Precedent and Policy

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The title and the subject matter of this paper perhaps deserve a word of explanation. Efforts to define the judicial process are almost as old as the process itself. There is now a vast literature devoted to explaining what judges do, or should do, and the output shows no sign of falling off. I do not venture into the field because I feel that I can propose a pat formula with which everyone will agree. Of course I have no such aim in view. But the questions of a judge's relationship to the past in the form of prior decisions, to the present in the form of the case at hand, and to the future in the form of the effect that his opinion will have as precedent are almost daily grist for the judge of a reviewing court. If there is ultimately to be understanding and agreement as to his responsibility and his power, it must come from the accumulation and synthesis of relevant data. All that I can offer are some observations which I hope are pertinent.

My remarks will be limited to the problems of a judge of a state court of ultimate appellate jurisdiction, because that is where my experience lies. It may be that with other courts there is more of similarity than of difference. There are, however, distinctive features which make me wary. The impact of the facts of the case upon the trial judge is direct. They come diluted to the reviewing court and refined by the determination of the trier of the facts. Trial courts for the most part do not write opinions; the reasons for their decision need not be revealed. Primarily, their responsibility is for the present decision and not for its future effect. And both trial and intermediate courts, while perhaps not so limited in choice of decision as is sometimes assumed, certainly enjoy a narrower range of freedom than does a court of ultimate review. Because it explains its decision in a written opinion, a supreme court, to a greater degree than other courts, must be conscious of itself as a rule-making institution. And, because our legal traditions require courts to pay attention to precedents, the case at

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hand must ordinarily be decided on the assumption that future cases are at stake in, its determination.

I shall be mainly concerned with those cases that "count for the future." Statistics are lacking, but it is undoubtedly true that the great bulk of all litigation is disposed of upon the facts, that is, by a determination that the facts do or do not fall within an established legal principle. Only a minute fraction of all cases reach reviewing courts, and it is there, in the main, that legal doctrines are shaped and formulated. Of the cases which are determined by reviewing courts, it is again only a small percentage which "count for the future."

The dimensions of the area of my concern do not measure its significance. For it is here that the law grows, that existing doctrines are tested, and that new doctrines are developed. It is here that the tone of a judicial system is set. And if the number of litigants immediately affected is small, the number which may be indirectly affected is great indeed, for each decision in this area is the potential progenitor of a long line.

We may begin with a few propositions about courts which I think are now generally accepted and which, in any event, I will assume to be true. Most lawyers today, if not most laymen, are willing to think of "the law" as something other than an independent entity which antedates and exists apart from judicial decision; and they no longer consider that what the judge does is to make a selection from an inexhaustible warehouse of pre-existing, ready-made legal principles. It is generally agreed that judges make law and that it is inevitable that they should do so. I shall also assume, and I think you will agree, that the creative function of a court is not the result of a logical analysis alone. The extent to which a court adheres to one prior case rather than another, or to neither of them, is not simply a matter of distinguishing dictum from decision or of extracting the true *ratio decidendi* imbedded in an opinion. In construing a statute a court may be concerned with the intention of the framers. But in dealing with a precedent the judge's function goes beyond perception of what was really intended; he exercises a choice. The point is obvious enough when a case is overruled, but it is equally true when a case is merely distinguished and even when it is followed without qualification.

Some writers have therefore suggested that the ordinary judicial opinion is a fraud, in that it purports to be derived by impeccable and inevitable logic from what has already been decided, and that the judge who wrote it is either a fool for thinking the process so simple

or a knave for pretending that it is. I do not think we need to go so far. It may be conceded that judicial opinions are something less than mirrors of the thinking behind the decision and that a judge has more freedom than the mustering of precedents makes it appear. But precedents, for the judge as well as the lawyer, are the starting point of decision; more often than not they are in practice the concluding point as well. When and to what extent they should prevail is the intriguing question.

