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LIMITATION OF NEW JUDGE-MADE LAW TO PROSPECTIVE EFFECT ONLY: "PROSPECTIVE OVERRULING" OR "SUNBURSTING"

THOMAS E. FAIRCHILD*

It is commonplace, in the current period, that the high courts of the states and of the United States make abrupt changes in rules of common law and in constitutional interpretation. The pressure of social needs which induces such changes, sometimes described by saying that the law must be in tune with the times, and must respond to newly emerging conditions of society,1 wars with the proposition that stability in the law is important to society, capsuled in the rule of stare decisis. These opposing forces generate uneasiness, yea struggle, in the minds of appellate judges. The subject of this article is a technique, most often called "prospective overruling," which facilitates change by limiting the undermining of stability which a judicially pronounced change would otherwise produce.

Prospective overruling is a device whereby a court limits the effect of a new rule to future transactions only, or, more commonly, to future transactions plus the case before the court which presents the opportunity for the announcement of the change. Really, though the device is usually called prospective the distinctive feature of it is the denial or limitation of overruling, retroactive application of a judicial decision. If every judicial departure from precedent were limited to prospective operation, this would fit a philosophy that any judicial decision, at least of a court of last resort, makes law which remains in effect until a later decision conflicts with it. But we do not really follow that philosophy, and we more commonly accept the classical doctrine that a decision which overrules a previous one is accorded retroactive effect, at least until it collides with a statute of limitations, an accord and satisfaction, or res judicata. We employ the technique of prospective overruling as an exceptional expedient when the traditional retroactivity would wreak more havoc in society than society's interest in stability will tolerate.

Whatever explanation we may make of prospective overruling in terms of judicial philosophy, clear it is that the use of the technique


1 See State v. Esser, 16 Wis. 2d 567, 580-584, 115 N.W.2d 611 (1962).
makes change less disruptive, and thereby makes an appellate court less apprehensive about making a change when it considers a new rule to be more sound than the old.

Prospective overruling is sometimes dubbed “sunbursting,” a term with a degree of aptness, but which came to apply through sheer coincidence. What practicing lawyer would realize that “sunbursting” refers to a technique in the work of an appellate judge? who has ever imagined himself an eavesdropper on a conference of justices, and hearing one remark to another, “How about it, Joe, shall we sunburst this one?”

If one thinks of a judicially pronounced new rule of law as the rosy dawn of a new day, “sunbursting” has an appropriate connotation. The word arrived on the scene, however, as the name of a party to litigation which reached the Supreme Court of the United in 1932, Great Northern Railway Company v. Sunburst Oil & Refining Company. Sunburst, a shipper, had sued Great Northern in Montana for refund of excessive charges. Sunburst recovered, relying on a rule of law announced by the Supreme Court of Montana in 1921. When the Sunburst case reached the Montana high court, the court overruled the 1921 decision, but limited the change to cases arising in the future. This was prospective overruling in its purest form. New law was announced for cases arising out of future events, but the old rule was applied to the case at hand, arising out of events which had occurred while the old rule was the latest word.

Great Northern was offended at the court’s refusal to give it the immediate benefit of the change in rule, and took the case to the Supreme Court of the United States. That court decided that no federal right of the railroad was infringed when the state court disavowed the old rule for the future, but applied it to the past, including the case at hand.

Mr. Justice Cardozo stated, for the Supreme Court, that in defining the limits of adherence to precedent, the state “may make a choice for itself between the principle of forward operation and that of relation backward.” On the one hand, he said, “It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.” He stated the alternative view as “the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited dec-

2 287 U.S. 358 (1932).
3 Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 91 Mont. 216, 7 P.2d 927 (1932). Actually the reasoning of the Montana court is largely set forth in a companion case, Montana Horse Products Co. v. Great Northern Ry. Co., 91, 194, 7 P.2d 919 (1932). (We should consider ourselves fortunate, with respect to nomenclature, that it was the Sunburst rather than the Horse Products case which came before the Supreme Court of the United States.)
4 It will be seen that the announcement of law for future cases only is sometimes criticized as prophetic dictum.
laration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning.\textsuperscript{5}

High courts which have used the technique of prospective overruling have done so selectively. One and the same court will permit the new law announced in some of its overruling decisions to be as completely retroactive as Blackstone would have it, and in other situations will choose varied formulae for limitation to prospective operation, depending on the court's estimate of the disruption which would be caused or avoided by greater breadth of retroactivity or closer limitation to purely prospective operation.\textsuperscript{6} Where a court uses this technique, it often applies the new rule to the case before the court, but not to other past transactions. This limited and personalized retroactivity is usually justified as a reward for a litigant who has persevered in attacking an unsound rule and as an avoidance of stating the new rule as purely prophetic dictum.

