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## The Influence of the Universities on Judicial Decision\*

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When I first became a student in the Law School, many years ago, I thought that the Law, developed through the centuries by judges and lawmakers, to meet the changing conditions and problems of life, was founded on principles that must be immutable because they must be right. I held to the idea that the judge did not create or change, but merely applied, rules which any right-thinking man could have evolved for himself; and that a lawyer who gave advice which proved wrong, or took the part of an unsuccessful litigant, must either be ignorant of established precedent and statutory enactment, or else he had failed to reason correctly; for surely each decision must be securely founded on statute or precedent. The rule of law was there and constituted the major premise of a syllogism, the facts of the case the minor premise, and the conclusion could be drawn by correct reasoning. I pictured the judge, selected because of his wisdom and high character, sitting in the court room or in his study and applying to any given case the true rule of the law. If error occasionally crept in, I thought that this must be due to human frailty and such error would unfailingly be corrected by an appellate court.

Before many months had passed I was dismayed to find that precedents were sometimes founded on rules and distinctions which no longer had any practical application; that in applying precedents the courts of different states reached varying conclusions, and sometimes, after I had heard analyses of leading cases in the classroom, I could not accept the conclusion reached generally by the courts. I was compelled to modify my concept of the Law as founded on immutable principles which were eternally right; but since I had come to the Law School for the purpose of acquiring knowledge which would enable

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me to advise prospective clients and to protect their rights, I still clung to the idea that the Law should represent certainty and that by proper study I could arrive at least at approximate certainty, by recognizing that the decisions of the highest court of any jurisdiction, whether right or wrong, represent the law of that jurisdiction, and that from the law so established its application to any given state of facts which might arise could be logically deduced.

My years of practise at the bar, like my law school studies, now seem to me merely a preparation for my work as a judge, for already I have been a judge more years than law student and practising attorney combined; yet I have not, I hope, reached the age where personal reminiscence seems of real importance. I am speaking in a personal vein only because a general problem can frequently be envisaged best by the personal experience of one who is trying to meet it. I cannot speak with special authority of judicial decision in general, but I can state frankly my own experience in reaching a decision and thereby perhaps give a picture of the general problem though from a personal aspect.

The lawyer in his practice deals with concrete cases, and his professional interest naturally lies in finding the general rule which the courts will apply to the case with which he is dealing. He seeks primarily certainty in law, so that he can advise his client what his legal rights and obligations are. If he can find a decision directly determining the question he has under consideration, he feels he has attained the desired certainty; if he cannot find such a decision, he seeks to arrive at his own conclusion of what the court will hold, based on what judges have decided in similar cases. Justice Holmes has said: "A legal duty so-called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court, and so of legal right," yet whenever as a lawyer I gave advice, I felt I was not making a prediction of what the courts would hold, but rather that I was making a statement of what the courts should hold. They might in the event reach a different conclusion based on different reasons, yet still I thought that incontrovertible premises for reasoning must exist either in prior decisions or in some generally accepted rule of conduct, and a truly learned judge would discover these premises and draw from them a correct conclusion.

My dismay when, as a law student, I first realized that Law was not an exact science founded on immutable principles, but that the decisions of judges even though at times wrong must necessarily, to a great extent, constitute premises from which other deductions must be

drawn, was as nothing to the dismay I felt as a judge when I first realized that in many cases there were no premises from which any deductions could be drawn with logical certainty. It is a truism that as conditions change the Law must keep pace with these changes; that as new problems arise the Law must develop to meet these problems, but a truism is little help to the judge who is faced each day with the problem of formulating a decision which will not only adjust equitably the rights of the litigants in the particular case before him, but will also be in harmony with the law as it has existed and as it should be applied in the future. Courts are instituted to do justice between man and man, but it is the basis of our institutions that justice must be done according to law, and even equity cannot be measured by the length of the chancellor's foot. Each old precedent discarded, each new precedent made, unless followed in the future, introduces uncertainty into the law and makes the equal administration of justice more difficult; yet, day by day, the courts are compelled to create new precedents and to consider whether old precedents are not worn out. The judge has the task of using forms and procedure, statutes and precedents—the law, in all its phases, which he has been called upon to administer—as an instrument with which to do justice between man and man; but he has also the responsibility of preserving and even of molding the law so that human relations can be fitly ordered by it in the future.

