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REALIST JURISPRUDENCE AND PROSPECTIVE OVERRULING

BERYL HAROLD LEVY †

"He that will not apply new remedies must expect new evils; for time is the greatest innovator."

—BACON, *Of Innovations*

"Well," said Owl, "the customary procedure in such cases is as follows."

"What does Crustimoney Proseedcake mean?" said Pooh, "For I am a Bear of Very Little Brain, and long words Bother me."

"It means the Thing to Do."

"As long as it means that, I don't mind," said Pooh humbly.

—A. A. MILNE, *Winnie-the-Pooh*

Ever since the publication in 1938 of my book, *Cardozo and Frontiers of Legal Thinking*, I have kept a concerned and watchful eye on current developments in jurisprudence and judicial methods. It has struck me increasingly that the drag in development of new judicial methods, such as prospective overruling, is associated with the lingering perdurance of traditional jurisprudence and the apathy toward realist jurisprudence. The failure of prospective overruling, despite its auspicious launching, to emerge as a standard appellate device seems to me largely explicable by a disinclination to stand up to the actualities of judicial functioning. A readier acceptance of realist jurisprudence, with its central emphasis on functional realities, would have hastened the spread of prospective overruling and other nascent techniques of judicial lawmaking. The conspicuously rapid changes in our society suggest the

† Lecturer in Law, Columbia University. A.B. 1929, Ph.D. 1933, LL.B. 1936, Columbia University. Member, New York Bar.

desirability of sharpening the appellate process as an implement of legal change along with legislative progress. The happily resurgent concern for vindication of substantial justice to the litigants, as a value to be held in focus along with change in the law, points to the expediency of prospective overruling as an apposite tool for the contemporary court. Hence the present exploration of realist jurisprudence in relation to prospective overruling is tendered as a pragmatic exercise in constructive cross-fertilization. The acceptance of the one would facilitate the adoption of the other and *vice versa*. Such, at least, is the respectful submission in this Article. It would doubtless be overweening to subtitle it: a memorandum to any interested appellate court.

TRADITIONAL JURISPRUDENCE AND APPELLATE LAWMAKING

Under the murky shadow of Blackstonian jurisprudence we have long pretended that appellate lawmaking was not happening at all; and those who think we are done with the pretense need only to recall the basis of recent attacks from high places on the lawmaking of the United States Supreme Court.

In the traditional view appellate lawmaking is unthinkable: judges are not to "pronounce a new law, but to maintain and expound the old one."¹ The judge merely *finds* the preexisting law; he then merely *declares* what he finds. A prior judicial decision is not the law itself but only evidence of what the law is. Thus a later judicial decision which seems to change the law has not really changed it at all but has only discovered the "true" rule which was always the law.² It follows that any judicial "change" in the law must necessarily be retroactive. It could not be otherwise, for the judge is deemed merely to be articulating what the law has always been—as though the law were, in Holmes' irony-tipped phrase, a "brooding omnipresence" and not some decision to be made by some specific court. The parties acted yesterday but the law at which the court arrives today is the law which nonetheless covered yesterday's conduct.

Blackstone's jurisprudence, entirely understandable in the intellectual climate of the eighteenth century, remains to this day a formidable impediment to honest and searching examination of the ways in which an appellate court inevitably makes new law. Appellate lawmaking itself is still typically covert and indirective, still half-apologetic and guilt-laden.

¹ 1 BLACKSTONE, COMMENTARIES *69.

² In this Article these premises of Blackstone are variously alluded to as the declaratory or discovery theory of law or as the traditional, inherited, or conventional view.

The traditional theory fudges together what are really two different functions of an appellate court. One function is to decide the instant case; another is to lay down a rule which may afford some guidance in the future. If we regard the rulemaking as the primary, if not exclusive, function of the appellate court, then woe to the litigant and his vain hopes for justice in his particular and individual plight. If we regard the rulemaking as a by-product of the adjudication, then that by-product is nothing less than the development of decisional doctrine in the common law or in the interpretation of a statute. To recognize clearly that these two functions are separable would itself be a huge clarification. We would then be in a position to begin—explicitly, analytically, systematically—to develop one set of operating techniques for adjudication and another set for lawmaking. But as long as we continue to treat this double function as though it were a Siamese twin, we perpetuate the inherited confusion and becloud every effort to contribute to the technology of judicial lawmaking as a consciously undertaken and responsible discipline, subject to criticism (including judicial self-criticism) addressed to the real grounds of the decision.

An appellate judge is a lawyer who has been forced to remain a law student. On the court of review he studies the law where it is continually developed and remade. He gives it a cast—not seldom a new cast—which finds its way into the reports and casebooks for lawyers and students of law to ponder in relation to earlier cases as they observe how the law grows without admitting that it grows. “Not a judge on the bench but has had a hand in the making.”³ The appellate judge makes law every time he decides to remake it as nearly as possible as it has been made before. He makes it when he fills in the chinks of statutes or when he elaborates their meaning. He makes it when he discards a common-law rule on the requirement of privity or the nonliability of charitable hospitals. He makes it when he crystallizes some public policy. He makes it when he selectively amasses the facts with one emphasis rather than another. Judges may be conservative, modest, and self-effacing, but the substantive law never got secreted from the interstices of procedure (in Maitland’s happy phrase) without their aid.

The very judge who makes the law is, however, the one who has been most under constraint to cover up what he is doing. Judicial legislation was severely frowned upon in Justice Sharswood’s definitive essay⁴ on professional ethics published a century ago. That attitude

³ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 11 (1921).

⁴ SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* (1st ed. 1854).

still persists even though we are bidden to remember that law in Sharswood's day was practiced "in a very different world" ⁵ and even though the *Canons of Judicial Ethics* adopted by the American Bar Association in 1924 assert that the judge "may contribute useful precedent to the growth of the law." ⁶

Even today "when a judge invents his own law and concocts his version of the facts, he will not fail to profess obedience to the accepted tradition." ⁷ He still purports to be finding the very law which he has himself laboriously rebraided. The hold of an inherited legal philosophy controls our mind against our will and forces us into intellectual circumlocutions which would shame a medieval schoolman.

One of the difficulties we encounter in seeking a franker recognition of the realities of the appellate process—aside from this traditional dogma and inertia—is the circumstance that in our language we often use the terms "find" and "make" interchangeably. Thus we speak of finding or making time, of finding or making an opportunity. In law, however, the distinction is a salient one because only when we cease to blur it do we have a clear break from the discovery theory of law. Blackstone's axioms are a carryover of medieval thinking which, not untypically, in law as in other fields, persisted into the Age of Reason. It was our "reason" which, in the eighteenth century, led us into what Blackstone, describing the common law, could call a kind of "secondary law of nature," which he also regarded as the "perfection of reason." Blackstone's view of the nature of law also reflected the eighteenth century's conception of nature itself as mechanical. If law, like nature, were mechanical, then it is only natural that the judge should be an automaton. ⁸

No sophisticated legal scholar today would fail to agree that "the fiction of *mere* law-finding by courts is being relegated to the shelf of forgotten things by both judges and jurists" ⁹ and that the "creative nature of much judicial activity has become a commonplace." ¹⁰ In

⁵ DRINKER, *LEGAL ETHICS* at ix (1953) (preface).

⁶ ABA *CANONS OF JUDICIAL ETHICS* XIX.

⁷ CAHN, *THE SENSE OF INJUSTICE* 143 (1949).

⁸ For a fuller exposition of this point, see the account in my book, *OUR CONSTITUTION: TOOL OR TESTAMENT* 5 (1942). I should perhaps add that though I am using the name "Blackstone" pejoratively, there is, of course, much to admire in Blackstone, including his insistence that the study of law is an integral part of any general liberal education (as we are only now beginning to realize here). Also I would by no means be understood to be denigrating the eighteenth century which gives us many models of sincerity, simplicity, and sense, as Franklin and Jefferson here and Hume and Johnson in England. These are qualities which are perennially valid and sorely needed today as we struggle with our ultra-sophistication, our technical ramifications, our symbolic and cryptic meanings, our delphic ambiguities.

⁹ 2 STAMPSON & STONE, *LAW AND SOCIETY* 705 (1949).