One of the landmark decisions in this field was made by the Supreme Court of Illinois in 1959, abrogating immunity of school districts from tort liability, and limiting the new rule to prospective effect, except for the case before the court.\textsuperscript{7} The court gave two reasons for applying the new rule to the instant case:

First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere \textit{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.\textsuperscript{8}

The Supreme Court of the United States recently announced a new rule excluding identification testimony in criminal trials if based on exhibition of the accused in the absence of counsel or equivalent protection. The new rule was announced and applied in two cases, \textit{Wade

\textsuperscript{5} Mr. Justice Cardozo had devoted much thought to the problem presented by Sunburst long before he was called upon to write the opinion. His earlier observations have been quoted by Mr. Justice Walter V. Schafer of the Supreme Court of Illinois in his Benjamin Cardozo Lecture, delivered April 13, 1967 before the Association of the Bar of the City of New York. Mr. Justice Schafer's lecture is an excellent exposition of this subject, entitled "The Control of 'Sunbursts': Techniques of Prospective Overruling." It appears at 42 N.Y.L.U. Rev. 631, as well as at volume 22, p. 394, of the Record of the Association.

\textsuperscript{6} See Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 157 N.W.2d 595 (1968), where the Wisconsin Supreme Court stated that a decision which overrules or changes a rule of law is to be applied retroactively, \textit{unless} there are compelling judicial reasons to the contrary.

\textsuperscript{7} Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

\textsuperscript{8} \textit{Id.} at 97.
and *Gilbert*,9 which reached the court on direct review. The same point had been presented in *Stovall*, a case decided the same day, but in a review arising out of collateral attack, begun after the possibilities of direct review had been exhausted.10 In *Stovall*, the court denied relief, and held that, except for *Wade* and *Gilbert*, the new rule would apply only to exhibitions occurring after June 12, 1967, the date all three decisions were announced.

Mr. Justice Brennan, writing for the court, dealt in *Stovall* with the claim that it was unfair to give *Wade* and *Gilbert* the benefit of retroactive application, while denying it to all others, as follows:

We recognize that *Wade* and *Gilbert* are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying *Wade* and *Gilbert* the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision making.11

I suggest that the decision to "sunburst" or not is reached after considering a number of factors—(1) How explicitly and how long ago was the old rule announced or recognized, and how deeply does the new rule modify the old? (2) Is the old rule of a type which people rely on in making deliberate choices of conduct or dealing? (3) Was the old decision really erroneous when made, or have conditions changed so that it has subsequently become unjust? (4) Is the new rule adopted primarily because it tends to prevent injustice which could, but need not always result under the old rule? (5) What is the extent of disruption which would result from retroactive application? (6) Have recent decisions suggested the probability of the change in rule?

Once the decision has been made to limit the effect of the new rule, the extent of the limitation must be chosen. Shall the new rule govern the instant case? Shall it cover all causes of action which arise after the date of decision? Shall there be a period after the date of decision during which a cause of action may arise and not be affected by the

11 Id. at 301.
new rule? Shall causes of action which have arisen in the past be affected, but only if a specified stage in the proceedings has not yet been reached?

There is no simple rule by which to decide the question whether to sunburst or not, nor to choose the type of limitation to be employed. It may be interesting to assemble a few examples of prospective overruling (by no means an exhaustive list) grouped according to the type of formula employed.\footnote{It will be apparent that the overruling of specific past decisions is not always involved. Sometimes the new rule is a break with a well recognized existing rule or procedure which does not rest upon a particular past decision.}

**A. Decisions Where the New Rule is Accorded No Retroactive Effect, Even in the Case in Which the Rule Is Announced, But Where the New Rule Is to Apply to Every Case Arising After the Date of the Decision.**

As already suggested, generalizations are difficult. We might expect cases in this group to involve transactions of a type where deliberate choices have been made in reliance on the old rule. In several of the examples, however, actual reliance was dubious, but the court was uncomfortable about making a retroactive change. Several of the examples are old, well in advance of the present era of frequent change in judge-made law.

