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Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility

By Roger J. Traynor*

There is an alluring ring of the future in a term like prospective overruling of judicial decisions. At the same time its kinship to statutes deceptively fosters the impression that decisions can bask in the ancient history of the principle originating in the Roman law that statutes operate prospectively only. In 1250 Bracton declared that principle anew. Eventually Coke incorporated it into the English common law, and by the seventeenth century it was an accepted rule of statutory construction in common law courts that statutes operate only prospectively. The rule bespoke the view of lawyers and judges that retroactive operation would be inherently unfair. By the time of Blackstone that view had evolved into the principle that statutes operate prospectively by their very nature. A statute could not be effective before it was enacted; ergo, it could not apply to events that preceded its enactment.

These views crossed the Atlantic Ocean and gained constitutional authority in the ex post facto clause and the impairment of contracts clause of the United States Constitution. The due process clause also served to militate against retroactive statutes that afforded no opportunity for notice or fair hearing.2


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2. Thus, a statute that reduced the period of adverse possession from twenty years to six after a six-year period had already run against the owner was held void as taking of property without due process of law. Ochoa v. Hernandez y Morales, 230
Since there are no comparable constitutional restrictions in England, Parliament is free to make or alter the law retroactively, even to the extent of depriving a successful party to litigation of the fruits of his victory. Thus, in *Burmah Oil Co. v. Lord Advocate*\(^3\) the plaintiff's property near Rangoon was destroyed under British military orders the day before Japanese authorities occupied Rangoon. After the war the plaintiff sought compensation under the common law, since legislation providing compensation for war damage did not apply to the case. The House of Lords upheld the plaintiff's claim. Shortly thereafter an Act of Parliament abolished retroactively the common law right of compensation declared by the House of Lords and nullified the plaintiff's judgment.\(^4\) Perhaps this case will be viewed as an extraordinary instance of the sovereignty of Parliament and not as a precedent to be invoked by any transient parliamentary majority for new jolts to the principle of judicial independence. Meanwhile, we can only rely on Parliament's own respect for judicial independence and its own self-restraint to confine such jolts to the most extraordinary situations. Given such restraint the singular pouring of Burmah Oil on judicial waterways may engender not trouble but reassurance, as Professor Arthur Goodhart maintains, of the strength of the fluid English constitution:

The English doctrine that the general principles of the common law are supreme but that in certain circumstances exceptions can be made to them, has enabled the constitution to continue with only one violent break for over eight hundred years.\(^5\)

Although statutes normally operate prospectively only, judicial decisions normally operate retroactively as well as prospectively. The mundane explanation is that a judicial decision, relating to events that have already occurred, naturally looks backward. That common sense must be taken with the essential grain of salt. A judge is bound to make constant use of the eyes at the back of his head, but he has also a re-

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sponsibility to keep a weather eye forward. I take my stand with this modern view the better to emphasize the need for occasional exceptions to the normally retroactive operation of judicial decisions. For all too many generations we justified mechanical retroactivity by the prim lore descended to us through Blackstone that judges do no more than discover the law that marvelously has always existed, awaiting only the judicial pen that would find the right words for all to heed. Once suitably bundled up it was automatically retroactive, given the premise that it had been there all along in the bushes at the bottom of the garden. The devotees of the discovery theory majestically dispelled the fractious problem of the overruled decision. The overruling decision simply displaced it all the way back in time so that it never had a life it could call its own. Under the spell of such moonspinning, American courts soon upheld a retroactive operation of decisions that they would have invalidated in statutes as contrary to the ex post facto clause, the impairment of contracts clause, or the due process clause of the Constitution. 6

Like many another myth, 7 the myth that judges discovered rather than created law, surviving well into the twentieth century, engendered rituals that have outlived it. The ritual of mechanical retroactivity of judicial decision came to have its own rationalizations, affording no leeway for exceptions. The conviction that a new judicial rule is more just than an old one is still likely to carry the topheavy inference that such a rule achieves maximum justice by retroactive application. There are no questions asked about countervailing injustice


7. See Address by Lord Diplock, Presidential Address, The Holdsworth Club, 1965. There Lord Diplock, speaking on “The Courts as Legislators,” said, “But judge-made law, as I have pointed out, is in theory retrospective. A precedent which reverses or modifies a previous precedent is applicable to all such cases which are tried subsequently even though they arise out of acts done before the new precedent was laid down. This is unjust, and because it is unjust it is itself a factor which makes the courts more hesitant than they would otherwise be to correct previous errors or to adapt an established rule of conduct to changed conditions. And yet the rule that a new precedent applies to acts done before it was laid down is not an essential feature of the judicial process. It is a consequence of a legal fiction that the Courts merely expound the law as it has always been. The time has come, I suggest, to reflect whether we should discard this fiction.” See also Lord Reid, The Judge As Lawmaker, 12 J. Soc’y Pub. Teachers L. (New Series) 22 (1972). There the author said, “There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s Cave there is hidden the Common Law in all its splendour and that on a judge’s appoint-
to those who have relied on the old rule. Neither is there any eye-
opening comparison with a new statute, which may also be superior
in justice to a judicial rule that it displaces, but which will ordinarily
be construed to have prospective operation only.

We might well quit ourselves of superficial rationalization for ret-
roactive operation of judicial rules, admitting of no exceptions, for we
can better justify their retroactive operation, admitting of reasonable
exceptions, by the very reasoning that justified stare decisis as a pre-
vailing principle, admitting of reasonable exceptions.

A persuasive justification of the retroactive operation of judicial
decisions and of the Blackstone conception, without its mythical trapp-
ings, has been advanced by Professor Paul Mishkin:

Actually, while the Blackstonian conception is not entirely valid,
neither is it wholly wrong. For it is certainly true that courts in
general handle the vast bulk of cases by application of preexisting
law; indeed even when "new law" must be made, it is often in
fact a matter of the court articulating particular clear implications
of values so generally shared in the society that the process might
well be characterized as declaring a preexisting law. Moreover,
this must inevitably be so. For it is the basic role of courts to
decide disputes after they have arisen. That function requires that
judicial decisions operate (at least ordinarily) with retroactive
effect. In turn, unless those decisions (at least ordinarily) reflect
preexisting rules or values, such retroactivity would be intolerable. 8

Stare decisis signifies the basic characteristic of the judicial proc-
cess that differentiates it from the legislative process. 9 In the legisla-
tive process there is neither beginning nor end. It is an endless free-

8. Mishkin, The High Court, The Great Writ, and the Due Process of Time and
Law, 79 Harv. L. Rev. 56, 60 (1965). One writer stated that “[t]o serve its highest
aims, a legal system must have the stability and predictability essential to security, order,
and evenhanded justice. If it is to continue even for generations and the more clearly
if it is to survive still longer, it must also have flexibility to change and ability to grow
with the institutions and society it serves—the capacity, in short, to renew itself.”
Preface to R. Keeton, Venturing to Do Justice at V (1969). See also Freeman,
Standards of Adjudication, Judicial Law-Making and Prospective Overruling, 26 Cur-
rent Legal Problems 166, 179 (1973) [hereinafter cited as Freeman]. Another au-
thor has said: “The art of free society consists first in the maintenance of the symbolic
code; and secondly in fearlessness of revision to secure that the code serves those pur-
poses which satisfy an enlightened reason. Those societies which cannot combine re-
verence to their symbols with freedom of revision, must ultimately decay either from
anarchy, or from the slow atrophy of a life stifled by useless shadows.” A. Whitehead,

9. See the excellent exposition of the characteristics that distinguish judges from
legislators in Freeman, supra note 8, at 174-80.
wheeling experiment, without institutional restraints, that may have rational origins and procedures and goals or that may lack them. In contrast, a judge invariably takes precedent as his starting point; he is constrained to arrive at a decision in the context of ancestral judicial experience: the given decisions or, lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it into the often rewoven but always unbroken line with the past.

A judge is constrained not only to heed the relevant judicial past in arriving at a decision, but also to arrive at it within as straight and narrow a path as possible. Unlike a legislator, he cannot undertake broad investigations beyond the case before him. He is confined by the record in the case, which in turn is confined to legally relevant material, limited by evidentiary rules. So it happens that even a decision of far-reaching importance concludes with the words: “We hold today only that . . . . We do not reach the question whether . . . .”

The very circumspection of the judicial process enhances the significance of a decision. No one is apt to take it lightly, knowing how intently a judge must hew to the record before him. It offers no reforestation or defoliation program, but what it decides about a single tree may give new perspective to the forest. Indeed, one might describe the ideal, the well-tempered decision as one that affords such perspective. It is not laden with ancient phrases harking backward; neither is it freighted with seven-league words for an ambitious march on the future. The well-tempered decision knows how to take graceful leave of a dark landmark that is no longer on its mark, but takes care to refrain from all-purpose guidance for all that lies ahead. It knows how to keep its place in time.