I should like to look first at some of the formal devices which have been designed or invoked to control the effect of precedents. There are not many. There is one state which lays down the rule that its supreme court, in deciding a case where there is a conflict between its present opinion and any former ruling, must be governed by what in its present opinion is law without regard to its former ruling.\(^2\) And another state provides that unanimous decisions by a full bench cannot be overruled or materially qualified except by a like concurrence.\(^3\) But such provisions are exceptional.

It has been said from time to time that various constitutional provisions limit the power of a court to qualify or overrule a former decision. To do so, it has been argued, amounts to a usurpation of legislative power or to legislation *ex post facto*; it impairs the obligation of contracts or violates due process or equal protection. Looking just at judicial opinions, we can say that these arguments have not generally prevailed. Courts do not hold that the decision which overrules an earlier precedent violates the Constitution. The actual effect of these arguments in shaping results is a different matter, about which I shall comment later.

Most frequently the formal argument against judicial innovation is based upon what is called a “reception” statute. The purpose of these statutes is to adopt at a single stroke the common law of England, except, it has been held, those portions which are repugnant to our customs and institutions.\(^4\) Many states have them. The Illinois provision is typical:

That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of and to supply the defects

of the common law, prior to the fourth year of James the First and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.\(^5\)

The arguments which are based upon these statutes often take extravagant ground. For example, this argument was made before our Court:

The power of this Honorable Court to adjudicate between litigants is derived from two sources, namely: the common law as it existed prior to 1607, and statute law. A cause of action for prenatal injuries was unknown at common law. There is no statute permitting such an action.\(^6\)

One answer to such an argument was made by Stephen A. Douglas over a hundred years ago when he was judge of the Supreme Court of Illinois:

If we are to be restricted to the common law, as it was enacted at fourth James, rejecting all modifications and improvements which have since been made, by practice and statutes, except our own statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than two hundred years behind the age.\(^7\)

A more comprehensive answer, and one which explains the development of the law in this country, is that the common law which the reception statutes adopted was not just that heterogeneous group of cases which happen to have been decided in England before 1607 but rather the common law as a system, the outstanding characteristics of which are its capacity for growth and its ability to slough off outmoded precedents.

There are, of course, many decisions which do turn upon the common law reception statutes. But I think the matter can be disposed of with the observation that nowhere have they stifled the capacity of the common law for accommodation to new conditions.

The judicial process is thus determined neither by transcendent principles nor by legislative direction. It operates in the framework described loosely by the title of this address. The phrase "precedent and policy," however, is deceptive. It suggests a sharp antithesis, a relationship of mutual exclusion; and it suggests that each term repre-

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\(^5\) ILL. REV. STAT. ch. 28, § 1 (1965).
\(^6\) See Amann v. Faidy, 415 Ill. 422, 433, 114 N.E.2d 412, 418 (1953).
\(^7\) Penny v. Little, 4 Ill. (3 Scam.) 301, 304 (1841).
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sents a simple, homogeneous concept. I think it may be profitable to explore the extent to which those implications are not true.

In the main, lawyers tend to treat all judicial opinions as currency of equal value. Exceptions must be made, of course, for the opinions of the acknowledged masters and for those opinions which carry dissents or special concurrences. But the masters are quickly numbered, and the discounted value of the opinion which carries a dissent or concurrence shows upon its face. When allowance has been made for the exceptions, there emerges the working thesis of the bar and perhaps even of the courts: "A case is a case is a case." To the working profession there is no such thing as an opinion which is just "a little bit" precedent or a precedent pianissimo. All of them carry the same weight.

Yet, when the judicial process is viewed from the inside, nothing is clearer than that all decisions are not of equivalent value to the court which renders them. There are hidden factors of unreliability in judicial opinions, whether or not there is dissent or special concurrence. Many an opinion, fair upon its face and ringing in its phrases, fails by a wide margin to reflect accurately the state of mind of the court which delivered it.

