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JUDICIAL CANDOR: DO AS WE SAY, NOT AS WE DO

JOHN J. KIRCHER*

I. INTRODUCTION

One who is law-trained should never believe that *stare decisis* carries with it a commitment to intellectual or moral stagnation. For example, *Plessy v. Ferguson*¹ was followed, thankfully, albeit much too late, by *Brown v. Board of Education*.² The serious student of the law is never taken aback when an appellate court reverses one of its prior decisions on a matter of constitutional or common law. One may disagree with the wisdom of the reversal, but not with the right of the court to change its mind.³ When a court reverses in such a matter, however, it usually articulates its reasons for so doing — it attempts to demonstrate why its prior ruling was “bad law” or at least why the old ruling is out of tune with current policy concerns. *Brown*, after all, did discuss the injustices wrought by *Plessy*.

There is one area of work, however, as to which courts may not be as forthcoming and candid. In fact, at times after analysis of that work, one is left with the impression that the jurists may be engaged in a cover-up of their past efforts. The manner employed makes it appear as if, at present, they are employing a clean slate for a matter of first impression. The area is statutory construction.

In this essay, I will provide an example of the clean slate approach from cases in one jurisdiction.⁴ Thereafter, I will discuss what I consider to be

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1. 163 U.S. 537 (1896), *rev'd*, 347 U.S. 483 (1954).

2. 347 U.S. 483 (1954).

3. It has been suggested that the Supreme Court, for example, has adopted a more relaxed approach to reconsideration of its constitutional doctrine since, because of the difficulty of amending the Constitution, the Court is the only effective resort for changing obsolete constitutional doctrine. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988). As to its common law rules, it is beyond doubt that a court has the power to change the doctrine it created, so long as in doing so, it does not deprive a party of a constitutionally protected right. See *Hunter v. School Dist. of Gale-Ettrick-Trempealeau*, 97 Wis. 2d 435, 293 N.W.2d 515 (1980); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1961).

4. Wisconsin was selected for this illustration. Any other jurisdiction could have been chosen. However, Wisconsin is my home and it would have been cowardly to select the work of a court hundreds of miles away, whose Justices I do not know, and within the reach of whose jurisdiction I may never be.

the important implications of this conduct. Finally, I will offer suggested reform.⁵ The jurisdiction which was selected for this analysis and the issue before its court in the cases which will be discussed are immaterial. Another jurisdiction could have been selected and a similar set of cases found.⁶ What is important in this analysis is the means by which the court achieved a desired result, a means which puts the integrity of the process in issue.

II. JUDICIAL COMMITMENT

On January 30, 1973, the Wisconsin Supreme Court decided *Peterson v. Roloff*.⁷ The issue presented to the court, in a medical malpractice action, was whether it should adopt the rule that a tort statute of limitations begins to run when the plaintiff is aware of the harm sustained, or in the exercise of reasonable diligence should have been so aware — the so-called “discovery rule.” The court rejected adoption of the rule, holding it to be established