Such a decision affords a court a modicum of flexibility within its severe constraints. Insofar as a decision remains uncommitted to drastic implications, a court gains time to inform itself further through succeeding cases. It is then better situated to retreat or advance with a minimum of shock to those who act in reliance upon judicial decisions. The greatest judges of the common law have proceeded in this way, moving not by fits and starts, but at the pace of a tortoise.

that explores every inch of the way, steadily making advances though it carries the past on its back. The slow motion of the judicial process, perhaps too summarily summarized as stare decisis, not only benefits the long-range evolution of the law, but also affords substantial protection against arbitrary judicial decision. Moreover, the legislature is always free to displace judicial rules with its own statutes.

Even when relevant precedents emerge, a judge can take hope prematurely. No sooner does one line of precedent become clear enough to command attention than another may appear that seems equally impressive. In a mass of uncertainty lies a variety of precedents, and a judge makes selection upon selection before reaching his decision. The precedents are writ in type that moves like water and they are not holy writ.

Though there is not always so baffling a choice to make, the manifold problem of precedent engenders other difficulties. A judge coming upon a precedent that he might not himself have established will ordinarily feel impelled to follow it to maintain the stability in the law that has value per se. Better the settled precedents that have proved reasonably acceptable and are reasonably in tune with the times than endless reexaminations that create uncertainty without ensuring improvement. The serviceable consistency of stare decisis rightly discourages displacement of precedent, absent overwhelming countervailing considerations. It also rightly discourages specious distinctions that confuse more than they clarify.

There are, of course, precedents originally so unsatisfactory or grown so unsatisfactory with time as to deserve liquidation. Unfortunately a court often lacks the forthrightness to bring about their demise. Instead it may pursue the unhappy alternatives of keeping them alive and kicking irrationally or of sustaining them half alive. It may blindly follow precedent only because it lacks the wit or the will or the courage to spell out why the precedent no longer deserves to be followed. It may deem itself helpless to overrule its precedents, as the Court of Appeal apparently still does in view of Young v. Bristol Aeroplane Co.11 despite Lord Denning's efforts to escape the bonds of that case. La Rochefoucauld reminds us that "[w]hen laziness and timidity yoke us to our duties, we often give virtue the credit for it."12 In Caerphilly Concrete Products Ltd. v. Owen13 a sense of helpless-

12. La Rochefoucauld, Maxims, No. 169 at 64 (L. Kronenberger transl. 1959).
ness may have been the yoke to duty. A lease for a term of five years contained a clause giving the tenant a right to another lease for a further term of five years "at the same rent and containing the like covenants and provisos as are herein contained (including an option to renew such lease for the further term of five years at the expiration thereof) . . . "14 In concluding reluctantly that this clause made the lease perpetually renewable, Lord Justice Sachs declared:

Not even the most impeccable conveyancing logic, however neatly expressed, can convince me that in the instant case it was the mutual intention of the parties that the lease should be perpetually renewable . . . It is difficult indeed . . . to think that two business men would be talking in terms of five years if both—or indeed either—of them truly meant that a lease should be granted which went on ad infinitum.

An examination of the relevant decisions discloses an area of law in which the courts have manoeuvred themselves into an unhappy position . . . [B]y strict adherence to precedent relating to the phrase ‘including the present covenant’ when following a covenant conferring a right to a renewal on the like covenants and provisos as are contained in the first lease, they appear to have bound themselves to hold that the use of a certain set of words . . . causes the lease to be perpetually renewable, even when no layman . . . would dream of granting such a lease and, if aware of the technical meaning of the particular phraseology, would almost certainly be aghast at its devastating effect and refuse to sign. One reason for the courts so binding themselves is said to, be that the formula is one of the effect of which is well known to trained conveyancers, and that this is advantageous, however much of a trap it may constitute for others.

On the issue of the intentions of the parties the law had become the prisoner of the machinery.15 Reasonable expectations of the parties would not be upset by overruling such a case. It is difficult to believe that a “trained” and reputable conveyancer would rely on precedents to create such a trap for an unsuspecting lessor. Res judicata would sustain the old interpretation of the clause in leases that had already been finally litigated, since final judgments in such cases would be immune from collateral attack.

Such dogmatic adherence to the past perpetuates bad law. It is hardly the lesser of two evils to postpone the making of good law by crowding an unfortunate precedent with distinctions instead of retiring it forthwith. It then lingers on, leaving counsel puzzled as to what strange complications will next attend its lingering illness. On the

14. *Id.* at 375.
15. *Id.* at 375-77.
unpredictable retirement date a formal overruling is too often attended by a cavalier pronouncement that the precedent must be deemed to have revealed itself as superannuated in the lengthening shadows of the newcomers. Such a pronouncement comes late to those who had long suspected it was overdue but had still to reckon with the possibility that it might not materialize.

Courts are often so dismayed by the extent of an unnecessary evil as to retreat into defeatism. The case law has come to such a state, they are wont to say, that only the legislature can set things aright. Ironically, judges themselves are all too ready to seize on this rationalization to shift to others the responsibility of overruling judge-made bad law. This is evasion, not mere abstentious avoidance of judicial responsibility. The time is ripe for redress and no one can undertake it more appropriately than the judges themselves. Their inaction speaks louder than words to perpetuate error and confusion.

Always there is the danger that an effort to induce a court to abandon or revise an outmoded common law rule may result only in resanctifying it. If the court adheres to stare decisis, as it is wont to do, with an aloof statement that the question is one for the legislature—although it is one created by judicial decision—it creates not only a new halo for the old rule, but a precedent that it is not within the province of the court to make a change. Thus doubly haloed the rule becomes judicially untouchable.

A bad precedent is doubly evil because it has not only inflicted hardship but threatens to continue doing so. When a judge resolves at last to overrule it, however, he confronts the immediate problem of how much reliance the precedent engendered. Reliance in one case of enormous repercussions? Reliance in many cases of small but cumulatively strong repercussions? No serious reliance at all in view of the mocking distinctions attending a precedent? A judge is mindful that an overruling is normally retroactive but also mindful of the traditional antipathy toward retroactive law that springs from its recurring association with injustice. He must reckon with the possibility that a retroactive overruling could entail substantial hardship. He may nevertheless be impelled to make such an overruling if the hardships it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent. An immediate consideration will be that statutes of limitations, by putting an end to old causes of action, markedly cut down the number of possible hardship cases.
No modern judge adheres to precedent ritualistically, but in the main he honors it for good reason, for the endlessly useful solutions it makes available to him by way of example as he confronts each puzzle to which something new has been added. If the puzzle still proves intractable to solution in familiar ways, a judge is still likely to do honor to the precedent in the breach, setting forth clearly the disparity between the square facts before him and the often well-rounded precedents that now fail to match them. He has also the responsibility of justifying the new precedent he has evolved not merely as the dispossessor of the old, but as the best of all possible replacements.

He is hardly eager to take on so demanding a responsibility if he can do otherwise. He knows that a new rule must be supported by the full disclosure in his opinion of all aspects of the problem and of the data pertinent to its solution. Thereafter the opinion must pass muster with scholars and practitioners on the alert to note any misunderstanding of the problem, any error in reasoning, any irrelevance in data, any oversight of relevant data, any premature cartography beyond the problem in hand. Every opinion is thus subject to approval.

Moreover, however moribund he finds a precedent, he may still be deterred from displacing it by another restraint of judicial office, the tradition that the function of a court is not itself to innovate changes but only to keep the law responsive to significant changes in the customs of the community. Normally the judge will abide by the tenet that the law must lag a respectful pace back of popular mores, not only to insure its own acceptance but also to delay legal formalization of community values until they have become seasoned. That tradition makes good sense so long as the lag does not deteriorate into a lapse.

When a judge does overrule a precedent, it matters little whether it related only to the common law or to the interpretation of a constitution or statute. Often a statute itself has codified rules of common law, and in any event a judge arrives at his decision via reasoning native to the common law. Hence the context of the case ordinarily does not affect the prevailing rule that an overruling decision operates retroactively.

It is my opinion that however sound this prevailing rule may be in the main, it can on occasion unduly restrict the development of the law. A court usually will not overrule a precedent even if it is convinced that the precedent is unsound, when the hardship caused by a retroactive change would not be offset by its benefits. The tech-
nique of prospective overruling enables courts to solve this dilemma by changing bad law without upsetting the reasonable expectations of those who relied on it. Only occasionally will there be cases that clearly demand this technique. In the hands of skilled judicial craftsmen, acting under well-reasoned guidelines, it can be an instrument of justice that fosters public respect for the law. Although the technique is frequently invoked in overruling precedents, it can serve in any case in which new rules are announced.


17. The "element of surprise will not realistically be an operative factor in a great many cases because the parties will have acted without any knowledge at all of what the governing law was; whatever law is finally held to govern their conduct, whether it be the old rule or the new rule, will be a new rule to them." *Prospective Overruling and Retroactive Application*, supra note 16, at 945. I believe that most judges would agree with Cardozo: "My impression is that the instances of honest reliance and genuine disappointment are rarer than they are commonly supposed to be by those who exalt the virtues of stability and certainty." Address by Justice Cardozo, New York State Bar Association, Jan. 22, 1932, in 55 N.Y. ST. B. ASS'N REP. 295 (1932).