Professor Wigmore has said that: "Experience has taught us that masses of men must be ruled by general principles; but it has also taught us that these generalities are merely abstractions and ignore concrete realities, and therefore will sometimes lead to results undesirable because inconsistent with the merits of the individual case as and when surveyed in all its circumstances. Hence the problem is to combine rigidity with flexibility, law with justice."

This statement of the problems assumes the existence of some recognized general principles, which should ordinarily govern, but which perhaps should not be applied rigidly in the individual case. It represents, however, only one phase of the problem which confronts the judge, who must first discover the general principle before he can determine how far that principle can be applied flexibly, and when it must be applied rigidly. The American form of government, organized under written constitutions, creates new questions which can be answered by no analogies drawn with certainty from ancient decisions; and the development of democratic ideals, the clearer recognition that the law must protect the human rights of the poor as well as the property rights of the rich, point insistently to a con-

sideration of these questions from a fresh viewpoint, untrammelled by blind acceptance of outworn theories of the past. The growth of commercial interests stretching out far beyond the bounds of a single state; the complexity of business relations, have introduced new problems which are not solved by old customs or old decisions. Mechanical inventions and the introduction of new means of communication and transport are profoundly changing our economic life. Great aggregations of capital struggling with great combinations of labor are profoundly changing our social life. New problems of human relations require a restatement of the rules by which such relations are governed. The legislative mills are constantly grinding out new rules in the form of statutes, and "in the insulated chambers afforded by the several states" new social experiments desired by an important part of the communities are being made. Legislatures may by statutes create new rules which become part of our law, but only the courts can by proper application of these rules adjust the general principle to the particular case. Legislative statutes seldom cover the whole field adequately and systematically and attempts to build up a new system of law by legislative action, regardless of the old system built up through the centuries by generations of men, learned in the law, would be doomed in advance to failure. Under our system of law the courts have always been able to evolve principles which have adequately, though sometimes slowly, met new problems as they arose; have given sufficient flexibility to general principles to make law an instrument of at least approximate justice; have kept what we call the Law in harmony with the thought and the needs of the day; and by recognition of the problems which the law must meet today, the courts I think are molding the law, slowly and carefully, with some steps forward and some steps backwards, with some failures, but I hope more successes, till the Law can adequately meet the problems of to-day.

I have said that the courts can mold the law by recognition of the problems which the law must meet, and now I want to add, by recognition of the function which the judges may properly exercise in molding the law, and here is where the universities can and do influence judicial decision most fundamentally. The dismay I felt as a student, I believe in common with other students, when I found that precedents represent sometimes the mistakes of judges, the dismay I feel as a judge, I believe in common with other judges, that new precedents cannot be unerringly created by correct reasoning from old precedents, must lead me, as it has led other judges, to study the process by which we may arrive at a judicial decision which so far as

possible will do justice in the particular case according to law, and not according to individual whim.<sup>1</sup>

Professor Pound has recently delivered an address on the Theory of Judicial Decision from which I shall borrow considerable material, not only because I am in agreement with much that he said, but also because through that address I can illustrate concretely what I mean when I say that the universities are influencing judicial decision. "In an appellate court which has the power and hence the responsibility of laying down a binding precedent by its decision, the fact that each departure, however slight, from the states of fact to which settled legal precepts have attached defined legal consequences calls for consideration not merely of the relation of such departure to the just result in that case but quite as much of the possible operation of the decision as a precedent or as furnishing an analogy for future cases—this responsibility adds to the burden of the tribunal. . . . Having to decide so many cases and to write so many opinions, either consideration of the merits of the actual controversy must yield to the need of detailed formulation of a precedent that will not embarrass future decision, or careful formulation must give way to the demand for study of the merits of the case in hand." No judge whether at *nisi prius* or in an appellate court can fail to note this difficulty or can feel entirely confident that in all cases he has arrived at a result which is even approximately correct. Each judge must work out for himself a method of arriving at a judicial decision, but Professor Pound has in another place pointed out that one of the elements of what we call law is "a body of traditional ideas as to how legal precepts should be interpreted and applied, and causes decided, and a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted and adapted to the exigencies of administration of justice." A radical departure from such traditional ideas and technique must result in uncertainty and lack of uniformity. What we call the Law will be something which can no longer form a valid basis of prediction as to what the courts will do or say, for what the courts will do or say will depend upon the individuality of the judge. Of course these traditional ideas, this traditional technique, are ordinarily accepted by the judge because his professional experience and training make him apply them almost instinctively, and there seems no logical ground in most cases for any departure from them. That same desire for certainty which I have felt as student, practising lawyer, and judge leads me and other