People who believe they have been legally divorced enter into new marriages in actual reliance on that belief. The Ohio legislature granted divorces for the first 40 years of statehood. In an 1848 case, the Supreme Court of Ohio held the legislature had no such power. The court, however, decided the case before it as if the divorce involved were valid. It noted the consequences to children of second marriages if it held all past legislative divorces void, and said "And in view of this, we are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces, on the part of the legislature, is unwarranted and unconstitutional. . . ."\footnote{Bingham v. Miller, 17 Ohio 445, 448 (1848).}

In 1952 the Supreme Court of Arkansas considered a claim that a time-price differential in an installment purchase contract was usurious under the circumstances. The court cited a number of previous decisions permitting the lender to recover under similar arrangements. Saying these decisions had become a rule of property, the court stated it must not overrule them retroactively. Then the court issued a "caveat" that similar transactions "entered into after this appeal becomes final, may be subjected to the taint of usury with the aforementioned decisions affording no protection."\footnote{Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952).}
This case, involving a type of common commercial transaction is, like the Ohio case on divorce, a good illustration of limiting a change in rule to prospective operation because of a real probability of actual reliance upon the past decisions.

In *Gelpcke v. Dubuque,* the Supreme Court of the United States considered a change in a state high court's construction of the state constitution. In earlier decisions the Iowa court had upheld legislation authorizing municipal bonds of the type involved in *Gelpcke.* After the *Gelpcke* bonds were issued, the Iowa court held such legislation invalid under the state constitution. It is quite apparent that the majority of the United States court agreed with the earlier decisions on their merits, but of course the holding was not on that ground. The Supreme Court of the United States held that the later decision could not be retroactively applied because such application would impair the obligation of contracts.

As already indicated the Supreme Court of Montana decided the *Sunburst* case in conformity with an earlier decision, which it announced was unsound and was overruled for the future. The older decision authorized retroactive determination that an established freight rate had been excessive. The extent of conscious reliance is not very clear, although the court did speak of reliance. The court also stated the theory that where a statute has been judicially construed, such construction remains part of the statute until reversed or modified.

*State v. Bell* was a criminal prosecution of tenants for removal of crops without following a statutory procedure to protect the rights of the landlord. An earlier decision had permitted tenants to defend by showing the landlord was in default on his obligations. The court in *Bell* decided to change the rule and strictly enforce the statute, but acknowledged the possibility that Bell had acted in reliance upon advice of counsel based on the older decision. Because of this possibility of conscious reliance, the court applied the old rule to the case before the court, but said the new construction would be applied to all future cases.

The Supreme Court of New Mexico similarly changed its construction of a statute in deciding an appeal in a criminal prosecution. The court had previously held that a theater "bank night" was not a lottery. It changed its view in *State v. Jones.* But it considered that promoters of bank nights may have consciously relied on the earlier decision. The older holding, that bank night was not a lottery, was applied to the case before the court, but the court announced it would "no longer be

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16 Note 3, *supra.*
17 Actually in Montana Horse Products Co., the companion case.
18 136 N.C. 674, 49 S.E. 163 (1904).
19 44 N.M. 623, 107 P.2d 324 (1940).
followed in cases having their origin in acts and conduct occurring sub-
sequent to the effective date of this decision."

A similar situation in a criminal case, except that conscious reliance
seems improbable, came before the Supreme Court of the United States
in *James v. United States*.20

James embezzled money in the years 1951 through 1954, did not
report it as income, and was convicted of wilfully attempting to evade
federal income taxes. In 1946, the Supreme Court had decided in *Wil-
cox*21 that embezzled money does not constitute taxable income. In 1952
the Supreme Court decided that extorted money does constitute taxable
income.22 *Wilcox* was not overruled, but limited "to its facts." In *James*
a majority agreed to overrule *Wilcox*, but a majority (somewhat dif-
ferently composed) agreed to reverse James' conviction and order
dismissed.