Several ingredients combine against complete certainty, even at the moment of decision. For a reviewing court the common denominator of all cases is that they must be decided, and must be disposed of, ordinarily by opinion. There are no intermediates. Judgment must go for one party or for the other. There are many cases in which complete conviction comes rather quickly. But there are many others in which conviction to a degree comes hard, and complete conviction never. Uncertainty, however, will not justify a failure to dispose of the case. So some opinions get written because the case must be disposed of rather than because the judge is satisfied with the abiding truth of what he writes.

That process is repeated with the other members of the court who are not directly charged with the preparation of the opinion. Indeed, with them it is likely to be aggravated. As a renowned jurist once said, or should have said, the judge who writes an opinion must be at least 51 per cent convinced in the direction of the result he reaches. But with the other judges of the court conviction may be less than 50 per cent, and the doubt will still go without expression. For that statement I can vouchsafe high authority to support my own observation. The constitutionality of the Adamson Law, which provided an eight-hour day for railroad employees, was sustained by a divided Court. Chief Justice White wrote the opinion of the Court. Justice McKenna wrote a concurring opinion, and Justice Van Devanter concurred in Justice
Pitney's dissent. One might assume that this array of opinions fully expressed the views of members of the Court. But then we find Mr. Justice Holmes, who filed no opinion, writing this to Laski: "I send the Adamson opinions by this mail. They are all together. I thought Day's dissent wrong but the most rational. My own opinion goes the whole hog with none of the C. J.'s squeams." And on another occasion Holmes tells Laski of an opinion he wrote "at high pressure—in a short time, and with our Court very evenly balanced, though only Pitney and Clarke dissented."  

There is more unexpressed doubt of that sort than the bar is aware of. Dissents do not remove these lurking doubts, for dissents are born not of doubt but of firm convictions. The fighting spirit which spells dissent appears in another letter from Justice Holmes to Laski:

I had last Monday the recrudescence of an old problem. Whether to dissent as to the judge's salaries being included in the income tax, was the occasion and the problem whether to allow other considerations than those of the detached intellect to count. The subject didn't interest me particularly. I wasn't at all in love with what I had written and I hadn't got the blood of controversy in my neck.

And on another occasion:

After all I succumbed and have written a short dissent in a case which still hangs fire. I do not expect to convince anyone as it is rather a statement of my convictions than an argument, although it indicates my grounds. Brandeis is with me, but I had written a note to him saying that I did not intend to write when the opinion came and stirred my fighting blood.

Here is the stuff dissents are made of. Here, too, is additional evidence that there may be disagreement without dissent. Whether or not to express publicly his disagreement with the prevailing opinion by a dissent is not a novel problem to Holmes but an old, familiar one.

Writing of Brandeis, Paul Freund says:

Not infrequently the preparation of a dissenting opinion was foregone because the demands of other items of work prevented an adequate treatment, but with the promise to himself

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9 1 Holmes-Laski Letters 68 (Howe ed. 1953).
10 Id. at 85.
11 Id. at 266.
12 Id. at 560.
that another occasion would be taken when circumstances
were more propitious.\textsuperscript{13}

The case of the specially concurring opinion is not quite so clear. Typically it would rest the result upon grounds other than those asserted in the prevailing opinion. Sometimes the choice of grounds may be the result of doubt as to that chosen by the majority. More often, I suspect, it, too, is the result of fighting conviction on the part of the concurring judge as to the ground which he selects.

The older practice of filing separate opinions helped considerably to eliminate the inherent element of unreliability in judicial decisions. But the working bar does not like multiple opinions. Paradoxically, the dislike seems to be based upon a desire for certainty. Moreover, only those courts whose jurisdiction is largely discretionary, or whose volume of work is small for other reasons, can indulge in the luxury of separate opinions in every case. With most of the state courts, that practice is out of the question. In our own court, the number of formal opinions handed down in the course of a year is now around 250 to 275. With Sundays and holidays excluded, and even without consideration of the large part of the work of the court which is not reflected in formal opinions, that works out perilously close to an opinion per day.