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<sup>1</sup>See Cardozo, *Nature of the Judicial Process; The Growth of the Law.*

judges to give weight to previous precedents; to follow them whenever we can and to develop new precedents wherever possible only by analogy with the old. In most cases the only question presented is, what are the precedents which are applicable to the case in hand. Usually we reason solely by analogy, but the time has passed when a judge can be satisfied when the result of his reasoning is one that fails to approximate his views of justice. In such case, he, at least, must test his result by turning back and weighing carefully each step of reasoning and studying each premise until he arrives at a definite point where he can say either that his reasoning is wrong or that the premise accepted, though based on prior precedent, produces when applied to the particular case a result which he considers undesirable. May he in such case discard the old precedent; and how may he formulate a new rule? I have said advisedly a "result which he considers undesirable" rather than "a result which is undesirable" for in most cases what any man, including a judge, regards as desirable depends not upon undisputable rules but upon individual viewpoint. There are essential differences in function between the judge and the legislator and no judge feels himself free to give his individual views the force of law, yet no thoughtful judge can fail to note that in conferences of the court, differences of opinion are based at least to some extent upon differences of viewpoint. All are trying to apply the rules of law correctly rather than to create new rules; all are guided by precedents and applying traditional ideas and using a traditional technique, but all are at the same time influenced in their search for the rule which is applicable by a conscious or unconscious view of what rule would be most desirable.

There has never been a time when judges followed precedent in all cases. The rule of *stare decisis* has been a curb on innovation, but earlier decisions have in all periods been subject at times to distinctions without differences, which destroyed their force as precedents, and have been occasionally expressly repudiated. In Blackstone's day this was done upon the theory that somewhere there was a true rule, even though never enunciated, which would cover each case, and the sum of these rules constituted the law. The function of the judge was to discover and enunciate such rules. A decision was merely evidence of the law, though conclusive until it was demonstrated to be wrong. That theory perhaps produced a sound result in those days; it has not been wholly accepted or entirely acted upon in this country. Kent's statement of the rule may not be essentially different from Blackstone's: "if a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its

correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it" but from that statement of the rule the Court of Appeals drew the deduction that at least in certain cases because a person has the right "to repose upon the decision of the highest judicial tribunal in the land" its decision is "the law, and not the mere evidence of the law."<sup>2</sup>

It is not I think wholly without significance that the court in that case quoted as authority for its decision not a prior decision of Kent the Chancellor but an exposition of the law by Kent the teacher and scholar. The retroactive effect of the repudiation of a decision which was intended to settle and establish rules by which the conduct of men should be governed depends logically upon considerations of the nature of law and the part played therein by judicial decision. If judges merely expound the law and do not create it, then logically an erroneous decision ought not to give rise to any legal rights or afford any protection to persons relying on it; yet I imagine that even those who insist most strongly that any theory which regards judicial decision as a source, and not a mere application, of law inevitably leads to judicial usurpation and legislation would yet instinctively feel that not only the parties to a litigation but all who rely upon the rule of its decision should be protected, even though the rule of the decision be subsequently repudiated.

So-called practical men, men dealing with the realities of life, are apt to distrust philosophy as the study of the merely abstract. We judges are called upon to decide the rights and wrongs of particular persons in particular cases, and in a not far distant past we could not see how these rights could be affected by metaphysical considerations of the nature of law and judicial decision. The studies during the past fifty years of the legal philosophers of the continent of Europe through which they have sought to formulate correct statements of what constitutes law, and the function of the judge and the legislator in its administration and in its creation or development, have seemed to many as barren, and as far removed from practical application as the discussions of the Schoolmen in the Middle Ages. Jehring, Remy, Duguit, are to most practising attorneys and judges mere names, if indeed they have heard of them at all; but their theories are being studied, tested, changed, developed, and adopted by legal scholars in universities here. I will not, I hope, seem to slight the work of others if I name here only Pound and

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<sup>2</sup>Harris v. Jex et al., 55 N. Y. 421, 424 (1874).

Wigmore as examples of such scholars. In a true sense they are the successors of men like Story and Kent, pursuing different paths, using different methods, but like them bringing light to the judges.