5. In relation to the CODE OF JUDICIAL CONDUCT (1972).

6. See, e.g., *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971) (judicial adoption of the discovery rule in attorney malpractice action was justified, in part, by the fact that the legislature had adopted the discovery rule in medical malpractice actions); *Layton v. Allen*, 246 A.2d 794 (Del. 1968) (construed statute of limitations to encompass discovery rule in medical malpractice cases after determining that the statutory language “date upon which it is claimed that such alleged injuries were sustained” was ambiguous); *Holmes v. Iwasa*, 104 Idaho 179, 657 P.2d 476 (1983) (recognized that, after the court extended the judicially adopted discovery rule from instances in which the doctor left a foreign object in the plaintiff’s body to instances of misdiagnosis, the Idaho Legislature substantially amended the statute of limitations to limit the scope of the judicially adopted discovery rule); *Lipsey v. Michael Reese Hosp.*, 46 Ill. 2d 32, 262 N.E.2d 450 (1970) (court adopted the discovery rule in medical malpractice action despite the fact that the Illinois Legislature in the previous year limited its adoption of the discovery rule to foreign object cases only); *Myrick v. James*, 444 A.2d 987 (Me. 1982) (adopting the discovery rule for cases involving acts of malpractice occurring in the course of surgical procedures despite the fact that the Maine Legislature, on several occasions, failed to pass similar provisions); *Franklin v. Albert*, 381 Mass. 611, 411 N.E.2d 458 (1980) (judicial adoption of the discovery rule even though the Massachusetts Legislature rejected three bills encompassing the discovery rule); *Sorenson v. Pavlikowski*, 94 Nev. 440, 581 P.2d 851 (1978) (redefining the term “accrue” to include the discovery rule in attorney malpractice actions); *Melnyk v. Cleveland Clinic*, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972) (court adopted the discovery rule in medical malpractice actions even though the court previously stated that it was unable to judicially adopt the discovery rule because it had been so clearly rejected by the legislature); *Berry v. Branner*, 245 Or. 307, 421 P.2d 996 (1966) (court adopted the discovery rule in medical malpractice actions despite the legislature’s rejection of two bills with similar provisions); *Wilkinson v. Harrington*, 104 R.I. 224, 243 A.2d 745 (1968) (adopting the discovery rule after determining that a creative judicial role complements the role of the legislature rather than conflicts with it); *Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974) (in determining that the legislature did not intend an absurd result, the court overruled precedent which held that the statute of limitations began to run at the date of injury from a tortious act and adopted the discovery rule); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967) (court adopted discovery rule in medical malpractice cases which was later abrogated by the Texas Legislature).

7. 57 Wis. 2d 1, 203 N.W.2d 699 (1973).

law in the state that a cause of action for medical malpractice "accrues," and thus the statute of limitations begins to run, at the time a negligent act results in harm.⁸ The court concluded that any change to a discovery rule would require legislative action.⁹ Actually, the case can be said to stand for the proposition that the discovery rule would not be applied in tort actions generally since the court had previously rejected the discovery rule in an action against a bank for negligently honoring a check;¹⁰ in a negligence action against architects;¹¹ and in a legal malpractice action.¹²

On the same day of the mandate in *Peterson*, the court decided *Estate of Kohls v. Brah*.¹³ In that case, the court was asked to determine which of two limitation statutes should apply in an action for dental malpractice. The appellant in the action conceded that the court had already construed the statutes, but argued that circumstances had changed sufficiently to justify a reinterpretation. In response, the court, noting that the appellant misconstrued its role vis a vis the legislature, stated:

Courts are not responsible for the law. It is their province to declare and apply it and to construe statutes and constitutions in accordance with the will of the lawmaking power, where construction becomes necessary. *When such construction has once been given to a law and finally established as a part thereof, it is as much a part of it as if embodied therein in plain and unmistakable language. . . . When that situation exists it is the province of the legislature alone to change the law. The court should not attempt it, whatever may be the notions of judges as to what the law ought to be.*¹⁴

Thus, on January 30, 1973, the court was well committed to the principle that construction of a statute, once given by a court, becomes a part thereof unless the legislature, by subsequent action, amends the statute to effect a change. In another case the court stated the same principle in somewhat different language:

8. At the time, WIS. STAT. § 893.14 (1972) required an action to be commenced within a specified time "after the cause of action has accrued." If not so commenced, the action would be barred. That principle is not embodied in WIS. STAT. § 893.04 (1987-88). The concept that the statute begins to run with the presence of a tort and accompanying harm was earlier adopted in a product liability action brought under the Wisconsin version of RESTATEMENT (SECOND) OF TORTS § 402A (1965). *Holifield v. Setco Indus.*, 42 Wis. 2d 750, 168 N.W.2d 177 (1969).

9. *Peterson*, 57 Wis. 2d at 7, 203 N.W.2d at 702.

10. *Peppas v. Marshall & Ilsley Bank*, 2 Wis. 2d 144, 86 N.W.2d 27 (1957).

11. *Milwaukee County v. Schmidt, Garden & Erikson*, 43 Wis. 2d 445, 168 N.W.2d 559 (1969).