It seems to me that the style of judicial opinion contributes its share to their latent uncertainties. Although an opinion may be born only after deep travail and may be the result of a very modest degree of conviction, it is usually written in terms of ultimate certainty. Learned Hand has referred to the tendency of some judges to reach their result by sweeping "all the chessmen off the board."\textsuperscript{14} The contentions which caused deep concern at one stage have a way of becoming "clearly applicable" or "completely unsound" when they do not prevail. Perhaps opinions are written in that positive vein so that they may carry conviction, both within the court and within the profession; I suspect, however, that the positive style is more apt to be due to the psychological fact that when the judge has made up his mind and begins to write an opinion, he becomes an advocate.

The fact that reviewing courts are multijudge courts influences the reliability of precedent in ways too numerous to mention. Opinions are read under the microscope. Particularly in the more esoteric reaches of property law, they are read with an eye to subtle nuances of meaning. The subtleties may, and often do, express the meaning of the judge who wrote the opinion. They do not in any realistic sense express the

\textsuperscript{13}\textsc{Freund}, On Understanding the Supreme Court 71 (1950).
\textsuperscript{14}\textsc{Hand}, The Spirit of Liberty 131 (1952).
view of the court as a whole. On a multijudge court no man can or should have every opinion expressed in words which he chooses. Of course every judge can and should make suggestions to his colleagues. But the relationship among the judges is a personal one and a continuing one, and effectiveness can be blunted by excessive suggestions. The balance between complacent acquiescence and overassertiveness is delicate indeed.

The late Mr. Justice Jackson, speaking of decisional law and stare decisis some years ago, made an observation upon which I should like to comment. He said:

> The first essential of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle. That means such individual study of its background and antecedents, its draftsmanship and effects that at least when it is announced it represents not a mere acquiescence but a conviction of those who support it. When that thoroughness and conviction are lacking, a new case, presenting a different aspect or throwing new light, results in overruling or in some other escape from it that is equally unsettling to the law.\(^\text{15}\)

With the ideal that doubt should be eliminated and with the suggestion that every opinion should express, so far as conscientious effort can make it possible, the conviction of every member of the court, I agree wholeheartedly. But I venture to doubt that the ideal of full commitment of every member of the court can be realized in every case, regardless of the amount of effort expended.

At this point I can hear the practicing lawyers say, somewhat irritably: "What you say is all very well, but it is the published opinion of the court with which we must deal. For our purposes a hidden reservation is unimportant." I am certainly not proposing that they poll the court, if that were possible. What I have said perhaps has practical value only as a counsel of caution.

There are additional respects, and more perceptible ones, however, in which opinions, and hence precedents, differ.

The intrinsic quality of the precedent relied upon is significant in determining its fate. Judges in the act of overruling a prior decision have often reconciled their action with the general requirements of stare decisis by stating that there is no duty to follow decisions which are absurd or manifestly in error. That formula may obscure the fact that a decision is often overruled, not because of inherent error, but

\(^{15}\) Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334, 335 (1944).
because it has become obsolete. Yet it remains true that an opinion which does not within its own confines exhibit an awareness of relevant considerations, whose premises are concealed, or whose logic is faulty is not likely to enjoy either a long life or the capacity to generate offspring. There are exceptions. The decision that a corporation could claim equal protection of the laws was made by a court which simply announced from the bench that it did not wish to hear argument on the point inasmuch as all the members of the court were agreed on it.\footnote{Santa Clara County v. Southern Pacific R.R., 118 U.S. 394, 396 (1886).} The point so decided has successfully resisted attack. But, by and large, the appearance of full consideration is important. Beyond the appearance there lies the question of actual consideration. Hardly a term of court goes by but that we send for and examine the briefs in an earlier case which is relied upon as decisive to see just what was argued in the earlier case and the quality of the argument made. And I may say parenthetically that the results of our examination make it clear to me that the advocates who present the cases to us do not follow the same practice.