18. *But see* Freeman, *supra* note 8, at 207: "It has been part of my thesis that rules contain within themselves social objectives and policy choices, and that judicial law-making which works within this ambit is legitimate. Prospective overruling does not and, in spite of superficial attractions, it is a technique which does not commend itself." Sir Leslie Scarman, then chairman of the English Law Commission and now a member of the Court of Appeal, commented: "I have difficulty in understanding the bifurcation of the judicial process... which all of us know has been achieving a measure of employment in various states of the United States of America. I find it difficult to understand how a judge can say a case will be decided in this way for the parties in front of him but to give notice that in the future it will be decided in a different way for different parties who may come later. This seems, to my mind, a straining or distortion of the judicial process which we should avoid if we can...." Scarman, *Law Reform by Legislative Techniques*, 32 SASK. L. REV. 217, 219-20 (1967).
Amid the current lively interest in the prospective operation of an overruling decision, particularly in the United States, it is worth recalling various decisions specifying such operation, covering a long space of time. They have a common objective, to rid the law of an unsound rule and at the same time preclude undue hardship to a party that has justifiably relied on it. Reliance plays its heaviest role in such areas as property, contracts, and taxation, where lawyers advise clients extensively in their planning on the basis of existing precedents.

In most of the decisions I shall now review briefly, overruling was the rational judgment and prospective overruling was essential to preclude the injustice that retroactive application of the new rule would have entailed. Thus the early municipal bond cases, to prevent gross injustice, precluded retroactive application of new rules. In 1863 the United States Supreme Court in *Gelpcke v. City of Dubuque*\(^{19}\) refused to give retroactive effect to a decision of the Supreme Court of Iowa, holding certain municipal bonds invalid and noting that plaintiffs had purchased such bonds in reliance on an earlier decision of that court holding them valid.\(^{20}\)

Other early cases limiting new rules to prospective application in the interest of justice also involved property rights. Thus, in 1892 the Alabama Supreme Court, ruling in *Jones v. Woodstock Iron Co.*\(^{21}\) on the vesting of legal title to property, took care to give the rule prospective application only. Similarly the North Carolina Supreme Court in 1906 approved the prospective application for decisions overruling settled rules of property or contract rights, on the ground that the "highest principles of justice" militate against divestment of rights acquired in reliance on prior law.\(^{22}\)


20. In 1879, the United States Supreme Court explicitly applied prospectively a rule invalidating municipal bonds in a situation similar to *Gelpcke*: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment." *Douglass v. County of Pike*, 101 U.S. 677, 687 (1879). From this language state courts and federal courts subsequently carved out a "contract right" or "property right" to preclude retroactivity. The objective was to foster stability in commercial transactions.

21. 95 Ala. 551, 10 So. 635 (1892).

22. See *Hill v. Atlantic & N.C.R.R.*, 143 N.C. 539, 55 S.E. 854 (1906). Sometimes a court tolerates indefinitely the vicious circle of a defective old rule and reliance thereon, even though the old rule may have been unsound from its inception. See my concurring opinion in *Boyd v. Oser*, 23 Cal. 2d 613, 143 P.2d 512 (1944). See also
The legislative divorce cases afford another early exception to the retroactive application of a court decision. Thus the Supreme Court of Ohio, in holding legislative divorces invalid, refused to apply its decision retroactively to invalidate prior legislative divorces that had been granted over a period of more than forty years.\textsuperscript{23} The court noted that retroactive application would have invalidated numerous second marriages and rendered illegitimate many children born of such marriages.\textsuperscript{24}

The leading case of \textit{Great Northern Ry. Co. v. Sunburst Oil & Refining Co.}\textsuperscript{25} involved a Montana statute that granted rate-fixing authority to the state railroad commission. The Montana Supreme Court had authorized a right of reparation to shippers or carriers unreasonably burdened by a rate modification. Sunburst had accordingly sued Great Northern for reparation. Then the Montana Supreme Court, overruling its earlier decision, held that the right of reparation did not exist. Nonetheless it permitted Sunburst to recover because the old rule had been "the governing principle for shippers and carriers who, during the period of its reign, had acted on the faith of it . . . ."\textsuperscript{26} The United States Supreme Court granted certiorari to consider whether Great Northern had been denied due process and held that no federal question was raised by the prospective overruling.

The significance of reliance was also dominant in \textit{Hare v. General Contract Purchasing Corp.}\textsuperscript{27} The Supreme Court of Arkansas had held in several cases that a form of instalment contract did not violate a prohibition in the Arkansas Constitution of interest rates in excess of 10 percent. When the same form of contract was again before the court in the \textit{Hare} case, the court found that the contract was usurious but applied the new rule prospectively because of the many contracts that had been entered into in reliance on the court's earlier decisions.

A salient example of the prospective application of an overruling decision is the case of \textit{Brown v. Board of Education}\textsuperscript{28} holding that the

\begin{footnotes}
\item 26. 287 U.S. at 358.
\item 27. 220 Ark. 601, 249 S.W.2d 973 (1952).
\item 28. 347 U.S. 483 (1954), 349 U.S. 294 (1955). In two cases the Supreme Court
\end{footnotes}
state action involved in segregated schools violated the equal protection clause of the United States Constitution. Normally, state action that has been declared unconstitutional would be promptly terminated. Given the massive adjustment necessitated by the decision, however, the United States Supreme Court framed its decision in terms of the now famous equitable injunction calling for compliance "with all deliberate speed," a phrase that enabled the court to have its new rule take effect in slow motion.

Eight years went by. Then the Court, in the 1963 case of Watson v. City of Memphis, held that enough time for deliberate speed had elapsed and that desegregation must now proceed in earnest.

The extraordinary technique of the Brown decision, allowing an unspecified time for adjustment, was the only possible way of ensuring orderly transition from an old social order to a new. Millions of people were involved in the transition, and they could hardly be maneuvered at a moment's notice like small platoons of plaintiffs or defendants. There would be adjustments to make for those who had clamored for change as well as for those who had resisted it. Each group needed time to expand its familiar province and to learn to live in a wider world. The judicial decision signaling the change was no simple decision weighing one individual's benefits or hardships against another's. It contemplated a long-range benefit for everyone concerned, and abundant time was of the essence to ensure that objective. There would have been great risk of its failure had the court ordered its decision to take effect at an appointed hour or even in an appointed year. Better an interim of trial and error, however bumbling, with time and time again to heal the breach.

In each of the foregoing cases an unsound rule was properly displaced, but the new rule was not applied retroactively because the hardship that retroactivity would entail clearly outweighed its benefits. In tort cases, however, it is my opinion that the hardship on parties who would be saddled with an unjust precedent if the overruling were not made retroactive, ordinarily outweighs any hardship on those who acted under the old rule or any benefits that might be derived from limiting the new rule to prospective operation. Neither the tort-


feasor nor the victim normally takes account of expanding or contracting rules of tort liability except tangentially in the course of routinely insuring against such liability.

In most cases, the expansion or contraction of tort liability has no drastic effect on the drafting and cost of insurance policies, but there may be exceptions. An agency, for example, relying on sovereign or charitable immunity under established law, may have deemed it needless to procure insurance. In the event of a judicial decision ruling against immunity such an agency would be unprepared to meet the newly created liability.

Decisions in several jurisdictions overruling sovereign or charitable immunity have sought to guard against hardship in this regard, but not satisfactorily. Thus in Illinois the court accorded the benefit of a decision overruling school district immunity to the plaintiff, but declared that apart from the instant case, the rule would apply prospectively only. Such a solution can result in grossly unequal treatment of persons similarly situated. It was bound to raise the question of why there should not be comparable benefit for others, including those injured in the same accident, whose potential claims were not yet barred by the statute of limitations or litigated to final judgment that would raise the bar of res judicata. I can find no rational justification for distinguishing between tort victims injured before and after an overruling decision. The hardship on the injured persons would seem clearly to outweigh the hardship on the taxpayers of the community among whom the damages would be distributed. Even if the agency saw no need to investigate the alleged tort or prepare a defense, given its reliance on the old rule, any hardship that might result from its failure to make a possibly adequate defense would be outweighed by the hardship on the injured who would be denied any remedy under an unjust rule.

It is equally specious to contend that the party attacking the old rule should be given the benefit of the new rule as a reward for litigating the issue, with a consequent incentive to others to attack unsound doctrine. Such a contention is precariously based on frustration of evenhanded justice. If a case impels a brief for overruling, the possibility of retroactive application should be incentive enough and counsel must accept the risk that the court will not overrule, let alone retroactively. Most cases involve more than one issue, and there is

31. See id. at 28, 163 N.E.2d at 97.
always the risk of failure on some or all of them. As Cardozo has noted, "the chance of miscalculation is felt to be a fair risk of the game of life . . . ."32 Furthermore, institutional litigants with recurring interests in overturning legal rules would find incentive and reward enough in achieving only prospective overruling. There might be merit in the argument that counsel would lack incentive to attack unsound doctrine if prospective overruling ever became so common that it could be generally anticipated, but that prospect is remote.