Three justices (the Chief Justice, Mr. Justice Brennan, and Mr.
Justice Stewart) voted to overrule *Wilcox*, but to reverse and dismiss
because wilfulness could not be proved as to acts done while *Wilcox*
was outstanding. Three justices (Mr. Justice Black, Mr. Justice Douglas,
and Mr. Justice Whitaker) would not have overruled *Wilcox* and there-
fore voted to reverse and dismiss. Mr. Justice Clark expressed the view
that *Wilcox* had been overruled in effect, and that in any event James
had not relied on it. He voted to affirm. Two justices, Mr. Justice Har-
lan and Mr. Justice Frankfurter, joined in overruling *Wilcox*, but felt
there should be a new trial for redetermination of wilfulness, resolving
any question of actual reliance.

The net result of *James* was purely prospective overruling. The
technique was not, however, discussed by that name, except for the
opinion of Mr. Justice Black, joined by Mr. Justice Douglas. They
disapproved of the technique, especially in the area of criminal law.

The cases above referred to illustrate purely prospective overruling
in areas of domestic relations, commercial transactions, and the criminal
law where the parties before the court may have acted in reliance on
the earlier decisions.

Pronouncement of new procedural rules in decisions of cases have
also, at times, been made prospective only.

In *England v. Medical Examiners*,23 the Supreme Court of the
United States announced a rule that where a plaintiff in a federal court
action has met with abstention in order that state questions may be
determined by a state court, he may not later return to the federal court
to litigate federal questions if he has freely and without reservation sub-
mitted his federal claim for decision by the state court, litigated them

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there, and has had them decided there. It was said such plaintiff has elected to forego his right to return to the federal district court. The court did not, however, apply the election rule to the plaintiffs before it. It indicated that although the plaintiffs were mistaken in understanding an earlier decision to compel them to submit the question to the state court, their mistake was not unreasonable and the court was unwilling to apply the rule to them.

In a 1965 case the Supreme Court of Wisconsin noted, but did not reach, the question whether the appointment of counsel for an indigent at the time of preliminary examination was constitutionally required. Two justices voted to reach the question and hold that it was.

The court did, however, announce a rule "on grounds of public policy" that an indigent is entitled to appointed counsel at that stage. The rule was to be applied prospectively only.

B. DECISIONS IN WHICH THE NEW RULE IS APPLIED TO THE CASE BEFORE THE COURT, BUT IS GIVEN NO OTHER RETROACTIVE EFFECT.

Ordinarily persons who drive carelessly do not do so in conscious reliance upon some rule of law which may exempt them from liability. Persons who engage in other conduct which approaches an unintentional, or even an intentional, tort, do not consciously rely upon some previous decision which places such conduct on the nonactionable side of a borderline. Thus there is little reason why retroactive application of a change in rule would be unfair.

Courts have recognized, however, that one who enjoys a broad immunity from liability may consciously rely on it in deciding that he needs no liability insurance. Conceivably insurance companies may set premiums in view of a degree of immunity enjoyed by a particular class of insured.

In abolishing municipal immunity, the Supreme Court of Illinois applied the new rule to the plaintiff before the court, but otherwise restricted it to cases arising in the future. The court mentioned both the probability that school districts had failed to insure themselves and that they had failed to investigate past accidents, all in reliance upon their immunity.

The Supreme Court of Wisconsin abolished immunity of charitable hospitals, immunity of municipal corporations, immunity of religious institutions and parental immunity. In each case the plaintiff before the court was given the benefit of the new rule, but all other retroactive effect was denied. In the case of immunity of municipalities and relig-

24 Sparkman v. State, 27 Wis. 2d 92, 133 N.W.2d 776 (1965).
25 Note 7, supra.
26 Kojis v. Doctor's Hospital, 12 Wis. 2d 367, 197 N.W.2d 131 (1961).
27 Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
28 Widey v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W.2d 249 (1963).
ious institutions, even prospective application to other cases was delayed, as will be mentioned later.

C. Decisions in Which a New Rule is Announced, but Its Full Application is Delayed to Some Later Date, or Until Certain Further Developments Have Come About.

As just mentioned under B, the Supreme Court of Wisconsin saw fit to delay full application of its decisions abrogating immunity of municipalities and of religious institutions. Holytz,30 abolishing municipal immunity, was announced June 5, 1962, and the plaintiff was accorded the benefit of the decision. The new rule was not to apply otherwise, however, to torts occurring before July 15, 1962. The six week interval was allowed so that municipalities could make arrangements to meet the new liability.31 Widell,32 abolishing the immunity of religious institutions, was announced April 30, 1963 and applied to the case before the court. Its application to other cases was postponed for two months, to cases arising on and after July 1, 1963.