With extraordinary prescience Justice Holmes pointed out at the Two Hundred and Fiftieth Anniversary of Harvard University in 1886 the role which such men would play in the future:

"If you consider the state of legal literature when Story began to write and from what wells of learning the discursive streams of his speech were fed, I think you will be inclined to agree with me that he has done more than any other English-speaking man in this century to make the law luminous and easy to understand.

"But Story's simple philosophising has ceased to satisfy men's minds. I think it might be said with safety that no man of his or the succeeding generation possessed or could have made the analyses of principles which are necessary before the cardinal doctrines of the law can be known and understood in their precise contours and in their innermost meaning.

"The new work is now being done. Under the influence of Germany, science is gradually drawing legal history into its sphere. The facts are being scrutinized by eyes microscopic in intensity and panoramic in scope. At the same time under the influence of our revived interest in philosophical speculation, a thousand heads are generalising the rules of law and the grounds on which they stand. The law has got to be stated over again, and I venture to say that in fifty years we shall have it in a form which no man could have dreamed of fifty years ago."

Holmes was, perhaps, too sanguine in his prophecy of what scholarly thought and generalisation of the rules of law and the grounds on which they stand could accomplish in the succeeding fifty years. Others have not been as quick as he to recognize the need of analysis of principles which have been generally accepted and of restating the rules of law, based on such analysis; but the work in the universities has been proceeding along the lines which he foresaw and it has been quietly influencing judicial thought and action, not towards radical departure from old accepted doctrines or principles, but towards a conscious discrimination of instances where the courts should accept precedents because they are precedents, and where they may discard old precedents; and towards a conscious recognition and even articulate expression in opinions of the reasons why in creating a new precedent the courts are molding the law in one direction rather than another.

I shall not attempt to state even in the most general form the problems of legal philosophy nor the answers which are offered to

these problems. I am dealing now only with the influence that the studies in legal philosophy exercise upon judicial decision, and I reiterate that I am thinking even of judicial decision mainly from the personal standpoint. From that standpoint I seek an answer first to the question: What is the law which I am sworn to administer and, which, I know from experience, the judge is not only administering but is molding? And then I seek an answer to the question: How far may I go in molding the law not only to meet the exigencies of the particular case, but also to meet the needs of the time without destroying the equality, uniformity, and certainty which I believe are salient characteristics of the law, and without transforming myself into a benevolent despot or usurping the functions of the legislator? What I may call the professional instinct of the judge, created by experience and tradition, leads him to accept Blackstone's statement that "it is an established rule to abide by former precedents where the same points come again in litigation; as well to keep the scale of justice even and not liable to waver with every new judge's opinion, as also because the law in this case being solemnly declared and determined what before was uncertain and indifferent is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to the known laws and customs of the land; not delegated to pronounce a new law but to maintain and expound the old law;" but even Blackstone admits the exception, saying "yet this rule admits of exception, where the former determination is most evidently contrary to reason, much more if it is clearly contrary to the divine law," and his exception is based upon philosophic ideas of his time which can hardly act as a guide today. It would be somewhat interesting to picture the tone of the dissenting opinion of a judge who today ascribed to himself the ability to determine with infallible correctness between conflicting reasons for different decisions or who would buttress his views with the weight of divine authority. The very frequency of dissenting opinions show that neither pure reason nor divine authority can be the basis of all judicial decision.

We may proclaim from the housetops that we are practical men seeking to decide each case only according to established precedents and disclaiming any general philosophy of law; yet without such philosophy we grope blindly. We know that the general rule will not always promote justice in the particular case, and only sound thinking of a general kind will show how far a judge may give flexibility to established rules without losing the uniformity which is an essential part of law as we understand that term. We know that all

precedents are not sound; we feel that sometimes we could create better rules than are embodied in existing precedents, and only sound thinking of a general kind—even though called philosophy—will show when we are justified in creating a new rule not regardless, but in despite, of old precedents. We must sometimes create new precedents because no precedents exist; we must sometimes interpret legislative statutes and constitutional provision to find out a more or less fictitious intent of the makers where the makers never even remotely considered the possibility of such facts arising as are involved in the particular case before us, and only sound philosophical thinking along general lines will lead us to give due weight to those considerations of social benefit which should exercise the preponderating influence upon our determination. Legal philosophy is gradually defining those phases of the law where certainty is essential, where even a precedent without reason should be followed by the courts and change if necessary left to the legislatures. Legal philosophy is gradually defining not only the nature of law but the true place in law of the judicial decision so that the limits may be recognized between judicial despotism and the application of principles of law which possess flexibility without undue loss of uniformity and between judicial usurpation of legislative functions and judicial administration of a living, constantly-developing law in conformity with modern thought and modern needs. In the words of Professor Pound, "We must learn how to partition the field of legal order. We must find a scientific theory that will insure the certainty required for the economic order and yet permit the flexibility required for the individual human life."