Dissenting and specially concurring opinions have their weight at this point, for they detract from the intrinsic value of the precedent. The therapeutic value of a dissenting opinion is important to the dissenting judge, but that is not its only value. Consider what our constitutional law might be today had there been no dissents. Nor is their value restricted to the field of public law.\footnote{For an example of a dissent which profoundly affected the future growth of the law see that of Justice Boggs in Allaire v. St. Luke's Hospital, 184 Ill. 359, 368, 56 N.E. 638, 640 (1900).}

Along with quality, quantity too is significant. A settled course of decision is more compelling than an isolated precedent, particularly when the latter, though never formally expelled from the books, has been vigorously ignored by the court which brought it into being.

This is not to say that a great volume of decisions upon a point of law necessarily commands respect. In some areas of the law decisions have proliferated without forming recognizable patterns. As examples I would cite the federal decisions on state taxation of interstate commerce or our own decisions in will-contest cases and zoning cases. The result is that although general principles are always stated in the opinions, decision actually turns on the court's subjective appraisal of the facts. Under such circumstances a court, unless it is bold enough to wipe the slate clean, is forced, despite Holmes's injunction, to join the lawyers in a search for cases on a pots-and-pans basis.\footnote{Holmes, The Path of the Law, in Collected Legal Papers 195-96 (1920).}
So much, then, for the reported decisions and opinions on their face. What use will be made of them? Baldly stated, I suppose that whether a precedent will be modified depends on whether the policies which underlie the proposed rule are strong enough to outweigh both the policies which support the existing rule and the disadvantages of making a change. The problem is not different in kind from that which is involved in the decisions of other regulatory organs, private or public. In the case of any one decision we may be able to explain why this or that consideration has prevailed, but it is hardly possible to state a general formula which will describe the process in its totality.

A court does not select the materials with which it works. It is not self-starting. It must be moved to action by the record and the advocate. The role of the advocate is more significant, I think, than has been suspected. The record must be adequate to raise the issue. But even a record which is technically correct may not cast light on all the aspects of the problem. It was to supply this kind of deficiency that the technique of the Brandeis brief was evolved. More recently, I think, the kind of information contained in the Brandeis brief has been finding its way into the actual record before the court.

Much depends upon the extent to which the court feels sure that it can see the ultimate results which will flow from a departure from precedent. Its willingness to depart will, I think, vary in inverse ratio to the complexity of the problem. Mr. Justice Brandeis expressed the thought in the Associated Press case:19

The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate . . . . Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly-

disclosed wrong, although the propriety of some remedy appears to be clear.\textsuperscript{20}

Two more commonplace situations may also serve as illustrations. With respect to both of them I think there would be general agreement as to the unsatisfactory quality of the existing rule. At common law there is no contribution among joint tortfeasors. When the negligence of more than one person contributes to the injury to the plaintiff, each of the guilty parties is liable for the full extent of the resulting damage, regardless of the degree to which the damage resulted from his negligence. And the plaintiff may have his choice among the defendants. One joint tortfeasor, perhaps least responsible morally and legally, but typically most responsible financially, can be called upon to satisfy the entire judgment. And, having done so, he has no right to call upon his codefendant to shoulder a part of the burden. In a few jurisdictions the problem has been met by provisions requiring contribution among joint tortfeasors. So far as I am aware, that change in the law has always been accomplished by statute. The reason, I think, is that the problem is not self-contained. It cannot be satisfactorily solved by judicial announcement of a rule requiring contribution among joint tortfeasors. To operate satisfactorily a system of comparative negligence would be necessary with resulting complication as to jury verdicts. The other common-law rule is that a judgment against two joint tortfeasors is to be regarded as a unit. If the judgment is set aside as to one defendant, it must be set aside as to all.\textsuperscript{21} That doctrine is obviously unsatisfactory, and courts have not hesitated to depart from it.\textsuperscript{22} The problem is self-contained, and the rule with respect to the joint judgment can be eliminated without affecting other areas.