The Minnesota court straddled the issue of prospective versus retroactive operation of an overruling decision with an unusual solution that has been labelled "prospective-prospective" overruling.33 It declared that the defense of sovereign immunity would no longer be available to school districts, municipal corporations, and certain other governmental subdivisions with respect to torts committed after the adjournment of the next regular session of the Minnesota legislature.34 Its objective was to give the agencies time to insure and to leave the way open for the legislature to enlist its abundant resources for comprehensive legislation in the area. The clear implication was that the formulation of new rules in this area was a responsibility more appropriate to the legislature than to the courts. That implication was at odds with an attendant warning that the court would undertake the legislature's responsibility if the legislature did not. It seems evident that the real, though unarticulated, reason for prospective overruling in the charitable and sovereign immunity cases was to forestall legislative opposition to the new rules.

It would be more rational in such cases for a court to decide for retroactive operation. The California court so decided, in a decision liquidating the doctrine of sovereign immunity.35 It reasoned that the doctrine had been almost uniformly condemned by the commentators, and had become so riddled with exceptions, via legislation as well as judicial decision, that "[o]nly the vestigial remains of such governmental immunity have survived; its requiem has long been foreshad-

32. B. CARDozo, THe NATURE OF THe JUDICIAL PROCESS 148 (1921).
33. See Note, Prospective-Prospective Overruling, 51 Minn. L. Rev. 79 (1966).
34. See Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962). In an earlier case, the court overruled the doctrine of charitable immunity, saying "[w]e believe the new rule should apply to the instant case and to all future causes of action arising after September 15, 1960, the date of the filing of this opinion.” Parker v. Port Huron Hosp., 361 Mich. 1, 28, 105 N.W.2d 1, 14 (1960).
owed.” Under such circumstances, any hardship to the agency that had failed to take note of the fatal illness of the old rule was overwhelmed by the hardship that a denial of recovery would have worked on the injured plaintiff.

The problem of retroactive versus prospective application calls for the most sensitive balancing of competing claims to justice in the area of criminal law. The time radius of the decision may directly affect the freedom or the very life of one accused or convicted of crime. An ex post facto clause hence exerts its most dramatic prohibition against retroactivity with regard to statutes that make conduct criminal that has not been criminal before. Though there is no comparable prohibition on a court, it usually also guards against any retroactive application of a decision that marks conduct as criminal for the first time.

In an early case in North Carolina the court found its rationale for prospective application in the defendant's reliance on an old interpretation of the law. He had been prosecuted under a statute prohibiting unauthorized removal of crops by a sharecropper. An earlier case involving the same statute had held that a sharecropper might defend by alleging the landlord's breach of contract as offsetting the amount of rent due. The court overruled the earlier decision, holding that the statute plainly meant that the crops were to remain on the land until all disputes between landlord and sharecropper were resolved and that any removal of the crops pending such settlement was a penal offense. The court went on to hold, however, that since the defendant might have acted on the advice of counsel in reliance on the earlier case, it would be unfair to deprive him of the defense authorized by that case.

In the unusual New Mexico case of State v. Jones the court saw anew a former defendant. Some years earlier, as the operator of a motion picture theatre he had used “bank night” to promote attendance, a common practice during the depression. He was successful in his defense that “bank night” was not a lottery. Now the same court concluded, as to the same defendant, that “bank night” was a lottery but held that the “plainest principles of justice” demanded that the new

36. Id. at 221, 359 P.2d at 463, 11 Cal. Rptr. at 95.
37. See note 6 supra.
40. 44 N.M. 623, 107 P.2d 324 (1940). See also State v. Longino, 109 Miss. 125, 67 So. 902 (1915).
41. 44 N.M. at 631, 107 P.2d at 329.
rule be applied prospectively only. The court's second thought could not make a lottery of the justifiable reliance its old rule engendered in the very defendant again before the court.

Normally, however, reliance plays an inconsequential role, if any, in criminal cases, as in tort cases. The decisive factor is usually the injustice of retroactivity, given its penal consequences, as exemplified in the case of *James v. United States.* At issue was the conviction of a defendant for "wilfully and knowingly" evading payment of an income tax on embezzled money. In an earlier case the United States Supreme Court had held that embezzled funds were not taxable income. Six members of the Court in the *James* case voted to overrule that decision, holding that embezzled funds were taxable income. A differently composed group of six justices, however, voted not to convict James; three on the ground that the old rule still prevailed when he failed to pay the tax, and hence made it impossible to prove wilful evasion; and three on the ground that the old rule was correct. Accordingly, there was no retroactive application of the new interpretation of the statute. It is hardly persuasive that James failed to report his income in reliance on the old rule; there was an equal likelihood that he concealed his income to avoid prosecution for embezzlement. Though no element of reliance is present, the *James* decision is responsive to the principle that the retroactive operation of a rule imposing or expanding criminal liability would be inherently unfair.

In a few jurisdictions, courts may convict persons of crimes even though the conduct charged against them is nowhere specified by statute as criminal. These jurisdictions punish so-called "common law offenses," acts that fall expressly or by analogy within some common law decision, however ancient and obscure. Predominantly they are acts characterized as immoral, obscene, or in some such wise offensive.

These so-called "morals offenses" create refractory problems of retroactivity. Usually a defendant cannot divine that a decision will make criminal the conduct he engaged in. Retroactivity in the common law of crime, attended by penal sanctions, may be particularly oppressive when the defendant's conduct lacks any element of mens rea. It is reasoning in a circle to attribute consciousness of wrongdoing to

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a defendant on the sole ground that since his conduct is now adjudged offensive to widely held community standards of basic morality, its criminal nature should have been known to him.

It may avail little to a defendant to exercise his right to a jury trial when charged with an allegedly criminal offense, not against a person or property, but against the abstraction of public morality. Given that indeterminate abstraction, randomly selected jurors have the same large discretion as a trial judge to adjudge conduct criminal that has nowhere been so specified.

Judicial discretion, whether of trial judge or jury, is also an indeterminate abstraction elusive of constitutional limitation. An appellate court is wary of countermanding the discretionary judgment of the triers of fact unless there is patent abuse of their discretion, a phrase whose own vagueness matches the abstraction to which it relates. Thus two indeterminate abstractions, one encompassing conduct allegedly criminally offensive and the other encompassing judicial discretion to adjudge conduct as criminally offensive, interact to create a vicious circle. It might better be described as a vicious vortex, into whose vacuum every person risks being drawn. It is a very present danger whose sinister aspects ironically are camouflaged by the ceremonious judicial process through which it moves. The courtroom, whose judges and jury are regarded as the intent guardians of fair procedure, lends itself to a vitiation of the procedure whenever the guardians freely invoke their discretion to stigmatize conduct as criminal and to apply the punishment retroactively.

Transcending the injury to the one thus condemned by the erratic operation of judicial discretion is the oppressive censorship it threatens to all others. Even if the threat does not materialize immediately or on a large scale, it exerts a damaging influence against the diversity of custom and thought that characterizes the open pluralistic society. Those aware of the threat tend to stifle themselves, to fit their conduct to prevailing patterns, to speak only the speech of the sickly sweet lest they offend a majority well able to mobilize its deadly innocence against any questioning words.

As for those who are not aware of any threat, or are not in fear of it, they risk more imminent injury. The first among them to be criminally prosecuted may be those whose offenses are so close to specified crimes as to seem properly punishable. But each such punishment broadens the area of prosecution and the number of those who may be caught in it. No one can forget that in our own time, in pur-
portedly civilized countries, millions have thus been caught who have committed no greater offense than to be themselves.

In *Ginzburg v. United States*,\(^4\) three of the four dissenting justices viewed the majority decision as a retroactive expansion of criminal liability for conduct not hitherto specified as a crime. The decision, interpreting a federal statute on obscenity,\(^4\) adjudged the defendants guilty of mailing obscene matter. Even though the majority opinion assumed that the magazines actually mailed were not obscene, it attributed to the mailing an obscenity derived from the manner in which the magazines were advertised and prepared for mailing. Thus the court greatly broadened the sweep of an already sweeping statute. Something new has been added to the normal question under such a statute: What was defendant doing? It is now in order in the courtroom to ask: What did he think he was doing?

With this subtle interpolation of motive in a statute on its face concerned only with obscene matter, whatever that vague term may mean, what are the limits of the growth possibilities of obscenity as a crime? Those who prosecute for obscenity need not prove that the defendant was murdering the English language or even roughing it up. The crucial question is not only how the defendant conducts himself, but whether his motive was pure. Evil to him who evil thinks.