The judge deals only with concrete cases, but each decision, especially of a court of last resort, becomes embodied in the law. Broad principles must therefore govern each decision. These principles are being worked out in the universities after research for which the judge has no time even if he had the training and capacity. They are being worked out by study of historical sources, by weighing the thoughts of others, by cooperation of numbers of scholars with specialized knowledge of different phases not only of law and economics and politics, but of other branches of science. They are being taught to the law students who become later practising attorneys, judges, and perhaps in turn teachers. The results of these studies are being published, becoming part of the legal thought of the day, and they are, consciously or unconsciously, profoundly influencing the judges in their viewpoints, in the form of their decision, and in their content. A judge who recognizes that a judicial decision constitutes in a sense a part of the law and is not merely evidence of the law cannot logically

refuse to follow a former precedent merely because he considers that the earlier case was wrongly decided. If it represents the law by which men have guided their actions in the past, it may be set aside only if upon consideration it is shown that the rule is unsound on some ground of general public policy; even though that ground of policy may be merely the assimilation of a rule of law in one jurisdiction to a rule of law applied generally in other common-law jurisdictions. If a judge recognizes that when a new rule of law must be enunciated, because there is no rule exactly applicable to the case under consideration, he is really creating law, he cannot logically base his decision merely upon apparent analogies; he must seek the reasons for old precedents and then determine whether law based upon old reasons is law in harmony with the needs of today.

The judge is often conservative by nature, he is always conservative by training and experience. He has learnt how often a decision which seems sound when rendered, as applied to one state of facts, rises up to haunt him in the future when he attempts to apply the general rule upon which it seems to be based to another state of facts. I heartily concur with Professor Pound that "it is an everyday experience of those who study judicial decisions that the results are usually sound, whether the reasoning from which the results purport to flow is sound or not." The legal scholar in the university deals with the same materials as the judge, but he studies legal history for the purpose of determining the reasons which lie at the bottom of a rule; he studies precedents for the purpose of enunciating general rules based on reasons that are sound today. The judge uses traditional legal reasoning, the university scholar scientific reasoning. The judge seeks primarily the rule he may apply to particular facts, the legal scholar seeks logical basis for the rule itself. The judge furnishes the legal scholar with material for study; the legal scholar generalises from this material a legal philosophy which in turn influences future decision. To quote Professor Pound again, "The traditional legal reasoning represents the experience of generations of judges in the past. It is in some sort a traditionally transmitted judicial intuition founded in experience. But it has been given shape by philosophy."

It is hardly possible to point to particular judicial opinions as evidence of the influence of philosophy upon traditional legal reasoning. A judicial opinion remains what it always has been: a statement of the reasons by which the court has arrived at a decision. The generalisations of legal philosophy may guide the court in the choice of these reasons, yet it is seldom that the expressions of such philosophical generalisations have a place in these judicial opinions. Even

though the judge should have the training and the bent of mind of the university scholar, when he is acting as a judge he must confine himself to his judicial function of deciding the particular case and stating the reasons why he so decides. The judge may properly cite judicial or extra-judicial authority for his reasons, or may fortify these reasons by extended argument, but the soundness of the method of reasoning must be justified by its persuasive effect and not by citation of the philosophical generalisation which may have shaped it. We can measure the influence of the legal philosophy of university scholars upon the decisions of judges only by tracing change in traditional legal reasoning, as embodied in judicial opinion, back to new philosophical conceptions. I shall not attempt to make any study along those lines. I must base my assertion of such influence mainly upon my own personal observation and experience that may perhaps give weight to this assertion.