12. *Denzer v. Rouse*, 48 Wis. 2d 528, 180 N.W.2d 521 (1970).

13. 57 Wis. 2d 141, 203 N.W.2d 666 (1973).

14. *Id.* at 146, 203 N.W.2d at 668 (quoting *Eau Claire Nat'l Bank v. Benson*, 106 Wis. 624, 627-28, 82 N.W. 604, 605 (1900)) (emphasis added).

Where a law passed by the legislature has been construed by the courts, legislative acquiescence in or refusal to pass a measure that would defeat the courts' construction is not an equivocal act. The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged; for the principle of the courts' decision — legislative intent — is a historical fact and, hence, unchanging. *Thus, when the legislature acquiesces or refuses to change the law, it has acknowledged that the courts' interpretation of the legislative intent is correct. This being so, however, the courts are henceforth constrained not to alter their construction; having correctly determined legislative intent, they have fulfilled their function.*¹⁵

Seven years after *Peterson* the court decided *Rod v. Farrell*.¹⁶ The action was for medical malpractice. The patient did not discover his harm until approximately twenty-one years after the operation alleged to have produced it. The court again refused to adopt the discovery rule and, as in the past, held that the statute of limitations began to run at the time the negligent act produced the harm. The court, quoting *Peterson*, noted that it had repeatedly stated: “[I]f a change in the statute of limitations was in order, the legislature was the proper body to make that change. . . . [W]e believe that the change of the statute of limitations is peculiarly a question of policy which should be left to the legislature to make if so convinced.”¹⁷

The court also noted that in *Peterson* it made a recommendation to the legislature that the statute of limitations for medical malpractice be amended as to accrual and that, thereafter, several bills were introduced to change the statute, including one to adopt a discovery rule. Although none of the proposals became law, the court observed that it was “clear from this legislative history that the legislature is aware of the problem of the statute of limitations in medical malpractice actions and is struggling with the policy issues involved.”¹⁸

Based on *Rod* and its precursors, one could be very confident in saying that, on May 6, 1980, the Wisconsin Supreme Court continued its commitment to the principle that a statute of limitations in a tort action begins to run at the time tortious activity produced harm or injury, regardless of when the person harmed became or should have become aware of the

15. *Zimmerman v. Wisconsin Elec. Power Co.*, 38 Wis. 2d 626, 633-34, 157 N.W.2d 648, 651 (1968) (emphasis added).

16. 96 Wis. 2d 349, 291 N.W.2d 568 (1980).

17. *Id.* at 353-54, 291 N.W.2d at 570 (quoting *Peterson v. Roloff*, 57 Wis. 2d 1, 5-6, 203 N.W.2d 699, 701 (1973)).

18. *Id.* at 355, 291 N.W.2d at 571.

harm.¹⁹ The discovery rule, it appeared clear, would only become applicable for tort cases in Wisconsin if the state legislature acted to create such a rule.

Following the decision in *Rod*, the Wisconsin Legislature did create a limited discovery rule for medical malpractice actions when it completely revised the chapter of the Wisconsin Statutes concerning statutes of limitations.²⁰ In that revision, the legislature did not create a discovery rule for any other form of tort action. At approximately the same time, the legislature considered and rejected a discovery rule applicable in all personal injury actions.²¹ Certainly, if the legislature wanted to create a discovery rule for all tort actions, or for those tort actions involving injury to the person, it had the perfect opportunity to do so when it made the wholesale revision of the statute of limitations chapter. Nevertheless, the legislature focused on medical malpractice, demurred as to a broader discovery rule for all personal injury actions, and left all else alone. What occurred was not the dreaded legislative acquiescence by silence.²² The revision of the statute of limitations chapter could be seen as an acknowledgment by the legislature that the court was correct in its past interpretation of the time a tort cause of action accrues — and a refusal by the legislature to change the rule except as to actions against health care providers.²³

19. It may be claimed that a case argued one day before and decided the same day as *Rod* carved out an exception to that rule. *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Co.*, 96 Wis. 2d 314, 291 N.W.2d 825 (1980). For a discussion of its significance, see *infra* notes 39-44 and accompanying text.