¹⁰ *Ibid.*

1937 Chief Justice Stone was already reminding us in his Harvard Tercentenary address that the judge's job is not devoted so much to "extracting" a rule from precedents as we were once accustomed to believe.¹¹ A few years ago another scholar-judge, Justice Douglas, took it as a matter of course that precedents are "only starting points." There are so many precedents "to go around," he remarked, that it is no great problem to locate precedents as authorities for almost any proposition.¹²

The real lawgiver is the one who has the final authority to say what the law is, as Justice Frankfurter is fond of quoting Bishop Hoadley as saying—concerning which Thomas Reed Powell observed: "This is a point that some clerics have been prone to gloss over by modestly attributing to another the views announced in their sermons."¹³ There may be justification in a clerical tradition for unwillingness to recognize the responsibility of the law interpreter in himself giving the law its direction. In the theological tradition, the church doctors or the rabbinical judges regarded themselves as construing the word of God. The word of God must remain untouched, but nonetheless the interpreters had to find a way of giving to it their own human application for their own times. God said in the Old Testament: an eye for an eye. And that fiat could not be altered. But

¹¹ Stone, *The Common Law in the United States*, in *THE FUTURE OF THE COMMON LAW* 127 (1937). In a personal letter to me dated October 16, 1941, from the Chambers of the Chief Justice, Stone wrote: "I can only say that I am positive I never took any stock in Blackstone's idea that the judges discover law, whether it be private law or constitutional law, and I do recall that in my Harvard address I did rather emphasize the fact that judges are legislators within certain rather restricted limits." On May 9, 1939, Robert H. Jackson wrote me from the Office of the Solicitor General: "The doctrine that the Court merely 'finds' what is correct law has pretty much passed out of the thinking of even the Court itself. But many people cushion their impact with a new idea by this very lack of candor." For a philosophic analysis, see COHEN, *The Process of Judicial Legislation*, in *LAW AND THE SOCIAL ORDER* 112 (1933). For a Realist exposure, see FRANK, *LAW AND THE MODERN MIND* 32-41 (1930). For a report of substantial lawmaking by trial courts as well as appellate courts in the early nineteenth century, see HURST, *THE GROWTH OF AMERICAN LAW* 185-89 (1950). For an early groping toward the same light, see Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 *HARV. L. REV.* 172 (1891). Remarking that the phrase "judicial legislation" carries on its face the notion of judicial usurpation and is used by the courts in this reproachful sense, Thayer added seventy years ago: "But if judicial legislation be understood to mean the growth of the law at the hands of the judges . . . it is a desirable, and indeed a necessary, feature of our system." *Ibid.* For the most recent exploration of judicial lawmaking, even in international law, see FRIEDMANN, *LAW IN A CHANGING SOCIETY* 26-62 (1959). Professor Friedmann sagely observes with reference to the recent Fuller-Hart controversy that: "Once it is admitted that there is an area of uncertainty in the interpretation of [common-law or statutory] concepts, the question whether the solution to a doubtful situation is found by drawing out a 'latent meaning' or by a creative interpretation, becomes mere verbal quibbling." *Id.* at 32.

¹² Douglas, *Stare Decisis*, 4 *RECORD OF N.Y.C.B.A.* 152, 153 (1949).

¹³ POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 27 (1956).

the judicial sages regarded such intentional maiming as inhumane.¹⁴ Thus an eye for an eye remains an eye for an eye; but it means, said the sages, due reparation.¹⁵ We lawyers, however, are not operating in a theological tradition—at least not professedly so—and once appellate judges face honestly their ineluctable lawcreating function, this critical pivot of our legal system will no longer be “among the most neglected questions of legal scholarship.”¹⁶

JUDICIAL AWARENESS AND PROSPECTIVE OVERRULING

In the present submission I shall undertake to examine from this perspective the emergence of prospective overruling as a deliberate and conscious technique of judicial lawmaking. In doing so, we shall hope to see how the appellate process is illuminated and enhanced once we have made the sharp distinction between adjudication and lawmaking. We shall see how the inherited view, in fuzzing this distinction, obscures the court's role as lawmaker and thereby inhibits the acceptance and development of new lawmaking techniques such as prospective overruling. We shall see how the idea of prospective overruling was projected into the stream of juristic analysis, how it was examined in the course of a rigorous continuity of discussion in the law reviews, how it has been fruitfully applied in a few courts, how it has been endorsed and acclaimed by eminent authorities, and yet how it has thus far failed to become a standard instrument of appellate justice.

The purpose of this Article is a two-fold one: while calling attention to a useful judicial tool, to show at the same time how its neglect is associated with an outmoded jurisprudence. The essay is neither wholly in the domain of judicial method nor wholly in the domain of jurisprudence. If taken to be an essay solely on prospective overruling, one might justly expect a more definitive treatment. If taken to be an essay solely in jurisprudence, one might justly wonder if it is not at this late date an inflated effort to kick a dead horse. By taking the two themes in juxtaposition, however, we may illumine one by the other: prospective overruling has been neglected because of the blinders of the inherited view; the inherited view retards the intrusion of new light into the judicial process as it is actually practiced. Thus, if we are successful, we shall have slain three dragons with one blow: the

¹⁴ This concept of inhumanity was made explicit with regard to capital punishment. See BABYLONIAN TALMUD, TRACTATE MAKKOTH, 7A.

¹⁵ Interpreting the *lex talionis*, MISHNA BABA KAMMA 8-I says: “He who hurts his fellow-man owes him a five-fold reparation: for the damage, for the pain, for the cure, for the lost time, for the disgrace.”

¹⁶ Hart & McNaughton, *Evidence and Inference in the Law*, Daedalus, Fall, 1958, pp. 40, 55.

discovery theory of law, the resistance to prospective overruling, and the shibboleth that judges do not make law. It is too much to hope, of course, that Blackstone's premises will really be discarded at last; that prospective overruling will immediately appear, shiny and sharp, in every appellate court kit; and that those who should know better will stop saying judges should not make law. But one can try; and perhaps by taking aim at all three together we shall have better luck than has attended attacks upon each singly. It would be a poor lawyer who would not take a worthy brief because his chances of success are slim. Surely not the least of our professional obligations is the humble effort to hand down to our successors, in a form more acceptable to present-day insight and more effective in accomplishing their desired ends, the processes and theories we have gratefully inherited. After all, modesty does not forbid us to recognize that we know more than our predecessors; we know what they knew together with what we know, with a longer span of experience.

THE DEVELOPMENT OF PROSPECTIVE OVERRULING

*The Origin of the Idea*¹⁷

It appears that prospective overruling was first explicitly suggested as a judicial technique by George F. Canfield, for thirty-six years a member of the faculty of the Columbia School of Law. A graduate of Harvard College and Harvard Law School, he studied Roman law in Germany and practiced law as a partner of Harlan Fiske Stone in a firm which, after Stone's retirement from practice in 1923, became Satterlee & Canfield. He was also an officer of the Morris Plan Company and a director of Dun & Bradstreet.¹⁸ It would be hard to fob off Canfield as a doctrinaire academician who did not know anything about how practical matters are handled in relation to law.

In an address to the South Carolina Bar Association in 1917, Canfield urged that a court should recognize a duty to announce a new and better rule for future transactions whenever the court has reached the conviction that an old rule (as established by the precedents) is unsound, even though feeling compelled by stare decisis to apply the old and condemned rule to the instant case and to transactions which had already taken place. Such an announcement, he

¹⁷ I am indebted to Owen Olpin of the California Bar for permission to utilize his share of research done in the preparation of this section in connection with another project on which we were both engaged.

¹⁸ GOEBEL, A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 172-73 (1955).

argued, may safely be made and ought to be made for regulating future transactions.¹⁹

But even before Canfield had explicitly formulated his prospective overruling proposal and propounded it in South Carolina as a "specific reform," there had been cases in which the courts of other southern states had adopted this approach. In 1892 the Alabama Supreme Court, in *Jones v. Woodstock Iron Co.*,²⁰ decided to change an old common-law rule but observed that litigants who had instituted proceedings "under the influence of the decision" in the overruled case should not be done the injustice of being deprived of their expectations under the old rule. The court ruled, therefore, that as to such litigants the old rule would still apply.