For the last fifty years the courts have been compelled in many instances to pass upon the validity of attempted legislative restrictions, upon the free right to contract under the "Police power" of the State. An examination of the earlier opinions show attempts to formulate generalisations which would define that almost indefinable concept. These generalisations proved too broad and were followed by attempts to formulate general exceptions and limitations, with the result that men came to feel that the courts would hold that a particular statute was a valid or invalid exercise of the police power according to the individual, social or economic views of the judge. The right of the courts to declare a statute unconstitutional and the manner of the exercise of its right has been and is today the subject of bitter controversy, but also of serious study. From that study no generalisation has resulted which determines the limits of the legislative power, but generalisations as to the power of the court have been drawn which profoundly affect the manner of its exercise. The courts that keep abreast with the thought of the times recognize that their function is not to pass upon legislative discretion, but upon legislative power. They may set no limits to legislative power but must give effect to the limits set by the constitution. A general judicial definition of the legislative power if followed blindly may result in judicial rather than constitutional limitation. Each case must therefore be considered in the light of the evil the Legislature is trying to remedy or the benefit it is trying to achieve, and in the light of the means used by the Legislature to achieve that purpose. It is inevitable that a judge in weighing individual rights as opposed to collective benefit will to some extent be influenced by his personal views, yet

this influence becomes minimised when the judge's reasons are made articulate in his opinion and are subject to criticism by an educated public opinion. If there must be a choice of conflicting views of public policy that choice should be made consciously, and the grounds of the choice should be stated. The change in the method of judicial reasoning upon such questions may be illustrated by the opinion of Chief Justice Taft in *Wolff Packing Co. v. Industrial Court*,<sup>3</sup> in which the Court held unconstitutional a law giving an Industrial Court the power to fix wages to be paid in certain industries. Here is no attempt to rest the decision upon previous judicial definitions nor to formulate a new definition. "All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusions and inclusion and to gradual establishment of a line of distinction," and the opinion then sets forth the reasons why in this case the law is held to be beyond the legislative power.

I might multiply instances of opinions by the highest courts of the various jurisdictions not only upon the constitutionality of statutes but on every other possible subject of judicial decision, where, in the conscious choice of reason for the decisions, in the reconsideration of old precedents in the light of new conditions, in the weighing of the advantage of adherence to the old against the advantage of the formulation of a new rule, in the scrupulous attempt to restrict the judicial function to its legitimate scope, coupled with the recognition that only through the fearless exercise of the judicial function the law can develop and remain flexible, I seem to discern the influence of the university scholar and philosopher. I admit that what I discern in these opinions may be colored by my personal views, by my belief that every judge with whom I have come in contact feels a deep sense of responsibility that each decision rendered shall be in harmony with the law not only as it was but as it should be, yet they have led me to the conviction that through the studies of legal scholars the so-called judicial technique is slowly and gradually being modified by the recognition that old precedents are merely premises for new juristic thought and new judicial action, to be discarded when, but only when, they can form no logical basis for such thought or action.

So far, I have treated the influence of the legal scholars in the universities upon the form and method of judicial decision, yet this

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<sup>3</sup>262 U. S. 522, 538 (1923).

influence is at least as strong and far more easily discernible in the content of such decisions. I have time, today, to touch only cursorily upon this influence. Our system of state government has produced a tendency, frequently pointed out by others, of building up a different law in the separate states. Of late the Legislatures have recognized the importance of having the law uniform, at least in the commercial matters, throughout the country, and as a result we have now a number of uniform statutes on Negotiable Instruments, Sales, Partnerships, and other subjects. The courts have always regarded the decisions of sister states as deserving of great weight when called to their attention, at least insofar as such decisions are not inconsistent with their own decisions. The rule of the United States Supreme Court that it will not follow in some matters the decisions of the highest court of a state, when not in conformity with general rules of law, presupposes that there are general rules of law of national scope. The same principles which require uniformity of the law within the state apply with considerable even though lessened force to the law within the whole nation. Judges and lawyers have always recognized the evils that may flow from lack of uniformity among the states, but uniformity in the law developed through judicial decision can be attained only through the formulation of general rules based upon the decisions of the courts of all the states. It is impossible for a judge to keep abreast of the decisions of all the forty-eight states, but the teachers in what I may call the national law schools preparing students for practice in all the states must, in their various branches, base their instruction not on the decisions of a single state but on general rules of law generally applicable in all jurisdictions. They are training practitioners and judges who have learned to look upon law from a national standpoint and to regard diversities in separate jurisdictions as unfortunate accidents or mistakes. Their criticism of existing precedents in any particular jurisdiction requires them to restate the rule at the bottom of each varying precedent, and these restatements of the rules are being embodied in text-books of recognised even though extra-judicial authority. A judge would be blind who did not recognise the need of such restatement; a judge would be rash who believes that he has the material, the time, or the capacity to restate these rules independently when there is doubt as to what rule should form the basis of a new decision. In advance of the formulation of the rule of the new decision he consults almost as a matter of course the writings of the extra-judicial or university authority. He does not accept such authority blindly; he tests the correctness of any restatement of the rule by such extra-judicial authority, through an