The pudding, of course, is in the proof. Since the proof of evil motive is not called for by the statute, *Ginzburg* could have become an endless pudding, spilling into little ones into every corner of the United States. It is not quieting to envisage the many custodians of morals who perennially stand ready to put in their plums, and pull out their thumbs, and say: What a good boy am I.

The plum puddings in the United States are no more spectacular than those of the mother country. The *Ginzburg* case finds a foggy peer in the English case of *Shaw v. Director of Public Prosecutions*,\(^4\) highlighting the durability of the conspiracy net in common law. The defendant published a "Ladies' Directory," listing the names and addresses of prostitutes. He was convicted of publishing an obscene booklet under the Obscene Publications Act of 1959, superseding common law rules hitherto governing obscene publications. He was also convicted of conspiracy to corrupt public morals, an offense declared by the trial judge to be a common law misdemeanor. The Court of

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Criminal Appeal affirmed the conviction and the House of Lords reaffirmed. In the reaffirmation, the majority adhered to a view of the court as *custos morum* of the people, as they say in English, or as Latins might say, the moral custodian. There was an oddly archaic sound to the purportedly forward-looking speech of several that equated the conspiracy conviction with the right and duty of the court to keep the common law of crimes responsive to current public policy. Thus Viscount Simonds declared, "The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society."

Lord Reid dissented, stating that "[w]here Parliament fears to tread, it is not for the courts to rush in. . . . [T]he courts cannot now create a new offense, or a new kind of criminal conspiracy . . . ." In 1973, ten years after the *Shaw* case, over a vigorous and persuasive dissent by Lord Diplock, the House of Lords held in *Knuller, Ltd. v. Director of Public Prosecutions* that the publishers of *International Times* were properly convicted of conspiracy to corrupt public morals by publishing advertisements by homosexuals for companionship with other homosexuals. In this case Lord Reid voted with the majority despite his continuing belief that *Shaw* was wrongly decided and that under its 1966 Practice Statement the House of Lords was free to abandon erroneous earlier decisions. He justified his concurrence in *Knuller* on the ground that there had been at least thirty convictions for the new crime in the intervening ten years and that Parliament had enacted relevant statutes without repudiating the rule in *Shaw*'s case. In his view general acceptance of that rule had made it law and "however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."

I would here reiterate my own view that the responsibility of overruling judge-made bad law rests with judges and should not thus be shifted to Parliament. I do not believe that bad law becomes enshrined by a supposed public acceptance that may be no more than public indifference. Law, good or bad, is made by courts and legislatures operating under appropriate judicial or legislative procedures, not by public indifference or acquiescence.

48. *Id.* at 268.
49. *Id.* at 275-76.
51. *Id.* at 903.
Vagaries in the criminal law of conspiracy in sequence of Shaw and Knuller have a disturbing range of propagation, as in the rule that a conspiracy to commit a tort is criminal. Thus in the Kamara case,\footnote{Kamara v. Director of Public Prosecutions, [1973] 2 All E.R. 1242.} students from Sierra Leone who protested against the policies of the party in power in their country and wished to call public attention to their grievances were prosecuted for occupying the premises in London of the High Commission for Sierra Leone. They were convicted on a charge of conspiracy to trespass, and the Court of Appeal affirmed their convictions on the syllogism that an agreement to do an unlawful act is a criminal conspiracy; trespass is an unlawful act; an agreement to commit trespass is therefore a criminal conspiracy. The major premise not only begs the question, but begets others. As Lord Diplock declared in his dissent in Knuller: "It is the height of sophistry to say that the doing of the acts in concert which alone can have harmful consequences is not what the law regards as meriting punishment, but that the prior agreement to do them is."\footnote{\[1972\] 2 All E.R. at 921.}

Such curious outcroppings of judicial creativity in a normally staid domain are not rendered safe and sane by virtue of bearing tags of prestigious authority. Nonetheless we can view Shaw, Knuller, and Kamara as aberrations. The traditional defenses against retroactivity of new rules of criminal law that would adversely affect a defendant are still firmly entrenched.\footnote{There may be a trend toward retroactivity of new rules that would beneficently affect a defendant. Contraction of criminal liability can take various forms: a court declares a criminal statute unconstitutional; a legislature repeals a criminal statute expressly or by implication, or repeals a statute and later substantially reenacts it; or a court reinterprets a criminal statute to the advantage of defendants, either by narrowing the scope of the statute or by articulating new defenses to it. These examples warrant examination.}

In the simplest example, when a court declares a criminal statute unconstitutional, the invariable rule is that all defendants previously convicted under that statute are entitled to release, whether their convictions are final or not. The rule is at least as old as an 1879 case in which the United States Supreme Court declared that a conviction under an unconstitutional statute is void and therefore subject to collateral attack. \textit{See Ex Parte Siebold,} 100 U.S. 371, 376-77 (1879).

As for legislative repeal of a criminal statute, it was normally attended at common law by automatic abatement of all prosecutions under it, on the presumption that the legislation intended repeal to operate as a pardon for past acts. Abatement did not extend, however, to final convictions, probably because of the originally limited nature of habeas corpus and general unavailability of remedies via collateral attack in early Anglo-American law. Moreover, since there was no abatement the legislature clearly could not have intended a pardon, as when the new statute merely affected the manner of punishment, or merely took over the field from the old, or substantially reenacted the old, as in the case of codifications, consolidations or revisions.
We turn now to the cluster of recently formulated constitutional

The problems of legislative repeal are exemplified in two modern cases decided by the Supreme Court. See Hamm v. City of Rock Hill, 379 U.S. 306 (1964); Bell v. Maryland, 378 U.S. 226 (1964). In Bell, "sit-in" demonstrators had been convicted of criminal trespass. While their case was pending on writ of certiorari in the United States Supreme Court, the Maryland legislature enacted "public accommodation" laws that gave them a right to be in public restaurants and therefore probably rendered the defendants' supposed trespass noncriminal. Like many states, Maryland had a "saving clause" to avoid the common law rule of automatic abatement on repeal, but there was some doubt whether the clause applied to petitioners' convictions. The Supreme Court therefore reversed and remanded to the Maryland court to determine whether under state law the prosecutions against petitioners might be deemed abated under the new statute. The Maryland Supreme Court affirmed their convictions. Bell v. State, 236 Md. 356, 204 A.2d 54 (1964).

In contrast, in Hamm, petitioners' "sit-in" conduct had been rendered noncriminal by a federal statute, the 1964 Civil Rights Act, 42 U.S.C. § 2000a (1970). The United States Supreme Court held that the convictions, still on direct review when the Civil Rights Act was enacted, were abated by the federal statute rendering their conduct noncriminal.

An analogous situation arises when a court reinterprets a criminal statute so as to narrow it, thus essentially repealing the statute as to some defendants. In this area, one decision aroused much criticism. See Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941). In Warring, a defendant had been convicted in 1939 under a federal contempt statute that punished conduct in the presence of the court or "so near thereto as to obstruct the administration of justice." At the time of the defendant's conviction case law required a causal rather than a geographical link between the offending conduct and the offended court. See Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918). Two years after Warring's conviction, however, the Supreme Court reversed itself, holding that the contempt statute required geographic proximity between conduct and court. See Nye v. United States, 313 U.S. 33 (1941). Under this new interpretation, Warring might not have been guilty of criminal contempt, but the court denied habeas corpus.

A comparable decision has been rendered by the Pennsylvania Supreme Court in a case where the petitioner had been convicted of first degree felony-murder in the course of a robbery. His victim, a policeman, had actually been killed by a bullet from the gun of a fellow policeman during the fracas of the robbery. Commonwealth ex rel. Almeida v. Rundle, 409 Pa. 460, 187 A.2d 266, cert. denied, 374 U.S. 815 (1963). Long after the petitioner's conviction the Pennsylvania court adopted a new theory of felony-murder that could have removed his crime from that category. See Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958). The Pennsylvania court, however, denied habeas corpus in Rundle, holding that criminal convictions are to be governed by the law in force at the time of the conviction. The United States Supreme Court denied certiorari. Almeida v. Rundle, 374 U.S. 815 (1963).

Sometimes there are legislative changes in punishment. They are usually subject to a rule precluding retroactive application to defendants whose convictions have become final. Such a rule is of course inevitable as to increases in punishment, where retroactive application would not be constitutionally permissible under the usual ex post facto clause. As to statutes mitigating punishment, however, there is no constitutional barrier to retroactive application, and there are compelling arguments in its favor. Once the legislature adopts a lesser penalty as adequate, the retention of the harsher penalty no longer serves any legitimate penological goal. Hence we declared in California that when a criminal statute is amended to mitigate punishment after the prohibited act was committed, but before a final judgment of conviction is entered, the amended statute governs. See In re Estrada, 63 Cal. 2d 740, 408 P.2d 448, 48 Cal. Rptr. 172 (1965).
rules relating to criminal detection, detention, and trial. They begin with the Bill of Rights as applied to the states via the fourteenth amendment, an application that has gained momentum since the propelling concept of ordered liberty enunciated in Palko v. Connecticut. They culminate in rules that would be beneficent to the defendant if retroactively applied.