The Supreme Court of Minnesota devised a formula which gave the legislature time to deal with the problem by statute before the judge-made changes would take effect. In 1962, the court reconsidered the doctrine of municipal immunity and decided it ought to be overruled. The plaintiff before the court was not given the benefit of the change, nor was the change to apply to cases arising immediately after the decision. The court stated it would overrule the defense of municipal immunity in all cases “arising after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims.”33

An unusual situation recently came before the appellate court for the second district of Illinois.34 At the invitation of the Supreme Court of Illinois, the appellate court tested the public policy supporting the rule that contributory negligence is a complete defense and concluded that the type of comparative negligence rule followed in Wisconsin is preferable. It would doubtless be awkward for an intermediate court to presume to make so fundamental a change in law throughout the state until there had been at least an opportunity for review by the state supreme court. The new rule was therefore said to apply to the case before the court, but otherwise to “apply only to cases arising out of future occurrences commencing with the date upon which this decision becomes final.”35

30 Note 27, supra.
31 17 Wis. 2d 26, 42, 115 N.W.2d 618, 626 (1962).
32 19 Wis. 2d 648, 657, 121 N.W.2d 249, 254 (1963).
35 Id. at 291.
There are other decisions, not often treated as examples of sun-bursting, where the sheer weight of circumstances have compelled delay in full application of a new doctrine.

In Brown v. Board of Education of Topeka,\textsuperscript{36} for example, the Supreme Court of the United States rejected the Plessy doctrine of "separate but equal" in the field of public education. The court posed the question whether a decree must necessarily follow that Negro children should forthwith be admitted to schools of their choice, or whether the court, in the exercise of equity powers might permit a gradual adjustment. The court's appraisal of the circumstances led it in the latter course.\textsuperscript{37}

In another field, it could puristically be reasoned that a statute creating legislative districts in conflict with the constitution is void, and that past acts of a legislature so elected are void, or at least that all such acts after the judicial determination of invalidity are void. Decisions in this field, however, have recognized and avoided the havoc which would result, utilizing equitable powers only to the extent necessary to produce the needed change in an orderly fashion.

In Reynolds v. Sims,\textsuperscript{38} the Supreme Court of the United States said:

With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a state in adjusting to the requirements of the court's decree.

In 1966 circumstances in Georgia brought into play a provision of the state constitution for election of the governor by its general assembly. It had previously been determined that the general assembly was malapportioned, but the court had permitted it to continue to function until 1968. In Fortson v. Morris,\textsuperscript{39} the Supreme Court of the United States refused to enjoin the election of governor by the malapportioned general assembly.

In 1964, the Supreme Court of Wisconsin held the legislative apportionment statute invalid, under the state constitution, but withheld redistricting by court decree until the existing legislature (itself elected under the invalid law) had a reasonable opportunity to act.\textsuperscript{40}

Later, the Wisconsin court took jurisdiction of a case attacking the districting of county boards, and ultimately held the districting invalid, but delayed the effective date of the decision, even though elections for new terms were about to be held under the invalid act, until the legislature had an opportunity to pass a new law.\textsuperscript{41}

\begin{thebibliography}{9}
\bibitem{36} 347 U.S. 483 (1954).
\bibitem{38} 377 U.S. 533, 586 (1964).
\bibitem{39} 385 U.S. 231 (1966).
\bibitem{40} State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964).
\bibitem{41} State ex rel. Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249 (1965).
\end{thebibliography}
When the court originally took jurisdiction, it recognized the problem which might arise out of doubts of the validity of proceedings of the boards in the interim. It entered an order as follows:

Because of the vital nature of the duties and power of the county boards of the state and the importance of their ability to continue to function without challenge to the validity of their acts, and because it would not be equitable, just, or in the public interest to hold invalid, on the grounds here raised, any action before the institution of this proceeding, or during its pendency, or during a reasonable time thereafter, this court now determines that if our judgment herein should declare invalid the provisions of sec. 59.03 (2), Stats., such declaration will expressly be limited to prospective effect only, after a date following the entry of judgment and to be specified therein.42


The Supreme Court of the United States has evolved several rules of criminal procedure which are fresh interpretations of the requirements of due process. Some of these, like the rule that a state must furnish counsel to an indigent defendant in at least felony prosecutions, are deemed so fundamental to "the very integrity of the fact-finding process" that they are retroactively applied, even to cases which can be reached only by collateral attack.