There are a number of North Carolina cases which seem to have had no difficulty with prospective overruling. In 1904 the state's highest court held²¹ that its earlier decision²² interpreting a criminal statute should be changed, but that a defendant could not be convicted of a crime for conduct which would not have been criminal under the prior interpretation. Though the judges of the court agreed that their current ruling was "the law," they said they were "embarrassed in applying this ruling to this case." In ordering a new trial, the court said that the defendant was entitled to make his defense under the old and superseded interpretation but that "the construction now put upon the statute will be applied to all future cases."²³ Not long afterward the North Carolina court described and defended what it had said in these words:

This Court, in *State v. Bell*, . . . gave practical effect to the rule that the reversal of a precedent should not be allowed to work an injustice, by requiring that the case then under consideration should be tried anew, not according to the principle as then decided to be the correct one, but according to the former adjudication, simply because the party is presumed to have acted in reliance upon it. Was that not the only fair and proper course to pursue, and would any other have commended itself to our sense of right? The opposite ruling would have met with strong condemnation, as being contrary to the plainest principles of justice.²⁴

These early cases, both civil and criminal, involving both common-law rules and statutory interpretations, made much of the extreme and

¹⁹ Address by George F. Canfield at 24th annual meeting of the South Carolina Bar Association, August 4, 1917, in S.C. BAR ASS'N REP. 17-19, 20-21 (1917).

²⁰ 95 Ala. 551, 10 So. 635 (1892).

²¹ *State v. Bell*, 136 N.C. 674, 49 S.E. 163 (1904).

²² *State v. Neal*, 129 N.C. 692, 40 S.E. 205 (1901).

²³ 136 N.C. at 677, 49 S.E. at 165.

²⁴ *Hill v. Railroad*, 143 N.C. 539, 578, 55 S.E. 854, 868 (1906).

singular plight of the parties who had reason to rely on the earlier, overruled decision. Neither the Alabama nor the North Carolina court apparently gave any thought to the projection of prospective overruling as a general and consistent judicial practice—a regular implement in the court's chest of tools. Canfield seems to have been the first to go that far: to urge its use in *any* case where the court is concerned about overruling because of unfairness to those who have relied on the prior decision. His was the first suggestion that prospective overruling (though he did not call it that) be treated as a "specific reform" and become a systematic judicial practice in appropriate cases.²⁵

The Jurisprudential Dialogue

In 1918 Robert Hill Freeman considered the types of cases in which courts have been especially concerned about the hardship caused by the retroactivity of an overruling decision. First, the courts are most concerned not to inflict a penalty in a criminal case for an act done at a time when the act was lawful under a prior decision. Second, the courts "almost universally" protect a *property right* acquired in reliance upon a prior judicial interpretation of a *statute*. Third, there is a "tendency" in the courts to protect any right acquired in reliance upon a common-law decision.²⁶ Freeman concluded that courts, in any such case, would be better able to face up to their responsibility to "eliminate the influence of a bad precedent" if they adopted Canfield's proposal as a way of eliminating the hardship caused by the ordinarily retroactive operation of an overruling decision. Freeman, perceiving also the connection between resistance to this proposal and the declaratory theory of law, tells us that "a whole-hearted repudiation of the theory that courts only declare law . . . may be necessary." Through such repudiation, he thought, we would find more acceptable "the suggestion that the courts have power to announce a new and better rule for regulating future transactions, while applying the old rule to the case in hand."²⁷

A few years later a suggestion similar to Canfield's was made by none other than John Henry Wigmore.²⁸ In the Barbour-Page

²⁵ In an article published a few months after Canfield's address, Charles E. Carpenter of the Illinois Bar, dealing with the same general theme, appears to be unaware—though he comes close to it—of the possible use of prospective overruling. See Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593, 606 (1917).

²⁶ Freeman, *The Protection Afforded Against Retroactive Operation of an Overruling Decision*, 18 COLUM. L. REV. 230, 250-51 (1918).

²⁷ *Id.* at 251.

²⁸ Canfield's name is not mentioned by Wigmore, nor is his influence, if any, upon Wigmore's thinking known. Cardozo later derived the idea from Wigmore, not Canfield.

Foundation Lectures at the University of Virginia, Wigmore criticized the "absolute dogma" of stare decisis. He pointed out that we make an "unreal fetish" of the concept when we think it will give us the certainty which it obviously does not provide, and when we let it burden us with "all the detriment of ancient law-lumber."²⁹ Then, in 1921, Wigmore warmed to the attack and argued that we should adhere to prior decisions in so far, but only so far, as the security of property and the faith of contracts have been rested upon them. The courts, he argued, should not have any more difficulty than the legislature in making a distinction between forward and backward application. The legislature will say that "this act shall take effect from January first, and shall not be applicable to any contract made or cause of action accrued prior to that date," and the courts, he urged, should experiment with applying the doctrine of stare decisis in the same way.³⁰

In this same year, 1921, Cardozo published *The Nature of the Judicial Process*. Among other central problems which he did not shirk, Cardozo came to grips realistically with the retroactive sweep of an overruling decision.³¹ He concurred in Freeman's observation that the courts had been more disposed to deny retroactivity in cases of changed statutory interpretation than in cases of changed common law,³² but did not feel that the line of division was a hard and fast one or that any adequately justifiable distinction between the two could be made.

Where the line of division will some day be located, I will make no attempt to say. I feel assured, however, that its location, wherever it shall be, will be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetish of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice.³³

Since Wigmore's observations were made at the same time as his own, and had not yet come to his attention, Cardozo did not at this time refer to prospective overruling. He did venture the comment, however, that ordinarily a court will not overrule a decision where it feels

²⁹ WIGMORE, *PROBLEMS OF THE LAW: ITS PAST, PRESENT AND FUTURE* 79-82 (1920).

³⁰ Wigmore, *Editorial Preface* to *SCIENCE OF LEGAL METHOD* at xxxvii-xxxviii (Modern Legal Philosophy Series vol. IX, 1917).

³¹ Cardozo's recurrent interest in this problem may perhaps be explained (as Edmond Cahn has suggested to me) by the injustice he suffered while a student at the Columbia Law School. After he had embarked upon his studies there in a prescribed two-year course, the faculty decided that the course requirements should be extended to three years. Cardozo would not submit—and never got his law degree!

³² CARDOZO, *op. cit. supra* note 3, at 147.

³³ *Id.* at 148-49.

that the retroactive hardship will be great. Cardozo returned to the problem and to its solution through prospective overruling, as we shall see, in an address to the New York State Bar Association a decade later.

In 1924 Robert von Moschzisker, Pennsylvania's Chief Justice, made the first assault on the proposal. It was objectionable to him, first, as "plain and outright legislation by the courts," which he could not stomach. Second, he thought it would turn out to be ineffective, as a practical matter, because parties would not institute appeals to attack an old rule when its overruling would give them no benefit. Third, the attempted future ruling would be only dictum. All in all, it seemed to him that the proposal would require "a decidedly questionable change" in our judicial system. Courts may incidentally affect previously settled rules, he reiterated along the conventional lines, "but it is not their office to make law avowedly to cover future cases." Clinging to the conventional view as though it had an affidavit from heaven, he insisted that courts cannot deliberately lay down two rules, one to govern the instant case and another to control similar cases subsequently arising.³⁴ These views of von Moschzisker seem to me traceable to his adherence to the declaratory theory.

In 1931 Professor Albert Kocourek of Northwestern University, a sometime collaborator of Wigmore, went so far as to draft a model statute designed to introduce and sanction prospective overruling. This statute proceeds upon the basis of the needed distinction between adjudication in the present and rulemaking for the future. It excuses the court from applying a new and more just rule if its application would adversely affect those who had relied on the old rule. The statute is solicitous of all those who have relied on the old rule and not merely the litigants in the instant case. The statute purports to declare the effect of judicial decisions of the supreme court (presumably referring to the top appellate court) and reads in full as follows:

Sec. 1. The final judicial decisions of the Supreme Court are

- (a) Decisive of the rights of the parties.
- (b) Declarative of the rules of law for future application which govern the questions raised on the facts presented and decided.

Sec. 2. (1) If the Supreme Court believes that a declaration of a rule of law theretofore made by the Supreme Court or by any inferior court is unjust, it will decide the instant case in accordance with the juster rule except

³⁴ VON MOSCHZISKER, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426-27 (1924), in *STARE DECISIS, RES JUDICATA AND OTHER SELECTED ESSAYS* 24 (1929).

- (a) Where the former rule is a basis of reasonable and justifiable reliance applicable to the facts of the instant case, or
- (b) Where application of a new rule in its judgment will be unduly disturbing to a standard of reasonable and justifiable reliance as to the existence or non-existence of legal relations of other persons not then before the court.

(2) When the Supreme Court refuses to depart from an existing rule in favor of what it pronounces a juster rule on the questions adjudicated, the expression of that view is evidence for future cases of the existence of reasonable reliance.