20. 1979 Wis. Laws 323 (effective July 1, 1980) which substantially revised Chapter 893 of the Wisconsin Statutes and created § 893.55 providing a limited discovery rule applicable to actions against health care providers. The proposal which led to the revision came to the legislature from the Wisconsin Judicial Council. This author was a member of that Council and chair of its committee which drafted the proposal. The bill which resulted in Chapter 323 was sent to the governor by the legislature on May 2, 1980. *Wisconsin Assembly Record Book* (May 2, 1980). It was approved by the governor on May 7, 1980. *ASSEMBLY OF WISCONSIN LEGISLATIVE PROCEEDINGS OF 1979*, at 188 (1981).

21. 1979 Wisconsin Assembly Bill 327, introduced March 21, 1979, provided in pertinent part: “[A]n action to recover damages for injuries to the person shall be commenced within 3 years after the person injured discovers the injury or reasonably should have discovered the injury whichever first occurs, or be barred.”

22. *Vincent v. Pabst Brewing Co.*, 47 Wis. 2d 120, 140, 177 N.W.2d 513, 522 (1970) (Hallows, C.J., dissenting) (“The doctrine of acquiescence by silence at best is a scapegoat doctrine . . .”).

23. If you think you have read that somewhere before, check *supra* note 15 and accompanying text.

III. JUDICIAL COVER-UP

On July 1, 1983, three years to the day after the effective date of the revision of the statute of limitations chapter, the court decided *Hansen v. A.H. Robins Co.*²⁴ The case involved the certification of a question of law from the United States Court of Appeals for the Seventh Circuit to the Wisconsin Supreme Court.²⁵ The issue certified was stated as follows:

When does a cause of action accrue within the meaning of the Wisconsin statute of limitations for personal injury actions, Wis. Stat. secs. 893.04, .54, when the injury to the plaintiff was caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance?²⁶

The case which resulted in the certification involved harm alleged to have been sustained by the plaintiff as a result of her use of a "Dalkon Shield" intrauterine device (IUD). The device was inserted into the plaintiff on May 28, 1974. In May, 1978, she began to experience various physical problems and subsequently, on June 13, 1978, consulted a doctor about her condition. He was not the doctor who inserted the IUD. He told her it was unlikely her symptoms were associated with pelvic inflammatory disease. On June 26, 1978, the plaintiff consulted with the doctor who inserted the IUD. He removed it and advised the plaintiff that she probably had pelvic inflammatory disease. She recovered from the infection. However, it rendered her sterile. She commenced an action in federal district court against the IUD manufacturer on June 24, 1981 — two days short of three years after her discovery of the link between her original symptoms and the IUD, but approximately three years and one month after the onset of symptoms later diagnosed as pelvic inflammatory disease.

The federal district court determined that under Wisconsin law a personal injury claim accrues and the statute of limitations begins to run when a negligent act causes the plaintiff to sustain some injury.²⁷ Thus, it held that since the plaintiff was injured some time prior to her June 13, 1978, visit to the doctor, her claim was barred by the three-year statute of limitations. This resulted in the appeal which led to the certification to the Wisconsin Supreme Court.

The supreme court did not disagree with the interpretation of the status of Wisconsin law by the district court. Rather, it decided that the time had

24. 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

25. Wis. Stat. § 751.12 (1983) is the Wisconsin version of the Uniform Certification of Questions of Law Rule.

26. *Hansen*, 113 Wis. 2d at 552, 335 N.W.2d at 579 (footnote omitted).