In other instances, the new rule has not been accorded such fundamental importance, nor full retroactive application. These new rules will not be applied to pre-existing cases which have reached a specified stage of procedure prior to the decision announcing the new rule. The rules will be applied to pre-existing cases which have not yet reached that stage.

It is interesting to note that in this class of cases, the Supreme Court of the United States has not announced any limitation on the retroactivity of the new rule in the decision which adopts the new rule. Limitations on retroactivity have in these instances been announced in separate cases in which the new rule, if retroactive, would have affected the result.

In re Gault, for example, which applies certain due process standards to juvenile offenders, sets forth no limitation on its own retroactive application, and state courts have divided on that issue.45

42. 25 Wis. 2d 177, 130 N.W. 2d 569 (1964).
44. 387 U.S. 1 (1967).
45. See State ex rel. La Follette v. Circuit Court, 37 Wis. 2d 329, 337, 155 N.W. 2d 141 (1967).
The Supreme Court of the United States recently decided that one can successfully defend himself against a failure to comply with federal statutes requiring registration of a wagering business or of certain firearms, or with certain related provisions "with a proper assertion of the privilege against self-incrimination." The decisions were rendered on direct review, rather than on collateral attack, and the privilege had been claimed on motions before trial, or on motions after verdict. There are cases still on appeal where the privilege was not claimed in the trial court, and presumably there are cases where the conviction has become final, and the sentence is being served, although the privilege was claimed in the trial court. Apropos of our present subject, questions have risen whether these decisions will benefit persons in the situations just mentioned.

Conceivably there may be some future decisions of the Supreme Court of the United States dealing with a limitation on retroactivity of Gault, and these later cases.

In 1961, *Mapp v. Ohio* incorporated into due process a rule excluding evidence obtained by unreasonable search or seizure. Plaintiff *Mapp* was given the benefit of the new rule. In 1965 the Supreme Court of the United States declined to give *Linkletter* the benefit of the *Mapp* rule. *Linkletter*'s conviction had become final (i.e. conviction followed by exhaustion or expiration of right to direct review) before *Mapp* was announced, and the court decided not to apply *Mapp* to any case of that type. Had the court decided not to void any trial at which the prosecutor, relying on the old rule, used tainted evidence, it might have declined to apply the new rule to any trial which had started before the *Mapp* decision. Such formula would correspond to the *Johnson* formula for *Escobedo* and *Miranda*. But since the unreasonable search and seizure was wrongful even under the old rule (though the evidence might be admissible) it is understandable that the court did not preserve the admissibility of evidence so seized before *Mapp* by following a formula corresponding to the later *Stovall* formula for *Wade* and *Gilbert*.

In 1966, the Supreme Court of the United States again applied the *Linkletter* formula, limiting a new rule to cases where a conviction had not become final before the date the new rule was announced. In 1965 the court had held that adverse comment by prosecutor or judge upon a defendant's failure to testify in a state criminal trial violates the federal privilege against compulsory self-incrimination. Six states

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50 Note 9, supra.
had permitted such comment, relying on the former doctrine that the federal privilege did not bind the states. In 1966, the court decided *Tehan v. Shott*\(^5\) arising from one of these states (Ohio), and held that the *Griffin* ruling was not to be applied to cases which had become final before it was announced.

In both *Linkletter* and *Tehan*, the court emphasized as a reason for limiting retroactivity the stress which full application would impose upon the administration of justice, and weighed such stress against the dilution of the purposes of the new rules.

*Escobedo v. Illinois*,\(^6\) was decided in 1964 and sparked great debate over its scope and retroactivity. *Miranda v. Arizona*,\(^5\) was decided, in the same area, in 1966. There the court codified rules which must be followed if the results of police interrogation of a person in custody are to be used as evidence. A week later, in *Johnson v. New Jersey*\(^7\) the court limited the retroactivity of both *Escobedo* and *Miranda*. It did not use the *Linkletter* formula. This time the new rules were to be applied to trials beginning after the dates on which *Escobedo* and *Miranda* were respectively announced. Perhaps the *Stovall* formula, to come later, would have been preferable: *i.e.* apply the new rules to all interrogations occurring after the dates of the decisions.

