of the application of these principles is *Silver v. Great American Insurance Co.*⁴⁸ The *Silver* Court considered whether factors other than residency should be addressed in a forum non conveniens motion.⁴⁹ The prior New York rule had been that forum non conveniens would not be invoked if one of the parties was a New York resident.⁵⁰ The Court

⁴³ B. CARDOZO, *supra* note 8, at 150-51.

⁴⁴ Excellent recent examples of such reexamination in the realm of tort law include the abandonment of the distinctions among injured plaintiffs in premises liability cases, *see Basso v. Miller*, 40 N.Y.2d 233, 239-40, 352 N.E.2d 868, 871, 386 N.Y.S.2d 564, 567 (1976), and the development of strict products liability, *see Codling v. Paglia*, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973).

⁴⁵ *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20 (1983); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring); *see also von Moschzisker*, *supra* note 8, at 420-21 (original error not to be perpetrated in constitutional cases when legislative correction available); *Wachtler*, *supra* note 13, at 102-13 (*Miranda* rights product of recent expansive interpretation of fifth and sixth amendments).

⁴⁶ *See* B. CARDOZO, *supra* note 8, at 156; *Loughran*, *supra* note 8, at 14; *von Moschzisker*, *supra* note 8, at 420.

⁴⁷ *See* *von Moschzisker*, *supra* note 8, at 418-19; *see also Wachtler*, *supra* note 13, at 102-03 (expansive reading of fifth and sixth amendments).

⁴⁸ 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

⁴⁹ *See id.* at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402.

⁵⁰ *Id.*

determined that reason and justice required relaxation of this rule and that residency should be only one of several factors considered.⁵¹ In altering the former standard, the Court proclaimed that *stare decisis* does not require blind adherence, especially when the rule was court-made and procedural.⁵² "Having concluded that reason and substantial justice call for modifying our prior decisions and relaxing our inflexible rule, there is nothing to deter this court from so doing."⁵³

An interesting problem arises when there is a long line of cases stating one rule of law and a few recent cases stating another.⁵⁴ In attempting to apply *stare decisis*, the question develops, "[w]hich is the *stare decisis*: The odd cases or the line of development never fully criticized or rejected?"⁵⁵

In *People v. Hobson*,⁵⁶ the Court addressed this issue. Answering that the long line of cases should be accorded the effects of *stare decisis*, Chief Judge Breitel cogently and persuasively argued against a mechanistic, "last in, first out" application of the doctrine.⁵⁷ Noting that the relative recency of a case does not determine that it should be accorded *stare decisis* effect, the Court held that the earlier line of cases was "intrinsically sounder and verified by experience," and therefore should be followed.⁵⁸

Stare decisis, if it is to be more than shibboleth, requires more subtle analysis. Indeed, the true doctrine by its own vitality

⁵¹ *Id.*

⁵² *Id.* at 363, 278 N.E.2d at 623, 328 N.Y.S.2d at 404.

⁵³ *Id.*

⁵⁴ See *People v. Hobson*, 39 N.Y.2d 479, 485-86, 348 N.E.2d 894, 899, 384 N.Y.S.2d 419, 423 (1976).

⁵⁵ *Id.* at 487, 348 N.E.2d at 900, 384 N.Y.S.2d at 424.

⁵⁶ *Id.* at 479, 348 N.E.2d at 894, 384 N.Y.S.2d at 419.

⁵⁷ See *id.* at 487, 348 N.E.2d at 900, 384 N.Y.S.2d at 424. The *Hobson* Court considered whether an accused in custody, represented by a lawyer in connection with a criminal investigation, may waive his right to counsel in the absence of his lawyer. *Id.* at 481, 348 N.E.2d at 896, 384 N.Y.S.2d at 420. An older line of cases, beginning with *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), had held that the accused may not so waive this right. See *id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. A more recent "trend" of three cases, however, "departed from [this] evident rule." *Hobson*, 39 N.Y.2d at 485, 348 N.E.2d at 899, 384 N.Y.S.2d at 423 (citing *People v. Wooden*, 31 N.Y.2d 753, 290 N.E.2d 436, 338 N.Y.S.2d 434 (1972) (mem.), *cert. denied*, 410 U.S. 987 (1973); *People v. Lopez*, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied*, 404 U.S. 840 (1971); *People v. Robles*, 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970), *cert. denied*, 401 U.S. 945 (1971)). The *Hobson* Court decided to follow the cases consistent with *Arthur*. See 39 N.Y.2d at 487, 348 N.E.2d at 900, 384 N.Y.S.2d at 424.

⁵⁸ 39 N.Y.2d at 487, 348 N.E.2d at 900, 384 N.Y.S.2d at 424.

should not, perversely, give to its violation strength and stability. That would be like the parricide receiving mercy because he is an orphan. The odd cases rode roughshod over *stare decisis* and now would be accorded *stare decisis* as their legitimate right, whether or not they express sound, good, or acceptable doctrine.⁵⁹

Moving from the specific to the general, Chief Judge Breitel issued a particularly apt warning, sure to be followed by the present bench:

Distinctions in the application and withholding of *stare decisis* require a nice delicacy and judicial self-restraint. At the root of the techniques [of the application of *stare decisis*] must be a humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors. Without this assumption there is jurisprudential anarchy. There are standards for the application or withholding of *stare decisis*, the ignoring of which may produce just that anarchy.

. . . .

The ultimate principle is that a court is an institution and not merely a collection of individuals; just as a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men.⁶⁰

CONCLUSION

Judiciously applied in a proper case, the doctrine of *stare decisis* will allay the fears of those who look with apprehension upon the ongoing personnel changes in the Court of Appeals. Perhaps more importantly, however, the prudent withholding of application of the doctrine, in accordance with the principles recounted above, will quiet the concerns of those who see the same changes as an excuse for the Court to forego its role as one of the leading courts of last resort in the nation. The New York Court of Appeals has had the courage to reflect in its judgments not inherited institutions, but its principles, its morality, and its own informed sense of justice. I am confident that my colleagues can strike the necessary

⁵⁹ *Id.*

⁶⁰ *Id.* at 488, 491, 348 N.E.2d at 901, 903, 384 N.Y.S.2d at 425, 427.

balance between stability and innovation, and I look forward to working with them to meet that challenge.