27. *Id.* at 553, 335 N.W.2d at 579. It is not altogether surprising that the district court so concluded in light of the very clear state of Wisconsin law it must have found.

come to adopt a discovery rule for all tort actions other than those already governed by a legislatively created discovery rule.²⁸

In so doing, the court asserted that in the past it declined to adopt a discovery rule because "change of the statute of limitations is peculiarly a question of policy which should be left to the legislature."²⁹ The court then stated:

This court has the power to establish when claims accrue. With the exception of sec. 893.55, Stats., [limited discovery rule in health care provider actions], the Wisconsin statutes do not speak to this issue. In the past this court has fixed the time of accrual for tort claims, and we retain the authority to do so now. Past deference to the legislature does not preclude our adoption of the discovery rule. As Justice Hallows pointed out in his dissent in *Peterson v. Roloff*, *supra*, this court has made legal changes in at least two instances after previously deferring to the legislature.³⁰

The foregoing statement needs to be examined closely since, like modern beach fashions, what it reveals is interesting, but what it hides is fundamental. First, the two instances referred to by the court in which it made changes in the law after initially deferring to the legislature both involved common law rules — parental immunity³¹ and charitable immunity.³² It is one thing, and not uncommon, for a court to defer to a legislature when a litigant asks the court to change a common law rule and then, subsequently, for the court to change the rule because of legislative inaction. It is quite another thing for the court to change a legislatively created rule it previously interpreted and which, while so doing, stated: "[I]t is the province of the legislature alone to change the law."³³ The latter situation is certainly not initial deference to the legislature. It is recognition of the respective roles of each body of government.

28. See *supra* note 20 (actions against health care providers). For an interesting bit of judicial legerdemain in which, subsequent to *Hansen*, the court applied the discovery rule to a medical malpractice action which should have been governed by *Rod v. Farrell*, see *Kohnke v. St. Paul Fire & Marine Ins. Co.*, 144 Wis. 2d 352, 424 N.W.2d 191 (1988).

29. *Hansen*, 113 Wis. 2d at 556, 335 N.W.2d at 581 (quoting *Peterson v. Roloff*, 57 Wis. 2d 1, 5, 203 N.W.2d 699, 701-02 (1973)).

30. *Id.* at 559-60, 335 N.W.2d at 582.

31. Compare *Schwenkhoff v. Farmers Mut. Auto. Ins. Co.*, 11 Wis. 2d 97, 104 N.W.2d 154, *cert. denied*, 364 U.S. 903 (1960) (abolition of parental immunity deferred to legislature) with *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) (parental immunity abolished following legislative inaction).

32. Compare *Smith v. Congregation of St. Rose*, 265 Wis. 393, 61 N.W.2d 896 (1953) (abolition of charitable immunity deferred to legislature) with *Kojis v. Doctors Hosp.*, 12 Wis. 2d 367, 107 N.W.2d 292 (1961) (charitable immunity abolished following legislative inaction).

33. *Estate of Kohls v. Brah*, 57 Wis. 2d at 146, 203 N.W.2d at 668 (citation omitted). See *supra* notes 14 and 15 and accompanying text.

Second, the statement by the court that, except for Section 893.55, the Wisconsin Statutes do not speak to the issue of accrual, is in direct conflict with previous pronouncements of the court. As noted earlier, prior decisions of the court established that a tort claim accrues when the tortious conduct produces harm to the plaintiff.³⁴ The court acknowledged that fact in *Hansen*.³⁵ Nowhere mentioned in *Hansen*, let alone distinguished, is the principle that once a statute has been construed by the court, the construction, to which the legislature acquiesced "is as much a part of [the statute] as if embodied therein in plain and unmistakable language."³⁶ If that precept is true, and its repeal cannot be found,³⁷ the Wisconsin Statutes certainly did speak to the issue of accrual. Except for actions against health care providers, the statutes stated, pre-*Hansen*, that a tort cause of action accrues at the time tortious conduct causes harm to the plaintiff, regardless of the plaintiff's knowledge of the fact of harm. This we know because, prior to *Hansen*, the court told us so.³⁸