It would seem that since the new rules have a common ground in the concept of ordered liberty, defined as "so rooted in the traditions and conscience of our people as to be ranked as fundamental," they would by definition be of universal application. Hence they would reach backward in time as well as forward, to apply retroactively even though they might upset final judgments. Thus the United States Supreme Court declared in 1963 that "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Since that noble declaration the Court has applied some but not all of the beneficent rules retroactively. Why not all? The question is basic, compelling us to seek out the considerations that in some cases dictated prospective operation only.

The fourth amendment cases demonstrate that rules of ordered liberty might operate with less than absolute retroactivity, however absolute a ring they have in the abstract. The fourth amendment of the United States Constitution prohibits unreasonable searches and seizures by government agents, and Mapp v. Ohio extended to the states the rationale of Estrada would seem to be equally applicable to a defendant whose judgment of conviction has become final. An early case decided otherwise. See State v. Addington, 18 S.C.L. Rpts. 516 (1831). The petitioner in that case was convicted of horse stealing and sentenced to death. Meanwhile an amendment to the penal statutes reduced the punishment to whipping, imprisonment, and a fine. The court refused to apply the lesser punishment retroactively on the ground that it loses all power over a case once a judgment becomes final. It nevertheless recognized the harshness of the rule and strongly recommended executive clemency.

Modern decisions extending the scope of habeas corpus have militated against such unbending finality of judgments in criminal law. Moreover, in states such as California, a system of indeterminate sentencing serves to keep a petitioner's case open. The Adult Authority may redetermine his sentence at any point up to the maximum term. CAL. PEN. CODE §§ 1168, 3020, 3023, 5077 (West 1970).


federal rule excluding evidence obtained in violation of that amend-
ment. Mapp generated concern throughout the country as to whether it would apply retroactively not only to cases on appeal but also to final judgments. In my own state I confronted the problem in a concurring opinion in In re Harris.60 Some years earlier in People v. Cahan,61 California had anticipated the Mapp decision by adopting the exclu-
sionary rule. Instead of making it a rule of constitutional dimension, however, we made it a rule of evidence. Hence its violation afforded no ground for collateral attack on final judgments. It was perforce turned into a constitutional rule by Mapp, and the question arose as to whether it must now apply with full retroactivity. In deciding against such retroactivity, in In re Harris, I noted that the purpose of the exclusionary rule is not to protect the guilty but to deter unconsti-
tutional police practices. It seems clear that deterrence would be served but little more and at exhorbitant cost by affording the weapon of collateral attack to those defendants who were convicted before the adoption of the exclusionary rule and hence had no way of challenging the admissibility of the evidence.

The most telling reason for collateral attack on judgments of con-
viction is that it operates to eliminate the risk of convicting the inno-
cent. Such a risk attends any conviction ensuing from the witting use of perjured testimony, the suppression of evidence, an involuntary con-
fession, the denial of an opportunity to present a defense, and the de-
nial of the right to counsel. A comparable risk arises upon failure to provide an indigent defendant with a trial transcript necessary to per-
fet an appeal.

The most telling distinction of a defendant convicted on evidence resulting from an unreasonable search or seizure is that he is clearly guilty. It is not the purpose of the exclusionary rule to protect the guilty. Its purpose to detect lawless enforcement will be amply served in any state by affording defendants an orderly procedure for challeng-
ing the admissibility of the evidence at or before trial and on appeal.62

60. 56 Cal. 2d 879, 880, 366 P.2d 305, 306, 16 Cal. Rptr. 889, 890 (1961). The
rule of Mapp would apply, as in Mapp itself, to cases that had not yet reached final
Peggy, 5 U.S. (1 Cranch) 103 (1801). See also Vandenbark v. Owen-Illinois Glass
Co., 311 U.S. 538 (1941).
62. See Traynor, Mapp v. Ohio At Large In The Fifty States, 1962 DUKE L.J. 319;
Weinstein, Local Responsibility for Improvement of Search And Seizure Practices, 34
The views set forth in the *Harris* case gained strength when the United States Supreme Court in *Linkletter v. Walker* 63 decided against any retroactive application of *Mapp* that would upset judgments that became final before *Mapp*. It invoked as a test "no likelihood of unreliability" in the factfinding process. 64 Given reliability, the Court was free to weigh official reliance and the advantages of orderly transition against the usual factors in favor of retroactive application of judicial rules.

New problems of retroactivity were soon to arise in the now famous cases that have worked basic changes in criminal procedure through the usual ordered liberty route of the fourteenth amendment. When *Malloy v. Hogan* 65 extended to the states the fifth amendment privilege against self-incrimination, it cast a formidable shadow on a rule followed in six states allowing comment on the defendant's failure to take the stand to explain or deny facts when he could reasonably be expected to do so. Nevertheless, we still felt free in California to uphold such a rule in *People v. Modesto*, 66 reaffirming the validity of a state constitutional provision that allowed restricted comment on the silence of a defendant in a criminal trial. My opinion in that case, however, proved to be only the next to the last words in my state. It is now displaced by the famous last words of the United States Supreme Court in *Griffin v. California*. 67

The United States Supreme Court relied at least in part on the theory that the comment rule impaired the reliability of the fact-finding process. Given this relation back to the *Linkletter* test, it seemed logical that the *Griffin* rule would be given the retroactive application adumbrated in the *Linkletter* test. In the subsequent case of *Tehan v. United States ex rel. Shott*, 68 however, the Court considered the appropriateness of retroactivity under a new test: Was there a "clear danger of convicting the innocent" unless there were retroactive applica-

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64. 381 U.S. at 638.


tion of the beneficent new rule? This language is not a restatement on all fours with the *Linkletter* test: Would there be “no likelihood of unreliability,” in the factfinding process, and hence no likelihood of convicting the innocent if there were no retroactive application?

It was no easy matter for the Court, after it had taken its stand in *Griffin* against comment, to decide in *Tehan* against complete retroactivity of the *Griffin* rule. This compromise was designed to preclude the *Griffin* rule from upsetting final judgments in the jurisdictions that had allowed comment.

Once the Court undertook such adjustment, it gained freedom to decide against any retroactive application of the new rules on police interrogation announced in the historic cases of *Escobedo v. Illinois* and *Miranda v. Arizona.* It came as a surprise, however, that when it did so in *Johnson v. New Jersey,* it specified a cutoff date that is baffling except in terms of expediency. Even though the case arose on habeas corpus and hence could have been governed by the *Linkletter* and *Tehan* tests, the Court chose to reject the final judgment cutoff. It held instead “that *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago.”

The Court made this choice between the two alternatives it postulated: whether the rules “shall affect cases still on direct appeal when they were decided or whether their application shall commence with trials begun after the decisions were announced.” Apparently it departed from the final judgment cutoff because it would have been compelled to apply the *Escobedo* and *Miranda* rules to cases then pending on appeal, something it did not wish to undertake.

The Court’s choice is hard to justify, whatever its expediency. It meant that no cases would be reversed in consequence of the new rule during the given transitional period. It is difficult to reconcile the Court’s own reference to immutable principles and to binding guarantees newly discovered in the century-old fourteenth amendment with a declaration that they are to have no effect until after June 22, 1964.

From among the cases pending that raised the *Miranda* issues, the Supreme Court applied the *Miranda* rule to only 4 and denied certi-

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72. *Id.* at 721.
73. *Id.* at 732.
orari in the remaining 129 cases. The denial of relief from imprisonment or death on the basis of an arbitrary date raises a grave question of equal protection. If those whose cases were pending were reliably found guilty and hence did not deserve relief, the inequity remains that a few among them nonetheless did receive relief.

So glaring an inequity is not dispelled by a rationalization that the lucky few were only incidental beneficiaries of a technique designed to avert wholesale reversals. For better or worse, the technique of the Johnson case is on the books, open to further use. We can anticipate that it will be urged by advocates seeking to make palatable a proposed change in criminal law or even in civil law. Thus a technique envisaged as an interim expedient may invite carelessness and induce otherwise reluctant judges to join in the announcement of a new rule. It can be used to temporize whenever a new rule is announced too precipitously for consistent and equitable application.

There is wisdom in the Linkletter and Tehan tests that preclude retroactivity to the extent of upsetting final judgments, when there is no appreciable risk that innocent defendants have been convicted. Without such risk, the doctrine of res judicata, which precludes collateral attack on final judgments in civil cases, should apply with equal force in criminal cases. Precluding complete retroactivity by adherence to conventional doctrine does not present any question of prospective overruling. The new rule is applied retroactively within the conventional limits that have traditionally governed the application of new rules.