Sec. 3. Nothing herein shall abridge the duty of inferior courts to apply the declarations of law made by superior courts.³⁵

In January, 1932, while still sitting on the New York Court of Appeals, Chief Judge Cardozo made his important address on legal realism to the New York State Bar Association. There he espoused prospective overruling. Returning to his concern about the retroactive effect of a needed judicial change in the law, he went over the familiar ground that an outmoded rule is sometimes continued because the court does not want to defeat the reasonable expectations of those who have relied upon it. He repeated his strongly held belief that cases of reliance—and genuine disappointment at a change—are not as widespread as is usually assumed. But in cases where actual reliance is involved, he thought courts should apply the outworn rule to the case at hand, and, as he said, “couple their judgment” with the assertion that they will feel free to apply another rule to transactions consummated in the future. Cardozo’s emphasis was rather on the notice given by the court that the old rule would not be further applied than on the explicit formulation by the court of the new rule. Where a defendant would really suffer an injustice because of his reliance on the old rule, Cardozo asked if it would not be the sensible thing to affirm judgment in the defendant’s favor but say in effect to all those who propose to have similar transactions in the future: we give notice here and now that the earlier statement of the law, now deemed to have been mistaken, may not be trusted in guiding your course hereafter.³⁶

Cardozo met head-on the objection that the judges on the court cannot tie the hands of their successors by a mere dictum which is not part of the judgment itself. What the court is really doing, he argued,

³⁵ Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B. A.J. 180, 182 (1931).

³⁶ Address by Chief Judge Cardozo, New York State Bar Association, January 22, 1932, in 55 REPORT OF N.Y.S.B.A. 263, 294-96 (1932).

is releasing, not tying; if anything, it is untying. What the court is saying, as Cardozo phrased it, is this: "The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice, however, that any one trusting to it hereafter will do so at his peril."³⁷

The effect, he pointed out, would be to leave the law uncertain as to new transactions until the court could speak again. Such uncertainty, however, would not be very grievous, for parties could fairly assume that the dictum would be followed when the opportunity came to turn it into decision. Of course no one could be sure the court would follow along; but when can one ever be *sure* what a court will do? "Whatever evil might inhere in the small margin of uncertainty would be something hardly to be complained of in a system of case law which by the very nature of its existence leaves so many other things unsettled."³⁸

Cardozo thought judges already had the power to proceed along these lines. But should there be any doubt, he thought the power should be conferred explicitly by statute and he praised Kocourek's draft as a satisfactory skeleton. So strongly did he feel that he added that, if necessary, the statute should be reinforced by constitutional amendment.

If this course were pursued, the fruits would be incalculably rewarding: "Much of the evasion, the pretense, the shallow and disingenuous distinctions too often manifest in opinions—distinctions made in the laudable endeavor to attain a just result while preserving a semblance of consistency—would disappear from our law forever. . . ."³⁹

Here, faith, is a golden prize: and we have only to reach out our hand to seize this cornucopia of blessings! But would there be any constitutional difficulties?

Constitutional Approval in Cardozo's Sunburst Opinion

By one of those uncanny twists of fate, before the year 1932 had come to a close, Cardozo, now an Associate Justice of the Supreme Court of the United States, was called upon to write the opinion passing on the constitutionality of the very device he had endorsed. Speaking

³⁷ *Id.* at 296-97.

³⁸ *Id.* at 297.

³⁹ *Ibid.*

for the Court in *Great No. Ry. v. Sunburst Oil & Ref. Co.*,⁴⁰ he expressed the view that the scope, timewise, of the limits of adherence to precedent—its backward relation or forward operation—was a matter for the states to decide for themselves.

Noting that the respondent had relied on the old rule, the Montana court in the *Sunburst* case⁴¹ had adhered to its previous construction of the statute in question but had announced that this interpretation would not be followed in the future.⁴² In denying application for rehearing, the court, though admitting that its earlier interpretation was "erroneous," nevertheless explained that it regarded this interpretation as a part of the statute—as though the interpretation had been written into legislative expression. For this reason, the court announced, the change in the construction of the statute would affect only contracts made thereafter.⁴³ The old rule, said the court, "measured the rights" of the parties in the instant case and prescribed the remedy, "notwithstanding our present views."⁴⁴ Thus the respondent, who had relied on the earlier interpretation, won the appeal, but the earlier interpretation which was the basis of the victory in the adjudication was simultaneously marked for extinction. It was no longer to be taken as a guide for the future.

The appellant carried the case to the Supreme Court of the United States claiming denial of due process. The question was clearly raised: can a court pronounce a new rule of law as the correct rule, but nonetheless apply the old rule in deciding the case at hand? Mr. Justice Cardozo, for a unanimous court, held that it is not a denial of due process for a court to adhere to a precedent in an adjudicated case and simultaneously to state its intention not to adhere to this precedent in the future.⁴⁵

The language and tone of Cardozo's urbane opinion are instructive and broadening, drawing as it does on a wealth of prior cogitation and far-ranging jurisprudential study. Cardozo pointed out that traditionally a court overruling an earlier decision allows the new ruling to have a retroactive effect. In plain words what has the court then effected? The court has made invalid what was valid when it was done. *Sunburst*, however, is a striking case where a court has taken pains to make its

⁴⁰ 287 U.S. 358 (1932).

⁴¹ 91 Mont. 216, 7 P.2d 927, *rehearing denied*, 91 Mont. 221, 7 P.2d 929 (1932).

⁴² See the companion case, *Montana Horse Prods. Co. v. Great No. Ry.*, 91 Mont. 194, 210-12, 7 P.2d 919, 925-26, *rehearing denied*, 91 Mont. 213, 7 P.2d 926 (1932).

⁴³ *Id.* at 215, 7 P.2d at 927.

⁴⁴ *Sunburst Oil & Ref. Co. v. Great No. Ry.*, 91 Mont. 216, 220-21, 7 P.2d 927, 929 (1932).

⁴⁵ *Great No. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932).

new ruling not retroactive. In so doing it cannot be said that the court has infringed the Constitution of the United States.

Realizing that he was dealing with a fate-freighted innovation, Cardozo went on to ring in other variations on the same theme. He puts it first one way. A state may say, as Montana did, that the prior decision of its highest court, now announced as overruled, is nevertheless law for transactions which have occurred up to that time. Or it may hold, in accord with the traditional approach, that the old and discredited rule will be viewed as if it had never been—that the new and reconsidered rule will be regarded as the “true” law from the beginning. The choice for any state will be determined by the juristic philosophy of its judges and their conception of the nature of law. Or, he said, we may put it another way. We may say that the earlier decision has not been overruled at all. We may say that it has been recognized as law anew. At the same time a warning has been issued that transactions arising in the future will be governed by a different rule.⁴⁶ “If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana,” concluded Cardozo, “we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.”⁴⁷

Sunburst involved the interpretation of a statute and the prospective overruling of a prior decision as to the meaning of that statute. But Cardozo made it clear—having by now evidently resolved the issue in his own mind—that it did not matter whether the decision was at common law or involved statutory construction.⁴⁸ As far as the philosophy of the nature of law is concerned, Cardozo thought it was not necessary to choose between the declaratory view and the modern view because the effect of the decision *upon the parties*, when the *Sunburst* doctrine is applied, is the same as if there had not been any weakening of the old and earlier rule. He was not concerned in the opinion—

⁴⁶ *Id.* at 363-66.

⁴⁷ *Id.* at 366.

⁴⁸ The *Sunburst* case came up from the state courts but I see no reason to suppose that a different result would be reached in a federal, constitutionally established court. We have no more warrant for reading Blackstone into the “judicial power” of article III than we have for reading Herbert Spencer’s *Social Statics* into the fourteenth amendment. Blackstone never dreamt of the judicial power asserted by that diligent student of the *Commentaries*, John Marshall. And since federal courts have frequently asserted judicial power to overrule, why should they not prospectively overrule; the greater includes the lesser. On this point, see Mr. Justice Vinson’s opinion in *Waring v. Colpuys*, 122 F.2d 642 (D.C. Cir. 1941), including dicta and cases there cited. The federal aspect of the problem—especially in relation to the line of cases on advisory opinions—presents an interesting opportunity for further exploration.

nor was it his business as it is ours here—to consider the old view's paralyzing effect on the ready acceptance of the doctrine.