It remains to consider the factor of change itself. In part this involves matters of a tactical quality. In deciding whether to translate its dissatisfaction with a former decision into action, a court takes into account the likelihood of cure from some other source. So there is general agreement, I think, that, because constitutions are difficult to change, courts exercise a greater freedom in dealing with constitutional precedents than with others. The expectation of prompt legislative action militates against judicial change.

The frequency with which the court will have an opportunity to deal with the problem has a bearing. If the problem is recurrent, a more suitable case may soon come. The countering consideration, of

\textsuperscript{20} Id. at 262, 267.
\textsuperscript{21} See, e.g., South Side Elevated R.R. v. Nesvig, 214 Ill. 463, 73 N.E. 749 (1905).
\textsuperscript{22} See, e.g., Chmielewski v. Marich, 2 Ill. 2d 568, 119 N.E.2d 247 (1954).
course, is that with each repetition the unsatisfactory ruling becomes more firmly riveted.

Sometimes, too, it is important to consider how much an opinion can carry. For example, we had in Illinois a precedent which unduly limited the scope of a subpoena duces tecum to appear before a grand jury and which seriously impeded grand-jury investigations. We also had not yet interred the notion that a man might purge himself of indirect contempt of court by filing a sworn answer. His answer was to be taken as true, the sanction for a false answer being thought to exist in a prosecution for perjury. Both precedents happened to come before the court in a single case.2 The opinion which was adopted overruled the decision which restricted the scope of the subpoena. The anachronistic character of the procedural rule was deprecated in passing, but it was not then disturbed.24 The following term it was overruled in another case.25

More basic, of course, than tactical considerations is the magnitude of the change involved. Courts may legislate, said Holmes, but they do so interstitially.26 They are restricted from movement of the mass and confined to movement of the particles. In a sense this is an aspect of the difference I have referred to between the isolated precedent and the settled course of decision. To quote again: "A common law judge could not say I think the doctrine of consideration a bit of historical nonsense, and shall not enforce it in my court."27

In another, and perhaps deeper sense, this factor is expressed in another remark of Holmes:

As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there still is doubt, while opposite convictions still keep a battle-front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field.28

The merit and magnitude of a particular change are not determined by a court on the basis of its own subjective appraisal. It does not measure competing doctrines solely on its own determination of their intrinsic value without reference to the status of those doctrines among those who are informed on the subject and who are particularly affected. One informed class whose opinion carries weight is the legal profession.

24 Id. at 490.
26 Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (dissenting opinion).
27 Ibid.
28 HOLMES, Law and the Court, in Collected Legal Papers 294-95 (1920).
Its comments, expressed in treatises, law reviews, and other legal publications, always affect the attitude of a court toward a precedent. Of course the class of persons who are informed and who are concerned with the question can vary widely. When it becomes so large as to include the public generally, its attitude becomes more difficult to ascertain and, I think, less significant. But where the class is small, and its informed status apparent, as with Lord Mansfield’s reliance upon special juries and the extra-judicial statements of merchants in the development of commercial law, informed opinion becomes significant. The state of medical knowledge as to the capacity of an unborn child to sustain life apart from its mother influences the right to recover for injuries suffered *en ventre sa mère*. And the attitude of psychiatrists toward the rule in the *M’Naghten* case goes far to determine whether the common law test for determining sanity in criminal cases will be reconsidered.

In addition to the state of mind and the expectancy of the informed public is the state of mind and the expectancy of the parties immediately concerned. The most frequent, and perhaps the most substantial, argument made against a court’s departure from precedent is that a sudden shift in the law will frustrate past transactions made in reliance on existing law. It is easy to overstate the objection, for in many fields of human action there is no reliance on past decisions and in many others no knowledge of the existing law.