It should be noted that in *Hansen* the court relied on its decision in *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Construction Corp.*³⁹ to support its adoption of a discovery rule. The court decided *Wisconsin Natural Gas* on May 6, 1980, the same day it decided *Rod v. Farrell*.⁴⁰ The case involved a suit by the gas company to recover damages alleged to have been caused by the negligent installation of a fourteen-mile natural gas pipeline. The faulty installation resulted in damage to the pipeline which occurred gradually and was evidenced by an increasing incidence of a condition called a "casing short." The first casing short was discovered in May 1969. The gas company filed its action in June 1975. The defendant argued that the claim was barred by the six-year statute of limitations applicable to property damage actions. In concluding that the action was timely commenced, the court observed that "[a] single casing short is not the type of evidence that this court considers to be 'sufficiently significant to alert the

34. See *supra* notes 8-23 and accompanying text.

35. *Hansen*, 113 Wis. 2d at 554, 335 N.W.2d at 580 ("Therefore, we have held that tort claims accrue on the date of injury.").

36. *Brah*, 57 Wis. 2d at 146, 203 N.W.2d at 668 (citation omitted). See *supra* note 14 and accompanying text.

37. In fact, three years after *Hansen*, a unanimous court declared that the principle continued to control in Wisconsin. See *Delvaux v. Vanden Langenberg*, 130 Wis. 2d 464, 457, 387 N.W.2d 751, 756-57 (1986), citing as controlling the text accompanying *supra* note 15.

38. See *supra* note 14 and accompanying text.

39. 96 Wis. 2d 314, 291 N.W.2d 825 (1980).

40. 96 Wis. 2d 349, 291 N.W.2d 568 (1980).

injured party to [sic] possibility of a defect.’”⁴¹ In *Hansen*, referring to that observation, the court noted: “Like the discovery rule, the foregoing reasoning indicates that a claim does not accrue until the claimant knows or should know of the injury.”⁴²

The court overstated the impact of its analysis of the statute of limitations issue in *Wisconsin Natural Gas*. In Wisconsin, the statute of limitations is an affirmative defense and therefore the defendant must not only raise the statute but also must establish how it applies to bar the plaintiff’s claim.⁴³ Thus, the defendant’s ability to prove only that the gas company knew of one casing short in May of 1969 did not establish that there was both tortious conduct and harm to the gas company at that time. In fact, evidence was presented that casing shorts were common even in well designed and constructed pipelines. Thus, the holding in *Wisconsin Natural Gas* is more consistent with adherence by the court to the old rule of accrual of a tort claim — tortious conduct coupled with harm to the plaintiff — than it is with adoption of the discovery rule. There is no mention of the discovery rule in the case nor is there mention of any of the cases previously cited which rejected the discovery rule. The briefs filed in the case are likewise silent as to those cases or as to any struggle over whether a discovery rule should be adopted.

One would expect that since *Wisconsin Natural Gas* and *Rod v. Farrell* were decided on the same day and were argued one day apart, a departure from the traditional rule as to when tort causes of action accrue would have been noted somewhere. In fact, a careful reading of *Wisconsin Natural Gas* discloses the statement of the court that the gas company “did not actually suffer an injury until a number of ‘casing shorts’ rendered the cathodic protection process ineffective and necessitated an extensive excavation and repair program to clear the pipeline of the shorts.”⁴⁴

What occurred in *Hansen*, therefore, was not only a change of principle by the Wisconsin court, but also a sub silentio usurpation of legislative

41. *Wisconsin Natural Gas*, 96 Wis. 2d at 325, 291 N.W.2d at 830 (quoting Tallmadge v. Skyline Constr., Inc., 86 Wis. 2d 356, 359, 272 N.W.2d 404, 405 (Ct. App. 1978)).

42. 113 Wis. 2d at 558, 335 N.W.2d at 582.

43. Wis. Stat. § 802.02(3) (1987-88).

44. *Wisconsin Natural Gas*, 96 Wis. 2d at 325, 291 N.W.2d at 831. Likewise, Tallmadge v. Skyline Constr., Inc., 86 Wis. 2d 356, 359, 272 N.W.2d 404, 405 (Ct. App. 1978), cited in *Wisconsin Natural Gas* for the “sufficiently significant to alert the injured party to the possibility of a defect” concept, is similarly unpersuasive as authority for the adoption of a tort discovery rule. It is only concerned with the identification of the fact of an injury to determine accrual or a cause of action for property damage under the traditional rule requiring tortious conduct and harm for the statute of limitations to commence running.

power.⁴⁵ The issue is not whether it is meritorious for a discovery rule to be applied to a statute of limitations. That, certainly, is not what this essay is about. The issue is whether a court should conceal its own precedent in the process of attempting to achieve what it considers to be a meritorious result.