Law Review Acclaim

The first barrage of law review comment evoked by the Supreme Court's decision in the *Sunburst* case was without exception favorable. The *Yale Law Journal*, using some sharp words for the traditional theory, expressed approval of the device:

Retroaction, underlain by a highly artificial theory of law, imposes a real hardship through its disregard of the reasonable expectation of the party who has relied on precedent; whereas prospective operation, while also exacting a kind of legal martyrdom, does not involve for the party challenging precedent any corresponding frustration of understanding as to legal status.⁴⁹

The *North Carolina Law Review* also thought it was too bad that the shadow of an obsolete jurisprudence might stand in the way of rapid adoption: "The course of the Montana court would doubtless be more generally followed were it possible to give the *coup de grâce* to antiquated dogma and useless fiction."⁵⁰

The rationale of Cardozo's opinion makes it possible for a court to embrace prospective overruling without a feeling of having left its traditional moorings in precedent theory. But these two comments perceive the high correlation between a ready acceptance of the device and an abandonment of the integral retroactivity implicit in the traditional approach. A judge who has fully liberated himself from the outmoded legal *Weltanschauung* of two centuries ago will have no trouble hailing the device as a sensible and simple way to cut a Gordian knot. Contrariwise, the more courts begin to utilize prospective overruling the more it will become obvious that the judge is in fact inescapably a judicial legislator.

The *Minnesota Law Review* was not deterred by the criticism that the asserted overruling was dictum: "Although such a procedure is open to criticism because the overruling portion of the case is merely dictum, . . . it appears to be a method of achieving a practical and just result."⁵¹ The *Illinois Law Review* was pleased that constitutional doubts had been dispelled and looked forward to the utilization of the device by the courts: "The present decision having removed the doubt as to the constitutionality of the technique used by the court in

⁴⁹ Note, 42 YALE L.J. 779, 782 (1933).

⁵⁰ 11 N.C.L. REV. 323, 329 (1933).

⁵¹ 17 MINN. L. REV. 811, 813 (1933).

the instant case in meeting this important problem, it remains for the courts to adopt this useful tool." ⁵² And the *New York University Law Quarterly Review* commented on the practicality of the device: "However, for all practical effects, the method seems to be satisfactory, and presents a means whereby the courts may correct errors in law which have long been recognized to exist but which have not been overruled because of the devastating effect a retroactive decision would have upon vested property and contract rights." ⁵³

A year later, however, this unanimity was shattered by a note in the *Harvard Law Review* which resurrected the three objections which von Moschzisker had asserted a decade earlier in the same journal, and added a fourth: that retroactivity should not be eliminated because it serves as a brake on courts which otherwise might be tempted to be too facile in overruling. ⁵⁴

Kocourek, in collaboration with Harold Koven, took up the cudgels and replied to these objections the following year. First, they pointed out, if the actual overruling of a prior decision is not condemned as judicial legislation, how can we condemn the practice of giving only a prospective effect to an overruling? Second, parties whose business involves the constant operation of the questioned rule will still carry up appeals if they will benefit by its change, even if the benefit does not accrue until after the instant litigated case. And cases are ordinarily appealed for more than one reason and on more than one ground. Third, the court would feel itself morally bound in a subsequent case to follow its previous dictum upon which parties would have come to rely. Fourth, if we are seeking justice as well as stability, how can we exalt retroactivity simply on the ground that it serves to keep judges from being more inclined to overrule? ⁵⁵

Adverting to Cardozo's analysis of the "paradoxes of legal science," Kocourek and Koven hailed prospective overruling as a merger of antitheses whereby change and stability can be made to co-exist. ⁵⁶ One can almost hear them saying: it is too good to be true; it is like finding the philosopher's stone.

Though Kocourek and Koven strained to show the compatibility of prospective overruling with the declaratory theory—merely "stripping it of its retrospective supplement"—it is not clear whether they

⁵² 28 ILL. L. REV. 277, 280 (1933).

⁵³ 10 N.Y.U.L.Q. REV. 528, 529 (1933).

⁵⁴ Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions*, 47 HARV. L. REV. 1403, 1412 (1934).

⁵⁵ Kocourek & Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 995-96 (1935).

⁵⁶ *Id.* at 973.

were subscribing to the traditional view. Indeed, their acceptance of it is doubtful in view of their subsequent avowal that courts do make law in some sense. Given the intellectual climate of legal analysis a quarter of a century ago, it is not hard to sympathize with their ambivalence. But when you have stripped the traditional view of its *inevitable* retroactivity, what have you left? If retroactivity becomes only a matter of purposiveness on the part of the judge—in any given case he either will or will not give his decision retroactive effect—you have acknowledged the basic autonomy of the judge's mind; and whether you call him a judicial legislator becomes only a matter of semantics.

Kocourek and Koven acknowledged that the *Sunburst* case obviated the need for the proposed model statute and concluded with the dithyramb that if courts would freely adopt the *Sunburst* doctrine there would be no trouble about changing the rules of the common law:

The chains which they have themselves forged and put on will fall away, and we may expect in the course of time a complete renovation of the common law. The important work of the American Law Institute and the extensive researches of specialists now lying unused in the pages of our law reviews and texts will be immediately available. We may achieve not only a renovation of the common law but possibly a renaissance of the common law that will carry us forward to a level higher than ever reached by any system of law.⁵⁷

Cardozo had already promised us the enormous boon of a final release from the painful and devious process of trying to make a new rule fit into the procrustean bed of past doctrine. Once released, we are now reminded, the courts may freely introduce into the law the best thinking of generations of legal scholars who, coincident with the rise of the modern law school, have devoted themselves to enlightened revision of common-law trends.

A few years later, in 1938, I remarked that the device was an instance of how judicial imagination could find a satisfactory way out of a burdensome impasse, pointing out that whenever we are caught between equally unacceptable alternatives—such as total reaffirmation or total rejection—we may find a third solution if we are resourceful enough.⁵⁸

In 1940 a further conscientious effort to find room for the *Sunburst* device within the declaratory theory was made by Orvill C. Snyder. Snyder reluctantly accepted the declaratory theory for no

⁵⁷ *Id.* at 999.

⁵⁸ LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 109-11 (1938).

better reason than that Austin, Holland, Gray, and Bentham had failed to eliminate it from legal thought.⁵⁹ His article serves to emphasize how much casuistry we are spared if we proceed from a base point which has left the declaratory theory behind.

In 1947 the *Harvard Law Review*, reversing its earlier position, came out in favor of the device and, with honorable amends, cogently met three of the chief bugaboos which had been raised, namely: first, that while the court may properly refrain from making a statutory interpretation retroactive, it may not refrain from making a common-law rule retroactive; second, that announcement of the future rule would be mere dictum; and third, that litigants would be disinclined to appeal. With regard to the first bugaboo, it was argued that the only reasonable test should be whether or not there has been reliance and that it really makes no functional difference whether a statute or a common-law rule is involved. With regard to the second, it was pointed out that the staunchest upholder of stare decisis must perceive that, as to any future decisions of the court, a present holding can never be anything but a prophecy and hence a kind of dictum—a promise of a decision to come. With regard to the third, it was pointed out that, aside from the incentive to appeal which remains for business concerns continuously governed by a rule, other parties would appeal in order to convince the court that there should be a full overruling rather than merely a prospective overruling.⁶⁰

Because the precise scope of an overruling might be difficult to ascertain, Edwin Patterson observed in 1953 that the drafting of legislation by a law revision commission is a better way to bring about the needed changes.⁶¹ He may be right that the law revision commission is a better vehicle than a court for eliminating certain types of technical or recondite rules. I am not suggesting that prospective overruling is always advisable for every situation or, when readily utilized by a court, that it should be used invariably. Prospective overruling is doubtless most in order when the appellate court is faced with a case embodying a repetitive fact pattern and there is reason to be deeply concerned about retroactive application, as has been typical in cases of reliance on rules of property or contract law or in criminal cases. But the court does not have to be restricted to that type of case; prospective overruling might also be of moment in tort cases, for example, where

⁵⁹ Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121, 122, 151-52 (1940).

⁶⁰ Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437, 439-40 (1947).