There is no wisdom, however, in the technique invoked in Johnson v. New Jersey. Equal justice before the law has been the proud boast of Anglo-American judges for generations. Why then give 4 defendants, Miranda, Vignera, Westover, and Stewart, the benefit of the new rule and deny it to the other 129 defendants whose pending cases also raised the Miranda issue? As Justice Harlan has noted in another case, the court was "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule . . . ." It was purely fortuitous that the case of the four lucky defendants given the benefit of the new Miranda rules was heard ahead of the other cases. As Justice

74. Id.
76. Id. at 679 (Harlan, J., concurring).
Schaefer of the Illinois Supreme Court has noted, "Too many irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system."

The apparent reason for this lack of evenhanded justice was to meet the case or controversy test in article III of the United States Constitution, and to render the new rule invulnerable to the claim that it would have been mere dictum had it been applied prospectively only. In my opinion the question whether a new rule should be applied prospectively is just as much an issue in a case as the question whether the old rule should be displaced at all.

Before considering the why of a prospective overruling decision, we must understand that it is the culmination of a process involving two issues. First, in the course of pondering the hitherto governing rule in the context of the instant case and any relevant predecessor cases, a court decides that it is inadequate or inept and must give way to an appropriately formulated new rule. It must then go on to decide whether it will operate most justly if it is given the usual retroactive application to the very case before the court that has provided the impetus toward a new rule. If the court decides against retroactive application, as in a case where it would work undue hardship upon a party that has justifiably relied on the old rule, it is driven to a dual resolution of the problem in a bifurcated decision, announcing the new rule for prospective application only and allowing the old rule to apply in the case before the court.

Each part of the bifurcated decision springs from an actual controversy between the parties. The decision to liquidate the old rule springs from its unfitness to govern such cases. The decision to pay final respects to the doomed rule springs from such considerations as the justifiability of a party's reliance on an old rule, given that it may induce reliance by the very authority of its existence, if not by its fitness. It bears emphasis that each part of the decision is essential to a proper resolution of the case. Neither is dictum.

The parties should have an opportunity to be heard on each issue and the court should have the benefit afforded by adversary litigation of the briefs and argument of counsel thereon. By continuing a case

79. See Prospective Overruling and Retroactive Application, supra note 16, at 936-37.
for such briefs and argument when it is not yet clear whether prospectivity will be an issue, a court ensures that the resolution of such an issue will not have to await a subsequent case. It thus precludes the uncertainty that would otherwise bedevil counsel and other courts in the interim.

Furthermore, the issue of retroactivity should not be decided summarily as the United States Supreme Court has done. A reasoned opinion should demonstrate why the issue was resolved as it was.

Assertion without reasons is unnecessary when reasons are available . . . and unwise in any circumstance; it leads too easily to the suspicion that the law of the case is based upon power alone, and not upon reasoned analysis and judgment.80

Moreover, I find inadequate such criteria as the Supreme Court has invoked for governing the issue of prospectivity, namely, the purpose of the new rule, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice.81 The inadequacy lies mainly in the failure to weigh against the foregoing considerations the hardship and inequity suffered by those who are denied the benefit of the new rule and compelled to bear the burden of what is now admittedly recognized as an unjust rule. Their hardship, particularly when imprisonment and death are at stake, would seem to outweigh the reliance of law enforcement agencies and the increased burden on the administration of justice that equal treatment of those equally situated would entail.

The foregoing review of the technique of prospective overruling as it has developed in the United States illustrates its possibilities for developing the law rationally in the interest of justice by repudiating unsound doctrine. The review also notes the dangers of inept use of the technique and the need not only for caution but for rational criteria to govern its proper use. It was properly used, I believe, in many of the illustrations I have set forth, but improperly used in such cases as Johnson v. New Jersey.82

The criteria I would suggest are: clear demonstrations that a precedent must be overruled, that the new rule is the best of all possible replacements, and that the hardship on a party who has relied on the old rule outweighs the hardship on the party denied the benefit of the new rule. Since there are few cases where such rigorous demon-

80. Prospective Overruling and Retroactive Application, supra note 16, at 939.
strations can be made, there should be few occasions when prospective overruling can justifiably displace the normal retroactive application of an overruling decision.

We turn now to the outlook for prospective overruling in England. For generations the House of Lords deemed itself without power to overrule its decisions. Thus as early as 1860 in Attorney General v. Windsor, Lord Campbell noted that House of Lords decisions "are binding upon itself when sitting judicially, as much as upon all inferior tribunals. . . . [They] can be altered only by Act of Parliament." Again in 1861, in Beamish v. Beamish Lord Campbell declared that if a House of Lords decision "were not considered as equally binding upon your Lordships, the House would be arrogating to itself the right of altering the law, and legislating by its own separate authority." There are echoes of Blackstone in this magisterial declaration beaming the message that when the House decides a case, it is merely finding the law, but when it overrules a case, it is legislating. The doctrine that the House could not overrule itself took firm hold in 1898 in London Street Tramways Co. v. London County Council in which Lord Halsbury noted the "disastrous inconvenience—of having . . . the dealings of mankind rendered doubtful . . . ." One can only muse how much the dealings of mankind might have improved with the benefit of a doubt now and then properly dubbed as a judicial deliberation. Only in 1966 did the House at long last liberate itself from the bondage of Windsor, Beamish, and London Tramways in its famous Practice Statement of that year. I quote the statement in full because its substance and implications are essential to any analysis of the prospects of prospective overruling in English law. Such analysis would have been idle in an era when the single word "overruling" was not pronounced in polite reasoning circles.

The 1966 Practice Statement provides:

Their Lordships regard the use of precedent (1) as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

84. Id. at 481.
86. Id. at 761.
88. Id. at 380.
89. [1966] 3 All E.R. 77.
Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements or property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.90

Note the word “retrospectively” in the third paragraph of the statement. Even without that word the statement assures the public that the House will bear in mind the danger of any disturbance of the basis on which contracts et cetera have been entered into. If such assurance were all that was intended, the word “retrospectively” is redundant. It seems likely that their Lordships included the word “retrospectively” to demonstrate their awareness of the normal retroactivity that attends any overruling. A determined advocate of prospective overruling might also hypothesize that the excess caution on retrospective disturbance was intended to leave the way open for prospective overruling in the light of the experience with that technique in the United States, with which the House was undoubtedly familiar.

Despite the 1966 Practice Statement, the House of Lords has abided by traditional pre-1966 techniques. Thus in Conway v. Rimmer,91 the House was faced with the broad language in Duncan v. Cammell92 that if the Crown asserts that the production of a document would be “injurious to the public interest” or that secrecy of a class of documents is “necessary for the proper conduct of the public service,” that assertion is final and conclusive and the document need not be produced. As Professor Julius Stone has noted:

This was a rather unlimited proposition. The House, nevertheless, found it possible in Conway v. Rimmer in 1968 (that is, after the 1966 Practice Statement) to sweep the proposition aside without departing from it. What they rather said was that, however solemn and unanimous Viscount Simon’s formulation, and however wide his intention, the House was dealing with Duncan’s case with naval documents about submarines in wartime; while they were now dealing in Conway v. Rimmer with police reports. He was dealing with centralized government operations, they were dealing with

90. Id.
local government. And they pointed to half-a-dozen differentiae of this kind.98

The reluctance of the House of Lords to turn over the new leaves of the 1966 Practice Statement results in such puzzlers as the Jones v. Secretary of State for Social Services case.94 Four Lords, Wilberforce, Dilhorne, Diplock, and Simon, agreed that Dowling's case,95 a previous decision of the House of Lords, was wrong. Only three of them, however, were convinced that the House should overrule that case under the 1966 Statement. The fourth, Lord Simon of Glaisdale, was unwilling to do so. The remaining three Lords, Lord Reid, Lord Morris of Borth-y-Gest, and Lord Pearson, were of the opinion that Dowling's case was right, but that even if it were wrong, the House should not overrule it. Thus the baffling conclusion is that the admitted unsoundness of a precedent does not justify overruling it.

Dowling's case involved a claim for injury benefit under the National Insurance (Industrial Injuries) Acts. The case held that a decision by the statutory authorities that the injury occurred in an accident arising out of and in the course of the claimant's employment was final and binding on the medical authorities with respect to a subsequent claim for disablement benefit based on the same accident. If Dowling's case was wrongly decided then not only were Dowling, Jones, and similar claimants awarded disablement benefits that Parliament had not authorized, but claimants to whom the medical authorities would have awarded disablement benefits were denied benefits Parliament contemplated they should have. The doctrine of res judicata, however, would preclude collateral attack on final judgments in either class of case. Had their Lordships undertaken to overrule Dowling's case they would have restored the statutory plan envisioned by Parliament and precluded new departures from that plan. Such a course would have done no violence to the reasonable expectations of claimants; it is hardly credible that they would have accidents in reliance on such a rule as that in Dowling's case. Administrative adjustments to a new rule presumably could be made without undue difficulty, but in any event administrative practices should be in accord with those contemplated by Parliament.