In fairness, it should be noted that exceptions exist to the principle of the immutability of a court's construction of legislation.⁴⁶ For example, it has been recognized that "when a word, such as obscenity, is used without an express definition in the statute, the legislature must intend the courts to furnish its meaning from time to time as the constitutional concept of that word varies."⁴⁷ In addition, it has been argued that the immutability rule is inapplicable when there is a conflict in the decisions of the court concerning the proper construction of a statute and the legislature fails to act to resolve the conflict.⁴⁸ Likewise, the rule has been held inapplicable when the decision of the court construing the statute is followed by a period of legislative inaction and the court subsequently concludes, unequivocally, that its prior construction is contrary to the clear and express language of the statute.⁴⁹

None of those exceptions to the rule applied to the situation which confronted the court in *Hansen*. The court never mentioned them nor fashioned any others. There was no need because in *Hansen* it treated cardinal principles of statutory construction, which predated that case and which it fashioned, as if they never were articulated.

IV. THE IMPLICATION

It is considered a breach of professional responsibility for an attorney to knowingly fail to disclose to a court legal authority, controlling in the jurisdiction, directly adverse to the position of the attorney's client and not disclosed by opposing counsel.⁵⁰ While there is no comparable provision in

45. See *supra* note 14 and accompanying text. As the court stated in *Zimmerman*, see *supra* note 15 and accompanying text, after the legislature has acquiesced in the interpretation of a statute by the court, only the legislature can change an interpretation. What the court did in *Hansen* was to assume to itself the authority of the legislature. Lest I be misunderstood, I do not endorse the view that courts should adhere to what Professor Eskridge has described as the "super-strong presumption" of the correctness of prior statutory interpretation. Eskridge, *supra* note 3, at 1362. In fact, I believe he is correct in his support for an "evolutive" form of statutory interpretation. My sole concern is that a court be candid and forthcoming if and when it makes a doctrinal shift from one approach to the other. See *infra* notes 52 and 53 and accompanying text.

46. 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 49.10 (4th ed. 1984).

47. *State ex rel. Chobot v. Circuit Court*, 61 Wis. 2d 354, 366-367, 212 N.W.2d 690, 696 (1973).

48. *Associated Hosp. Serv. v. City of Milwaukee*, 18 Wis. 2d 183, 193, 118 N.W.2d 96, 102 (1962) (Currie, J., dissenting).

49. *Green Bay Packaging, Inc. v. DILHR*, 72 Wis. 2d 26, 35, 240 N.W.2d 422, 428 (1976).

50. Model Rules of Professional Conduct Rule 3.3(a)(3) (1983).

the Code of Judicial Conduct which would require a court to disclose and expressly overrule or distinguish past precedent contrary to the position it intends to adopt, the Code does provide:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself [sic] observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.⁵¹

The proposed Wisconsin Code of Judicial Ethics differs substantively from the ABA Code only in the following concluding statements:

This Code, designed to further that purpose, is intended to apply to every aspect of judicial behavior except purely legal decisions. Legal decisions made in the course of judicial duty on the record are subject solely to judicial review. Only in this way can the independence of the judiciary be preserved. The provisions of this Code should be construed and applied to further these objectives.⁵²

The foregoing statement may have merit as to trial or intermediate appellate courts. Obviously, however, the chances for judicial review of a decision of the highest appellate court of a state are limited. But for a motion for rehearing to the same court, judicial review of a case like *Hansen* does not exist.