⁶¹ PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 579 (1953).

limited insurance has been taken out by the defendant in reliance on some rule of limited liability.⁶² No court would have to adopt prospective overruling as its fixed and standard practice even in such cases. It is an instrument which may be used. Liberal judges will tend to overrule without too much anxiety about reliance when progress must be made to keep the law updated and in living touch with current realities. Conservative judges will tend to cling to the old rule because of preoccupation with the vested interests which have accrued around it. In such a dilemmatic situation, prospective overruling has the sterling virtues of any beneficent compromise device. One of the main reasons for turning to the law revision commission is that it enables the courts to avoid the retroactive effect of a change in law—which without the *Sunburst* device could not be accomplished by the court. In a carefully considered analysis of the law revision commission made by Judge Fuld this point emerges clearly:

As perusal of the books readily discloses, the courts themselves have on occasion modified or overruled decisions earlier made, in response to current needs and experience. There is no doubt, however, that the interests of stability and certainty, particularly in fields such as those involving property interests and commercial transactions, may often preclude judicial departure from settled rules of law, no matter how antiquated. In such areas, any change of decision made by the courts *would necessarily be retroactive in application*, and the courts have rightly been loath to announce new rules which would adversely affect transactions entered into in reliance on previously declared doctrines.⁶³

⁶² The Illinois court did not hesitate so to apply it in the recent case of *Moliter v. Kaneland Community Unit Dist. No. 302*, 163 N.E.2d 89 (Ill. 1959), *cert. denied*, 362 U.S. 968 (1960), which discarded the traditional tort immunity of school districts as far as Illinois law was concerned. The opinion, while implementing the device of prospective overruling, illustrates the extent to which courts still feel bound by the Blackstonian theory and also how, in a given case, they may apply the *new* rule to the litigants *before it* and restrict it to *future* occurrences. "In here departing from *stare decisis* because we believe justice and policy require such departure, we are nonetheless cognizant of the fact that retrospective application of our decision may result in great hardship to school districts which have relied on prior decisions upholding the doctrine of tort immunity of school districts. For this reason we feel that justice will best be served by holding that, except as to the plaintiff in the instant case, the rule herein established shall apply only to cases arising out of future occurrences. This result is in accord with a substantial line of authority embodying the theory that an overruling decision should be given only prospective operation whenever injustice or hardship due to reliance on the overruled decision would thereby be averted. . . . At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were merely to announce the new rule without applying it here, such announcement would amount to mere *dictum*. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it." 163 N.E.2d at 96-97.

⁶³ Fuld, *The Commission and the Courts*, 40 CORNELL L.Q. 646-47 (1955). (Emphasis added.)

Through prospective overruling the court could often accomplish the needed result with less delay.

Patterson's apprehension that the precise scope of the new rule would be difficult to ascertain is applicable as well to any rule formulated by a court, whether overruling or otherwise. Moreover, a court need not attempt affirmatively to elucidate a new rule of law; it could merely issue a warning, as Cardozo made clear, that this particular case or line of cases can no longer be relied on as law. There seems, therefore, to be no reason why prospective overruling would present any more difficulty than where the overruling is given full retroactive effect. Indeed, were the court to sound such a warning, the legislature itself might be alerted to formulate a statutory change in the rule before the next case should arise. The law revision commission would also be put on its toes. The entire law-changing mechanism would, so to speak, be lubricated.

Sequelae in the Federal Courts

Two opinions in the United States Supreme Court, one by Mr. Justice Black in dissent and one by Mr. Justice Frankfurter concurring in a different case, have invoked *Sunburst* in a plea for prospective operation.

In 1951 Mr. Justice Black, as the sole dissenter in *Mosser v. Darrow*,⁶⁴ suggested a novel application of the *Sunburst* device. In that case, the Supreme Court directed that a trustee, who was not guilty of corruption or bad faith, be surcharged for profits received by employees of the trust who had traded in the securities of the trust with his express permission. The majority cited no statute or case for this view of the fiduciary duty. Only a novel "rule of trustee liability," as Black described it, was involved. Because the trustee had made only an honest mistake, which he could not have known would subject him to this penalty, Black argued that it was unfair to apply the rule retroactively as to him and, citing *Sunburst*, contended that "if the new rule is to be announced by the Court . . . it should be given prospective application only."⁶⁵ Black's is the first suggestion that prospective operation be resorted to where no prior case has been overruled. Here the Court's decision merely treated a fact situation in the light of the fiduciary standard of punctilio.

In a concurring opinion in *Griffin v. Illinois*,⁶⁶ where the Court's opinion was written by Black, Mr. Justice Frankfurter also argued that

⁶⁴ 341 U.S. 267, 275 (1951).

⁶⁵ *Id.* at 276.

⁶⁶ 351 U.S. 12, 20 (1956).

Sunburst should be followed. That case involved a statute which required defendants to submit bills of exceptions as a prerequisite to an appeal from a conviction; the act was held unconstitutional in that it provided no means whereby indigent defendants could secure a copy of the record for this purpose. Frankfurter wanted the Court to make clear that the law as announced in that case was to be regarded as the law from that point forward, and not retroactively. He thought the Court should not upset previous convictions, perhaps releasing from prison many men who had been convicted because they had been unable to pay for transcripts. Espousing Cardozo's reasoning in *Sunburst*, Frankfurter pointed out that "in arriving at a new principle, the judicial process is not impotent to define its scope and limits. Adjudication is not a mechanical exercise nor does it compel 'either/or' determinations."⁶⁷

Frankfurter then thrust the declaratory theory into the morgue and took the occasion to bestow a benison upon Cardozo's jurisprudential insight:

We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. That this is consonant with the spirit of our law and justified by those considerations of reason which should dominate the law, has been luminously expounded by Mr. Justice Cardozo, shortly before he came here and in an opinion which he wrote for the Court [Citation of Cardozo's New York State Bar Association address and *Sunburst* opinion]. Such a molding of law, by way of adjudication, is peculiarly applicable to the problem at hand. The rule of law announced this day should be delimited as indicated.⁶⁸

Self-respect, won by shedding tattered fiction, is no small prize for our courts to cherish. Is not self-respect a condition precedent to public respect?⁶⁹

Frankfurter's concurrence and Black's dissent are impressive milestones on the *Sunburst* doctrine's sporadic journey toward acceptance. Black and Frankfurter represent differing Supreme Court views as to the scope of judicial activism, and yet both of them, among our most experienced and penetrating judges, have been won to the use

⁶⁷ *Id.* at 26.

⁶⁸ *Ibid.*

⁶⁹ I am not commenting upon the substantive point here involved as to the serious question of denial of equal protection. My sole interest is to unfold the use of *Sunburst*.

of the prospective operation of decisions in circumstances deemed by them to be appropriate.

Earlier than either the Black or the Frankfurter opinion is a dissent by Judge Jerome Frank which places the case for prospective overruling flatly on the grounds of its sensibleness.⁷⁰ In a characteristically direct grasp of the nettle, Judge Frank brings to the relation of reliance and prospective overruling the cool perception that the role of precedent is simply whether reliance upon it can rise to the height of an estoppel. In Judge Frank's view, the issue in the case was whether, for tax purposes, a grantor had in fact relied on a prior case, *May v. Heiner*,⁷¹ and failed to relinquish his life interest on the assumption that *Heiner* would apply. There being some doubt whether *Heiner* had been overruled by the Supreme Court, it was Frank's position that it should continue to be regarded as effective law in any instance where it had truly been relied upon. On the question of overruling in relation to purported reliance on an earlier holding, he observed:

The rational basis for judicial reluctance to overrule a gravely unsound decision, with not only prospective but also retroactive effect, would cease to exist if *stare decisis* were treated . . . solely as a sort of estoppel doctrine. Except when a person has detrimentally changed his position because of his knowledge of a decision, I can see no valid reason for adhering to a precedent when, upon subsequent reflection, it shows up as ill-considered and unwise. To assume, without opportunity to prove the contrary, that men have so changed their position—have acted or been inactive because they had in mind a court's decision—and, on that ground, to refuse to wipe it out, no matter how erroneous, does not seem to me to be an intelligent method of administering justice.⁷²

Neglected by the New York Courts

In view of the great authority enjoyed by Justice Cardozo and the spur given to prospective overruling by the *Sunburst* decision, we might perhaps have expected wider utilization of the device in the highest courts of the various states⁷³ and particularly in New York.

⁷⁰ *Commissioner v. Hall's Estate*, 153 F.2d 172, 174 (2d Cir. 1946).

⁷¹ 281 U.S. 238 (1930).

⁷² 153 F.2d at 175.

⁷³ Shortly before his recent and lamented death, Chief Justice Vanderbilt wrote me that he intended to broach the proposal to the other members of the highest court of New Jersey. Judge Traynor divulged at the Columbia Centennial Conference in 1958 that he is endeavoring to win to its use the highest court of California. Litigants would not in natural course make such a suggestion and hence it could only be brought into play by the court's own ingenuity and creative imagination or in briefs *amici curiae*.