As said earlier, *Wade*\(^6\) and *Gilbert*\(^7\) decided June 12, 1967, announced a new rule excluding identification testimony if based on exhibition of the accused in the absence of counsel or equivalent protection. In *Stovall*, decided the same day, the court did not apply the new rule, and held it applicable only to lineups occurring after June 12, 1967, except for the lineups involved in *Wade* and *Gilbert*. The formula seems more defensible in terms of reliance than the *Linkletter* or *Johnson* formulas would have been.

The foregoing examples all relate to procedural requirements of constitutional stature. There have also been instances of changes in more nearly substantive rights, where the courts have limited the application to cases where a particular procedural stage had not been reached at the time the new rule was announced.

There have been instances, where a court has announced a new definition of the defense of insanity and the defendant before the court has been afforded a new trial where the new definition may be used, but other defendants who had been tried under the older rule were not given a new trial.\(^8\)

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\(^7\) 384 U.S. 436 (1966).
\(^8\) 384 U.S. 719 (1966).
\(^7\) Gilbert v. California, 388 U.S. 263 (1967).
\(^8\) Durham v. United States, 214 F.2d 862, 874 (C.A.D.C. 1954); State v. Shof- fner, 31 Wis. 2d 412, 426, 143 N.W.2d 458 (1966); United States v. Shapiro,
The Supreme Court of Wisconsin changed its rule with respect to liability for contribution of tort-feasors who sustain a common liability. Under the old rule the burden ultimately was to rest upon each in equal amount. Under the new rule it was to be apportioned according to the degree of fault. The doctrine of gross negligence was abolished in the same decision. The court limited retroactive application, stating that the new rule should not apply to specified situations, the evident purpose being to avoid otherwise unnecessary trials or retrials in matters which had proceeded beyond that stage.59

PROBLEM OF UNEQUAL TREATMENT INHERENT IN PROSPECTIVE OVERRULING

A degree of awkwardness is inherent in any substantial change in law. When the legislature makes an important change, it is usually preceded by committee hearings and debates which inform the public of the possibility of change and permit people to take steps to reduce the dislocation in transition. Sometimes the legislature postpones the effective date for some time after the enactment. If the legal consequences of an event on one day are markedly different from those of an identical event a day later, the persons who are disadvantaged by the change may wish it were different, but they have had an opportunity to learn of the change in advance, and, perhaps, to protect their interests.

A change by judicial decision, applied retroactively as well as prospectively, results in fortuitous inequality of treatment. Identical transactions may have occurred the same day, but the ultimate consequences may be different because the parties to one achieved a final settlement or permitted an adjudication to become final before the change was announced while the parties to the other did not.

Other types of inequality of treatment will result when a court limits the retroactivity of its overruling decision. A and B, for example, may be involved in similar contemporaneous transactions. Both may contest the rule which denies them a particular benefit. A may be lucky enough to have his case decided against him on the pleadings, without the delay of a trial, and his course to the court of last resort may be speedy. Suppose the high court overrules precedent, decides in A’s favor, but decides that the new rule shall not be applied to any other case arising before the announcement of its decision. A is rewarded for his diligence in challenging a bad rule. B may have been equally, or more, diligent, but less lucky, and may feel unjustly treated.

A few illustrations of problems of this sort are at hand.

Linkletter was not given the benefit of the Mapp rule, because his conviction had become final before Mapp was announced. Mr. Justice

383 F.2d 680, 687 (7th Cir. 1967); Commonwealth v. McHoul, —— Mass. ——, 226 N.E.2d 556, 563 (1967).

Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
Black pointed out, in dissent, that Linkletter committed his offense later than Miss Mapp committed hers, and the illegal search of Linkletter occurred later. Linkletter was unlucky enough, however, to have his case proceed to finality much more quickly than Miss Mapp's.

Johnson and Miranda were before the Supreme Court of the United States at the same time, the former's attack on his conviction being collateral. He was not given the benefit of the new rules adopted in Miranda's case, though the rules are of constitutional stature. Similarly with Stovall, Wade, and Gilbert. Stovall was making a collateral attack and he was not given the benefit of the Wade and Gilbert rule. Johnson and Stovall were each under sentence of death. The new constitutional interpretations, given a "sunburst" limitation on retroactivity, did not signal the "dawn of a new day" for them.

The plaintiff in the case in which the Supreme Court of Illinois abolished municipal immunity was Thomas Molitor. He was one of 14 children injured in a serious school bus accident. The court limited the new rule to prospective effect only, except "as to the plaintiff in the instant case." One justice thought that the new rule should apply to all the children injured in the same accident.