The integrity of the judiciary is certainly sullied when a court, without overruling, distinguishing, or even mentioning past precedent, adopts a rule that it once asserted it was powerless to embrace. That criticism would never be made if the court had announced that it had shifted its theory of statutory interpretation from one through which an attempt is made to determine legislative intent to an approach of dynamic interpretation.⁵³ But *Hansen* is silent as to the intent of the court to make such a doctrinal shift.

One may ask, and with good reason, if all of the foregoing is much ado about nothing. After all, few would recognize the implications of what this court did. Some who did recognize those implications might believe that having a discovery rule justifies the means employed to create the rule. Clearly, without the discovery rule persons would be barred from pursuing a tort recovery simply because the limitation period ended before they knew

51. Code of Judicial Conduct Canon 1 (1972).

52. Wisconsin Code of Judicial Ethics, Canon 1 (the proposed code was developed by the Wisconsin Judicial Commission at the behest of the Wisconsin Supreme Court and is presently before the court for its adoption, having been submitted to the court by the commission on May 27, 1988).

53. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

they sustained harm. Guido Calabresi, in his thoughtful and provocative opus which explores the growing tendency of courts to revise statutes and statutory interpretations thought ill-suited to the times, observes:

We should not forget, however, that the language of categoricalals, of subterfuges, is particularly prone to manipulation. It allows those who are in a position to employ the absolutes to mask what they are doing, to hide whose interests they are trading off. And too often such hiding becomes self-serving or exploitative. If a court denies that it is modifying or forcing review of a statute it deems out of phase, it is usually more able to serve its own ends than a court that must openly admit to what it is doing and justify its behavior rationally. The charge made by the followers of the legal-process tradition against Justice Black, that he could use his absolutes as he wished and that this was dangerous, has obvious merit. The same charge, in miniature, can be leveled against judicial tricks that accomplish allocations of the burden of legislative inertia.⁵⁴

Of the three branches of government, the judiciary should be the leader in disdaining the philosophy that the ends justify the means. Of late, the other branches of government have shown us too many instances of the evils wrought by that philosophy. A situation such as the one described here will never reach the level of public attention or condemnation occasioned by an incident such as the Watergate scandal or one in which a member of Congress or a state legislator uses a political position for personal gain. That certainly does not make it any less a cause of concern. Should we tolerate a situation in which those who judge the executive and legislative branches, but who themselves have no judges, fracture the law to achieve what they consider to be a "just" result? Does the fact that this occurred only in a case which has no media allure make what was done somehow acceptable? One would certainly hope that no one would give an affirmative response to those questions.

V. THE RECOMMENDATION

The proposal which flows from the foregoing is simple, but hopefully not simplistic. It is that codes of judicial ethics mandate that the highest appellate court of a jurisdiction refrain from changing any established legal principle without either expressly overruling or distinguishing past precedent that is pertinent to the issue at hand.

Some may believe that this proposal could be fraught with difficulties—it is. As was the case in *Hansen*, the briefs of counsel may not call pertinent

54. G. Calabresi, *A Common Law for the Age of Statutes* 179 (1982).

authority to the attention of the court. The courts, however, employ the services of the best and brightest recent law school graduates to serve as their law clerks. They also have access to modern tools such as computerized legal research. Nevertheless, modern legal research, even in the care of the most gifted researcher, does not assure perfection. There will always be debate as to whether any given case is controlling or even pertinent to an issue at hand. Of course, even if unanimity exists as to the pertinence of a case, debate may take place as to the exact holding of the case or as to whether it has any holding at all. But is it unfair to expect of our courts of last resort any less than that which is expected of the attorneys who practice before those courts?⁵⁵

While it is true that courts of last resort are infallible because they are final and not final because they are infallible, the offered proposal does not seek perfection.⁵⁶ It does seek to make it clear to the courts, and to the public they serve, that every effort should be bent to assure avoidance of even the appearance of impropriety. We should demand and accept nothing less. Absent changes in the Code of Judicial Conduct, and possibly even in spite of them, it will continue to be the task of academic lawyers to tweak the noses of members of the judiciary when we find their actions suspect.

55. See *supra* note 50 and accompanying text.

56. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