Strangely, Cardozo's strong endorsement cut no swathe in the New York Court of Appeals even though, only three years after the *Sunburst* case, an intermediate appellate court in New York found it necessary to grapple with the philosophy underlying an overruling decision in order to determine the extent of its retroactivity.⁷⁴ New York had passed an income tax and had applied it so as to tax royalties derived from copyrights. The United States Supreme Court, having first declared such an application of a similar statute unconstitutional,⁷⁵ later overruled its decision and upheld⁷⁶ the validity of taxes on income so derived. Did this mean that the New York tax had been valid from the beginning? The state tax commission took that position and sought to collect taxes on copyrights for the period between the two decisions. In its opinion sustaining the Commission's position, the court took as its "general principle" the "Blackstone doctrine." The validity of the statute in question was established, not forward from the date of the second Supreme Court decision, but backward to the date of the passage of the statute. The reason given for so holding—and in doing so for following the general (or Blackstonian) "principle" of retroactivity—was that the case did not come within one of the "exceptions" which, as we have seen, the courts make when there has been reliance in a property, contract, or criminal case. The opinion pointed out that when someone, in reliance upon an earlier decision, has done an innocent act or acquired a property or contract right, the application of the Blackstone theory—causing a later overruling decision to be retroactive—is deemed to cause hardship. At the "call of justice," said the court, we have generally refused in such situations to go the whole length of the doctrine in applying the new decision retroactively, because doing so would impair "vested rights" of property or contract. In such *exceptional* cases, the "true rule," said the court, is that a change of judicial construction is to be given the same effect as a change in legislation; that is to say, the courts will give it an effect which is "prospective but not retroactive." But otherwise, as in the instant case, the court regarded itself bound to follow the general principle of retroactivity in accordance with the Blackstone doctrine: "not that the former decision is bad law, but that it never was the law." ⁷⁷

⁷⁴ *People ex rel. Rice v. Graves*, 242 App. Div. 128, 273 N.Y. Supp. 582 (1934), *aff'd mem.*, 270 N.Y. 498, 200 N.E. 288 (1935), *cert. denied*, 298 U.S. 683 (1936).

⁷⁵ *Long v. Rockwood*, 277 U.S. 142 (1928).

⁷⁶ *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932).

⁷⁷ 242 App. Div. at 132, 273 N.Y. Supp. at 588. Here again, I am not concerned with the merits of the decision. I am interested in pointing out that 25 years ago the New York court was still echoing the "brooding omnipresence"—still living in what Carl Becker aptly called the "heavenly city of the 18th century philosophers." Would they still be doing so today, a generation later?

From this analysis emerges an odd paradox from our present vantage point. The courts have broken away from the declaratory theory (they call it an exception) when "vested rights" are involved. Thus when the courts are being most conservative—in their solicitude for property and contract rights—they in effect embrace the Austinian view that the judge is making law just as the legislature does and, therefore, his ruling need not be retroactive and, in justice, should not be retroactive.

REALIST JURISPRUDENCE AND PROSPECTIVE OVERRULING

The spread of prospective overruling may have been impeded not only by the philosophic hurdle of a traditional jurisprudence lingering on in its dying gasps but also and more specifically by the climate of jurisprudential discussion since the thirties. The Realist critique placed its emphasis on other facets of the judicial process. This critique has been in the direction of rule skepticism, as with Llewellyn, which emphasized the malleability of rules, their distinguishability, their multiplicity, and the naïveté of a single-line precedent doctrine. Or it has been in the direction of fact skepticism, as with Frank, which diverted our attention altogether from appellate courts and their rules. The word "rule" tended to become an almost naughty word to those who wanted us to look at the overall behavior of legal officials, or to those who were ashamed of old-fashioned conceptualistic analysis, or to those who sought to stress ethical ends and moral content. *Stare decisis* itself was treated in a much more relaxed way as the "method of sociology" loomed into greater prominence. Precedents tended to be taken, as by Douglas, with considerable salt, especially in the Supreme Court. And generally there was less concern about the evils of overruling and less sympathetic attachment to the framework of *stare decisis*. Precedents tended to thin out to "analogies"; and "adherence to precedent" tended to become "comparative reasoning." Thus the impact of our most vigorous and influential criticism of judicial methods was away from a reform like Canfield's which thinks quite simply in terms of rules and *stare decisis*.

An inveterately "liberal" judge like Brandeis, centrally preoccupied with the progress of the law, does not hesitate to overrule even when there has been reliance. "That is life," Brandeis said to a friend of mine who raised the point with him. Others might feel they should be concerned about reliance only in the familiar trilogy of property, contract, and criminal cases. Still others, like Chief Justice Weintraub of

New Jersey,⁷⁸ might feel disposed to extend their concern to tort cases where the defendant's insurance is inadequate, such as those broadening the liability of charitable hospitals for torts of their physicians. Whether the appellate court should indulge a presumption of reliance beyond this point—or to this point—will doubtless vary with the sophistication and liberality of the judge's mind. Cardozo thought that courts stressed reliance overmuch and that the important factor was whether laymen had really relied, not what lawyers knew the law to be in situations where businessmen customarily did not consult lawyers.⁷⁹

If we now meet the challenge of judge-made law more directly, we shall not only utilize prospective overruling more readily but also assign ourselves a challenging agenda: a fresh and sedulous search into the ways in which judge-made law can be made more effectively, more honestly, more responsibly—less indirectly, less circuitously, less furtively. While we still have a long way to go in recognizing the appellate court as an explicit lawcreating institution, it is nonetheless true that the lawmaking function has assumed a far more self-conscious direction in our own day. Courts have been remaking law with increased frankness and deliberateness and in doing so have been more sensitive to social implications and social data.⁸⁰ There has been a greater tendency on the part of judges to assume overt responsibility for the changes they make. *"The potter, and not the pot, is responsible for the shape of the pot."*⁸¹

Neither the force nor the value of our inherited judicial methods should be underestimated. They are an implicit and constant discipline to any judge who might feel egocentrically licensed to go on a legislative rampage. *"When we examine how a society bends its individual members to function in conformity with its needs, we discover that one*

⁷⁸ N.Y.L.J., March 19, 1959, p. 4.

⁷⁹ The question of whether appellate courts should attempt to get at the facts concerning reliance by such devices as queries to counsel or by remanding the case to the trial court for evidence on that point carries us into areas of appellate aptitude and ingenuity opened up by this Article but beyond its present scope.

⁸⁰ See Judge Bernard Botein's extraordinarily prescient, *The Future of the Judicial Process: Challenge and Response*, 15 RECORD OF N.Y.C.B.A. 152 (1959). He comes out, *id.* at 170, for a liaison "agency" between courts and sources of social data, along the same lines as my earlier proposal in the same journal that a "Legal Commission on Social Data" be established. Levy, *Cardozo Twenty Years Later*, 13 RECORD OF N.Y.C.B.A. 461 (1958). For a further recognition of the need for some such agency, see generally CAHILL, JUDICIAL LEGISLATION: A STUDY IN AMERICAN LEGAL THEORY (1952). As Cahill says: "Surely there was no necessity for a flood of books and articles to tell the judges that theory justified their doing what they were already doing. On the other hand, in so far as it was advocated that judges should legislate, there remained several questions that the theories themselves do not answer. Few of the writers, for example, deal directly with the problem of keeping the judiciary informed." *Id.* at 157.

⁸¹ WHITEHEAD, SYMBOLISM: ITS MEANING AND EFFECT 8-9 (1927).

important operative agency is our vast system of inherited symbolism." ⁸²

But if hypocrisy is the tribute which wickedness pays to virtue, then courts have been freed from the onus of hypocrisy to the extent that their lawmaking is no longer regarded as a departure from judicial chastity. That is a very significant stride, and one which deserves to be elaborated and celebrated. *"The art of free society consists first in the maintenance of the symbolic code; and secondly fearlessness of revision, to secure that the code serves those purposes which satisfy an enlightened reason. Those societies which cannot combine reverence 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."* ⁸³

Since Judge Cardozo spoke in 1932, a quarter of a century has only served to italicize his observation that "we are talking about ourselves and looking into ourselves . . . in a measure that to the thought of our predecessors would have been futile and meaningless or down-right unbecoming." ⁸⁴ An unflinching facing of the facts-of-life about the law-making facet of the appellate process will result, one trusts, in less surreptitious and less creaky devices for accomplishing the task—with less hardship to the litigants and to the community and with more accountability to the bar and to the public. As we recognize increasingly the judge's role as it really is, we must also go about changing the traditional symbolism as it grows more and more otiose. *"It is the task of of reason to understand and purge the symbols on which humanity depends."* ⁸⁵

A generation ago the judicial process was a central preoccupation of American jurisprudence. It can never lose its signal importance, but latterly, as we have broadened our perspective, the roles of the legislature and of administrative agencies have come to the fore, with explicit concern to come to grips with the moral ends of law and

⁸² *Id.* at 72-73.