Two years later the Supreme Court decided an appeal brought by other children injured in the same accident, including three others in the Molitor family. It appeared that all these cases had been pending when Thomas Molitor appealed and that after the decision in his case, limiting the retroactive effect of the new rule to him, the other cases had been dismissed. The Supreme Court, on the second appeal, was satisfied that when Thomas' appeal was taken "it was commonly understood and accepted that this court's ruling on the dismissal of Thomas Molitor's claim would be the basis for determining the other claims arising out of the same bus accident and then pending against defendant." The court decided, in effect, to extend the benefit of the new rule to them.

It happened that there was an opportunity for a modest recovery without the benefit of the Molitor ruling. The district had insurance in effect with an overall limit of $100,000 for one occurrence. This insurance was a waiver of immunity pro tanto, but the total claims exceeded $2,000,000. After the first Molitor decision, but before the second, some of the injured children recovered judgment out of the insurance coverage. The jury was instructed on policy limits, and these plaintiffs received verdicts much smaller than those who went to trial after the second Molitor decision. The children with the smaller verdicts later sought new trials, but because of various circumstances the appellate

61 Ibid.
court for the second district thought there had been no miscarriage of justice.\footnote{Larson v. Laneland Community Unit District No. 302, 52 Ill. App.2d 209, 201 N.E.2d 145 (1962).}

\textit{Holytz}\footnote{Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).} was the decision in which the Supreme Court of Wisconsin abolished municipal immunity for most purposes. The court applied the new rule to the case before it and to other cases arising after an interval of about five weeks. The \textit{Holytz} injury was sustained June 24, 1960 and the case was decided on appeal June 5, 1962. A Mrs. Marshall sustained an injury February 19, 1961 and she and her husband diligently pursued a claim against the city of Green Bay. The trial court delayed deciding the demurrer in the Marshall case to learn the outcome of \textit{Holytz}, and then sustained the demurrer because of the \textit{Holytz} limitation on retroactivity. The Marshalls appealed and their case was decided January 8, 1963.\footnote{Marshall v. Green Bay, 18 Wis. 2d 496, 118 N.W.2d 715 (1963).} The court conceded the Marshalls had been diligent, but declined to modify the \textit{Holytz} limitations.

The Marshalls succeeded, however, on a different theory. The city had insured itself and the policy contained an agreement by the insurer not to raise the defense of governmental immunity. The court held this contract a waiver of immunity pro tanto, though it was required to overrule a prior case on the city's power to insure in order to reach this decision.

\textit{Olson v. Augsberger},\footnote{\textit{See} Wojtanowski v. St. Josaphat's Congregation, 34 Wis. 2d 1, 148 N.W.2d 54 (1967).} is a case where the Wisconsin court, having previously adopted a new rule and specifically limited its retroactive application, decided to modify the language of the limitation and thereby permit a party to enjoy the benefit of the new rule seemed unjust not to do so.

But it is not always possible nor wise to pull a rabbit out of the hat. Generally, an express limitation on retroactivity ought to be and is carefully maintained.\footnote{\textit{Wojtanowski v. St. Josaphat's Congregation, 34 Wis. 2d 1, 148 N.W.2d 54 (1967).}} The foregoing few illustrations at least emphasize the caution which must be employed and the imagination which must be drawn upon when a limitation on the retroactivity of a precedent changing decision is formulated.

\textit{Epilogue}

The availability of the sunbursting technique relieves some of the pressure against departure from precedent. Use of this technique serves the same social interest in stability which is at the root of \textit{stare decisis}.

Yet there are difficulties and possibilities of injustice which attend the sunbursting device.

The reader, impressed with these difficulties, may recur to the old question: Why not stand firmly by at least the definable doctrines
worked out in past court decisions and leave all changes in course to the legislature?

But there is great merit in the suggestion that legislatures seem too thoroughly absorbed in the complex areas of taxation, budget making, and broad economic and social problems to give adequate attention to less dramatic areas, where the need for change is constantly being made apparent to the courts. And there is usually no lobby for the unfortunates who feel the impact of some outmoded rule of tort law or criminal procedure.

High courts ought to be cautious in exercising their power to change, but should use it whenever thoroughly satisfied that because of changes in social conditions a judge-made rule now no longer serves the cause of justice.