Although no question of reliance by either claimants or administrative agencies was presented in the Jones case, such a question might conceivably arise in a future case, given the failure in the Jones case to overrule a precedent that the majority deemed wrong. Nonetheless, a party could hardly make a plausible case for reliance on the basis of an already dubious precedent. There should hence be no obstacles to an outright overruling of the precedent if it is again placed in issue.

In my opinion Dowling's case should have been overruled in the Jones case. Moreover, the now admittedly sound interpretation of the Parliamentary scheme should have been applied retroactively, for there are no plausible reasons for applying that interpretation prospectively.

In the "afterthoughts" of his speech in the Jones case Lord Simon voices his own unease with the decision in light of the 1966 Practice Statement. He noted that he was

left with the feeling that, theoretically, in some way the most satisfactory outcome of these appeals would have been to have allowed them on the basis that they were governed by the decision in Dowling's case, but to have overruled that decision prospectively. Such a power—to overrule prospectively a previous decision but so as not necessarily to affect the parties before the court—is exercisable by the Supreme Court of the United States, which has held it to be based in common law: see Linkletter v. Walker.96

Lord Simon went on to observe that the pretense that judges were not makers of law but merely its discoverers and expounders had its value.

[In limiting the sphere of lawmaking by the judiciary (inevitably at some disadvantage in assessing the potential repercussions of any decision, and increasingly so in a complex modern industrial society), and thus also in emphasizing that central feature of our constitution, the sovereignty of Parliament. But the true, even if limited, nature of judicial lawmaking has been more widely acknowledged of recent years; and the declaration of 26th July 1966 may be partly regarded as of a piece with that process.97

An advocate of prospective overruling would subscribe to the use of that technique by their Lordships, and indeed by the judges of the Court of Appeal once they are unchained from Young v. Bristol Aeroplane Co.,98 as "no more than a logical extension of present realities and of powers already claimed." The advocate would find encouragement in Lord Simon's suggestion, and Lord Diplock's concurrence therein, that such an extension should be "seriously considered." The advocate, however, would hardly agree that such an extension "would

97. Id. at 198.
98. [1944] 1 K.B. 718.
preferably be the subject matter of Parliamentary enactment." The problem is so manifestly a judicial one that the responsibility for its solution on a case by case evolution in the course of the traditional judicial process should remain with judges. Prospective overruling calls for sensitive and timely adjustments. There is no reason for judges to abdicate such a uniquely judicial responsibility. Legislators cannot formulate a definitive all-purpose plan for prospective overruling that would be feasible.

An advocate of prospective overruling would not be dissuaded by Lord Simon's objections that the initiative for such a task should not be taken by the House of Lords itself. The answer to his Lordship's objections, in the order in which he presented them, might be somewhat as follows: In the first place, if there is informed professional opinion that their Lordships have no power to overrule decisions with prospective effect only, that alone should not be an insuperable obstacle. Although such opinion should always be seriously considered and may be one source of law, it is not itself law and is not binding on their Lordships "sitting judicially." Secondly, any suspicion that an amplification of the 1966 Practice Statement by the House would "be endeavouring to upset one-sidedly the constitutional balance between executive, legislature and judiciary" could be allayed by a clear demonstration that a precedent had to be overruled, that the hardship on the party who had relied on it outweighed the hardship on the party denied the benefit of the new rule. Moreover, as Lord Diplock has noted, it "is not an essential feature of the judicial process" that a new precedent be applied retroactively.99 One might add that it is not essential to the constitutional balance that only the legislature make a precedent operate prospectively.100 Thirdly, the concomitant problems his Lordship noted as worthy of serious consideration are at most tangential to the technique of prospective overruling.

100. Indeed, there is a serious question in the United States whether the legislature can even do so. The California Supreme Court overruled an old precedent on state constitutional grounds that had governed the taxation of private leaseholds on tax-exempt public property. It applied its new rule retroactively after weighing the considerations pro and con. Then the legislature came into the picture and after weighing the considerations on its own scales, retimed the new rule so it would not apply retroactively to leases negotiated prior to its adoption. When this legislative retiming was put to the test in Forster Shipbuilding Co. v. County of Los Angeles, we upheld it, stating: "[T]emporary application of the rule of an overruled case may be prescribed by appropriate legislation as well as by judicial decision, for the legislature is no less competent than the court to evaluate the hardships involved and decide whether considerations of
I have saved to the last a 1675 case discovered by Professor Leach in which Lord Nottingham set forth the general Chancery policy that those who relied on overruled statements of law “are to be protected.” In this case

[It appears that there was a ‘received opinion’ that a certain Elizabethan statute did not apply to the Crown; a tenant then laid out money in erecting a building in reliance upon that opinion. When the law was declared to be otherwise in a decided case, it was held that the ‘new law’ was inapplicable to the relying tenant.]

I believe that it would be appropriate for the House of Lords to resurrect this 1675 Chancery decision of Lord Nottingham and to amplify the 1966 Practice Statement by adopting the technique of prospective overruling. Cautiously and skillfully used in exceptional cases where retroactive overruling would be demonstrably unjust, it would

Fairness and public policy warrant the granting of relief.” Forster Shipbuilding Co. v. County of Los Angeles, 54 Cal. 2d 450, 459, 353 P.2d 736, 741, 6 Cal. Rptr. 24, 29 (1960). It bears noting that the court did not make retroactivity a constitutional mandate. It viewed retroactivity as a problem turning on considerations of fairness and policy. This multiparous problem begets many such considerations, and they may be just as much the concern of the legislature as of the court. See also Elder v. Doerr, 175 Neb. 483, 22 N.W.2d 528 (1963).

Cases may of course arise in which retroactivity is a constitutional mandate, as in the new rules designed to preclude the risk of convicting the innocent. In such a case a legislature would be bound by the retroactivity of the rule, as much as by the rule itself, as the last word.

101. Lord Nottingham’s Chancery Cases, 73 Selden Society 182 (1954). “But then in Chancery when men act according to an opinion which hath long been current for law, they are to be protected, although a latter resolution have controlled the former current opinion, as in Magdalen College case, the resolution in the 11th report (11 Co. Rep. 66b) being contrary to a received opinion which for a long time held the King not to be bound by 13 Eliz., c. 10, the tenant who had laid out money in building upon that opinion was protected in his lease against the resolution by Lord Ellesmere’s decree, and the like case was again decreed by the Lord Bacon C., between Long & Dean and Chapter of Bristol, for which see 1 Rolle, 378, (S), 2 [Prolegomena, c.30, s 30].” Id.


103. See Friedmann, Limits of Judicial Lawmaking And Prospective Overruling, 29 Modern L. Rev. 593, 605 (1966). That author states, “It is unlikely that English courts—still much more strongly wedded than American courts to the Blackstonian doctrine—will adopt, eo nomine, any theory of ‘prospective overruling.’ But the House of Lords, in one of its recent major lawmaking decisions, found another way of doing virtually the same thing. In Hedley Byrne, the House of Lords could have been content to dismiss the action on the ground that the defendants had excluded any legal responsibility for their statement. It chose instead to enunciate, in a series of elaborate opinions, a future principle of responsibility for financial statements negligently made under circumstances in which third parties can reasonably be expected to rely on them. The House of Lords overruled Candler v. Crane, Christmas & Co. with respect to future situations. And while it has been suggested that the entire series of judgments may be dis-
implement the purpose of the 1966 Statement to preclude injustice in a particular case and serve the proper development of the law. Useful lessons and analogies could be drawn from the now substantial experience with the technique in the United States. Meanwhile, law reform resulting from Parliamentary adoption of proposals of the Law Commissions of England and of Scotland and the various Royal Commissions would not only implement the prospective overruling technique, but also serve to reduce the number of occasions where it would be necessary to invoke it.

If the House of Lords undertakes the humble task of eradicating weeds from a splendid garden of law, it will do honor to a profession as noble as the painstaking gardeners who tend this beautiful land.

missed as obiter dicta, this is unlikely. The decision thus operates as a 'prospective overruling.'” Id. (citations omitted). See also Stevens, Hedley Byrne v. Heller: Judicial Creativity and Doctrinal Possibility, 27 MODERN L. REV. 121 (1964); Stevens, The Role of a Final Appeal Court in a Democracy: The House of Lords Today, 28 MODERN L. REV. 509 (1965); Israel, Gideon v. Wainwright: The “Art” of Overruling, 1963 SUPREME CT. REV. 211.

For other cases in which new rules were in effect applied prospectively only, see Connelly v. Director of Public Prosecutions [1964] A.C. 1254 (rule that a count of murder should stand alone would no longer be followed; new rule not applied to Connelly); Cassell & Co. v. Broome [1972] 1 All E.R. 801 (affirmed judgment on exemplary damages based on prior case, but set forth detailed rules “for the future”). Prospective operation of new rules is also accomplished by characterizing them as “rules of practice.” See Friedland, Prospective And Retrospective Judicial Lawmaking, 24 U. TORONTO L.J. 170, 185 (1974).