⁸³ *Id.* at 88.

⁸⁴ 55 REPORT OF N.Y.S.B.A. 263, 264 (1932).

⁸⁵ WHITEHEAD, *op. cit. supra* note 81, at 7. The philosophic truisms which I have culled from Whitehead's ripe wisdom may be said to be illustrated in their application to our present problem in a straightforward avowal by Judge Roger J. Traynor, Associate Justice of the Supreme Court of California: "The responsibility to keep the law straight is a high one. It should not be reduced to the mean task of keeping it straight and narrow. We should not be misled by the cliché that policy is a matter for the legislature and not for the courts. There is always an area not covered by legislation in which the courts must revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration." *The Work of State Appellate Courts*, 24 U. CHI. L. REV. 219 (1957). And again: "Something is lost to the judicial process if judges fail to exert full responsibility for their decisions. Such responsibility imposes its own discipline." *Id.* at 224.

the sense of injustice. In this shift of emphasis, statutory revision may claim primary significance as a vehicle for effective legal change. But judicial lawmaking has its own part to play, in the construction of statutes no less than in common-law revision. It was with the hope of facilitating more effective and defensible judicial lawmaking, along with a simultaneous shift in our basic philosophy of law, that the present analysis has been undertaken.

We started our story a century ago with a pervasively Blackstonian atmosphere, in which, far from using their own judgment to make law, judges were supposed to find the law and declare it. The law was a preexisting law and the judge was Sir Oracle through whom this law spoke. This view compelled retroactivity as a matter of course for any change in the law through judicial decision. This fabulous mythology was riddled in England by Bentham and his friend Austin,⁸⁶ the founder of contemporary jurisprudence in the Anglo-American tradition, and the only voice which spoke to Holmes across the ocean. Holmes and Gray, our most philosophically acute minds, could make no rhyme or reason of our inherited confusion except as they brought to it the Austinian perception that, of course, judges make law.

Because we recognize as a plain fact that judges legislate, and should legislate, does not mean that we sanction incontinent judicial legislation. It means only that judges will legislate with their eyes open and with the expectation that we will criticize them with our eyes open. Judicial legislation will become more accountable and less slippery. There are corpses, runs the French proverb, which it is necessary still to kill. When we have finally laid the ghost of Blackstonianism, we shall be able to encourage the judge to do his thinking more openly and honestly. What a relief that should finally be for him if he has the courage to stand up to his own views instead of running for cover behind a congeries of other men's views embodied in precedents!

Then we could comfortably, not only effortlessly but irresistibly, accept the obvious enough distinction between the judge as policy-maker and the judge as adjudicator. Having seen and seized this distinction, we would no longer need to be troubled about the harsh and unfair retroactive effect of judicial legislation, because we could avoid it, if we think we should, by prospective overruling. We could decide the instant case with due respect for reliance upon the old rule by the party threatened with its overthrow. Usually he is not, in any event, caught as unaware as we think, for almost always the court has

⁸⁶ What hindered Blackstone was "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges." 2 AUSTIN, JURISPRUDENCE 655 (4th ed. 1879).

dropped hints and caveats in the intermediate cases between the failing old rule and the emergent new one. We saw that process in the cases between *Plessy v. Ferguson*⁸⁷ and *Brown v. Board of Education*⁸⁸ on the issue of segregation. He had only to run to read. The same is true of the attrition of privity and of the expanded liability of charitable hospitals.

Here is a vista for the appellate court as a lawcreating institution of tomorrow: a capitalization upon the intellectual investment of Canfield, Wigmore, Kocourek, and Cardozo, from which Black, Frank, and Frankfurter have already drawn interest. In giving to their earnest thought on this phase of law advancement a measure of respectful attention, and in building upon their contribution, we may perhaps even indulge in the extravagant expectation that our own contributions will not go unheeded by our own contemporaries and successors. Thereby shall we have avoided the status of the luckless mule, bastard and impotent offspring of an ass and a horse, of whom Aristotle sadly remarked that he had neither pride of ancestry nor hope of posterity.

We jettison an enormous weight of excess baggage in our professional labors once we have put Blackstonianism behind us and recognized appellate courts for what they are and do. Handsome is that handsome does—courts are what courts do. We have, in our time, given much lip service to the functional and institutional approach, but we have balked at readily absorbing its fundamentals into our work-a-day techniques and patterns. At the bottom of the strange neglect of how judges should cope with “legislative” facts—those having effects beyond the issue between the parties, as contrasted with mere “adjudicative” facts—is “the traditional reluctance of the courts to admit that they are making law at all.” The law which the courts make—which we always rush to circumscribe as “interstitial” or “elaborative” law—is “made or supposed to be made under the discipline of an effort to show a reasoned connection between the newly made law and established doctrines of law which underlie and justify it.”⁸⁹

After registering a protest against this traditional masquerade which tries to cover up the transformation of the law judicially made in response to demands for adaptation, Mr. Justice Douglas said, appropriately enough in his Cardozo Memorial Lecture:

But the more blunt, open, and direct course is truer to democratic traditions. It reflects the candor of Cardozo. The principle of

⁸⁷ 163 U.S. 537 (1895).

⁸⁸ 347 U.S. 483 (1954).

⁸⁹ Hart & McNaughton, *Evidence and Inference in the Law*, Daedalus, Fall, 1958, pp. 40, 55.

full disclosure has as much place in government as it does in the market place. A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe.⁹⁰

Out of such refreshing honesty would come many benefactions. Not the least would be a reduction of the dead weight of redundant rationalization in judicial opinions and a freer utilization of critical scholarly studies. Another negative advantage of no small importance would be a limitation on the "anarchical proliferation" of our case law.⁹¹ Prospective overruling is only one of many positive ways of placing newly formulated judicial law on a sound basis. These other ways remain a program of inquiry. The future beckons us to experiment, once the dead past has buried its long since dead. For when we see the judge as himself, a partial legislator in a period of legislative dominance, we shall be freed to devote a disciplined and unencumbered imagination to the task of aiding judicial lawmakers to perform their duties with facilities more appropriate to their function.

⁹⁰ Douglas, *Stare Decisis*, 4 RECORD OF N.Y.C.B.A. 152, 175 (1949).

⁹¹ See Wechsler, *Reflections on the Conference*, III Columbia Law Alumni Bulletin 2, Dec. 1958, p. 5.

A NOTE ON BACKGROUND AND INDEBTEDNESS

In 1958 the Columbia Law School held its centennial conference on Legal Institutions: Today and Tomorrow. In connection with plans for this conference I had many talks with Judge Stanley H. Fuld of the New York Court of Appeals on phases of the judicial process. Though both Realist Jurisprudence and Prospective Overruling were substantially spawned and incubated by Columbia, they received scant attention at the conference. I agree with David Riesman that the paucity of significant research generated by the Realist movement (as distinguished from its marked influence on law teaching and law practice) may cause disillusionment to set in, if it has not done so already. Accordingly, though I could not aspire to supply the missing Voice, I thought I might reach the decibel of a stage whisper.

In the generation since the Realist movement was launched, I have been disappointed to see this intellectual ferment subside when, now more than ever, we need the clarity, candor, and directness of its approach. Doubtless the movement suffered in its inception because it seemed to be a legal analogue to New Deal developments and, in retrospect, we can see how it also reflected the parallel effort in the social sciences at that time to insulate "values" in the scrupulous effort to be realistic. But now the balance has set in, not only in jurisprudence, but in social studies and in post-Freudian psychiatry. It is not realistic to be only realistic and to try to look only at what is *there*, because the value-flavors are also there, as are the potentialities implicit in the flux, including the changes which may be wrought by the very efforts of the Realist critics themselves.

I have much pleasure, accordingly, in recording my thanks for comments on this paper from friends on the bench and at the bar, on law faculties and in business (where I have drawn on a department store executive with a tropism toward decision-making, which sociologists have noted in this line of business) and I should like to mention particularly David Berks, Elliott Cheatham, Robert L. Hale, Paul Hays, Arthur Miller, Alexander Lindey, Louis Tepper, and Herbert Wechsler. None of them is inculpated in any of my errors or ineptitudes. My New York colleagues-in-interest, Harry Jones and Edmond Cahn, have been more than generous in their evocations.