examination of the judicial precedents cited in the notes; yet the frequency with which the courts quote such works as Williston on Contracts is convincing evidence of their influence.

Even these text-books, however, are not fully meeting the need of judges and lawyers for a more or less authoritative restatement of the rules of law generally applicable throughout the country and the reasons upon which such rules are based. Few in our profession would be willing to have the development of the law, which now, as always, proceeds through the creation of new precedents, through the process of inclusion and exclusion and of experiment, hampered or halted by the adoption of a code which seeks to define all legal right and all legal remedies and to leave to the courts only the application of such definitions. On the other hand, when we once recognize that the precedents in any one jurisdiction do not furnish in all cases adequate premises for the creation of new precedents; that new problems may require a restatement of the reasons underlying the old precedents; that absence of direct precedent in one state may require a search for precedents in other states; that the importance of uniformity, at least in some branches, in the rules of law applied in all the states may induce courts to retrace their steps when they find that they have proceeded in their decisions along a path which leads them away from the road pursued by courts generally—then the members of the bar must seek, from some source upon which they may rely, those general rules and fundamental principles upon which they may, with at least some degree of certainty, base a prediction of the future action of the courts and an argument to the courts to influence such action; and the judges must seek from a similar source, which should be as authoritative as possible, the materials for future judicial action which under present conditions no judge could possibly find for himself. It is to furnish such material to bench and bar that the Institute of Law has undertaken to restate the law, and this restatement of the law will possess authority because of the learning and the experience of those who take part in such restatement. No one can question that such a restatement of the law is now possible only because of the work already done in the universities, and no one can doubt that when made it will greatly influence the content of future judicial decision. It will not stop, as a code might stop, development of the law through research, criticism and judicial decision, but like generally accepted judicial precedent it should form the basis for new juristic thought and new judicial action.

I hope that in this paper I have said nothing which might give the impression that uncertainty in the law and reliance by a judge on his

individual reasoning rather than on authority may result from the influence of the university scholars writing on legal philosophy and teaching rules of so-called law not as they actually exist in any one jurisdiction but as they are formulated by the teacher from a broad study of judicial precedents and historical sources. I believe the actual result is exactly the opposite. Philosophical generalisations produce order in the field of thought and historical study and research make ready the materials for sound thought. The law has always developed through judicial decision; the judge has always been compelled to use his own reason and his own experience in determining the nature of each new decision. The future development of the law will be less uncertain, and less dependent upon the whim of the individual judge, if the choice of alternative paths of development is dictated by conscious reason guided by accepted philosophical thought.

There never can be a prediction of judicial action made with certainty. As long as I remain a judge I shall feel dismayed at times because I cannot decide the cases submitted to me with even a personal sense of certainty, and as long as you practice at the bar or study judicial decision you will feel dismayed at times because you will find that judicial decisions do not agree with your predictions or accord with your views of right or reason. I have chosen this subject for my address to you because I believe that the study of the influences of philosophical concepts upon judicial decision is of practical as well as intellectual interest. Only if you understand those influences can you either predict or help shape the development of the Law.

The Law as it has come down to us is a precious heritage. If our system of law breaks down, no one can predict what will take its place or what other institutions will fall in the same ruins. Neither by self-sufficient reliance on his own wisdom, nor by blind acceptance of the rules of law laid down under other circumstances by judges who are dead and gone, can the judge of today satisfactorily perform his high function. Precedents constitute the sign-posts pointing out the path of the Law's development. As such they may not be disregarded, but the judge must determine whether the indicated path will lead to a quagmire or to the desired end, and in reaching that determination and in creating new precedents and thus erecting new sign-posts to guide the wayfarer of the future, he must rely largely upon the studies of the legal scholars in the universities.