The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains.

But some reliance there undoubtedly is, and how much a court can only guess, so it is a consideration which cannot properly be disregarded.

Courts have set their faces against the possibility of disappointment of expectations by legislation. Before a statute can be given retrospective effect, it must first hurdle the presumption against retroactivity, a very real obstacle which it meets in the course of interpretation. If it succeeds, it must then surmount express constitutional provisions concerning due process, impairment of contracts, or *ex post facto* legislation. With judicial decisions the attitude has been quite different. The overruling decision is not generally thought to violate

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29 See Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).
constitutional provisions. Of course courts often rest their adherence to a disapproved decision on the ground that a "rule of property" has grown up under it. They do so by choice, however, and not by command. Even more often, I suspect, dissatisfaction with a retrospective result, though not explicitly avowed, influences the decision.

There is an important difference between the two situations, however. In the case of a statute the desire not to unsettle the past may be achieved without preventing the establishment of a new pattern, for the statute becomes effective for the future. But, when that desire not to unsettle prevails against a proposed change in decisional law, the result is simply to perpetuate the existing rule.

Most courts seem to have assumed that a new doctrine cannot be announced judicially unless it is applied retroactively. The assumption is of course a logical offshoot of the theory that what a court does is to state what has always been the law. But it is not a necessity, either conceptually or practically, and some courts have found it possible to apply the existing rule to the case at hand while at the same time expressing disapproval of that rule and stating by way of caveat that a contrary rule will be applied in the future to litigation arising out of transactions subsequent to the present decision.

The idea is not new. Wigmore suggested it as an "interesting experiment" in 1917, and shortly thereafter Kocourek formulated a proposed statute providing that a supreme court should not decide any case under a prior rule if the court believes that rule unjust, unless the former rule had been the basis of a reasonable and justifiable reliance by the litigant or by other persons not before the court. Cardozo, in 1932, also referred to the practice with favor and intimated that the power existed without statutory enactment. Some months later he delivered the opinion of the United States Supreme Court in the Sunburst case, sustaining against constitutional objection the action of the Montana court in applying the existing rule to the case at hand while announcing a different rule for the future.

Objections have been made. It has been said that the practice involves an improper exercise of legislative power and that, in any event, what the court announces as the rule to be applied in the future is mere dictum. In my opinion these objections are not substantial. Anything in a court's opinion beyond the judgment order

84 Cardozo, New York State Bar Address, 1932 N.Y.S.B.A. REPORT 263, 295.
is legislative to the extent it purports to lay down a general rule. There are other instances where courts have been willing to go beyond the necessities of the case at hand, in the form of opinions resting on alternative grounds, or even opinions rendered in cases which have become moot, when the question at issue is one of sufficient public importance. Familiarity in recent years with the declaratory judgment makes it increasingly difficult to regard courts as doing no more than redressing completed injuries and reminds us that they have a role also as general organs of public administration, competent to exercise a preventive jurisdiction through their declarations of rights.

That a court's announcement of the future rule will in fact be followed when the time comes is of course not absolutely guaranteed. At least one court has declined to apply a rule which it had announced prospectively in an earlier case, with the remark that the announcement was obvious "dictum."37 But, as a practical matter, that sort of "dictum," obviously stated upon close consideration of the point involved, is likely to fare better than most of what is intimated in the ordinary, retroactive decision.

The Sunburst technique has been pretty largely confined to decisions construing statutes or passing on their validity and to situations where the criminal law or contractual relations were involved.38 These limitations, perhaps based on the analogy of constitutional provisions, do not seem essential. The doctrine is equally applicable where the overruled decision relates to nonstatutory law. How far it should be applied presents problems. Its heart is reliance, actual or presumed, upon the earlier doctrine. In real life, reliance may attach to a forceful though technically unnecessary dictum, as in the Sunburst case, or to the hitherto unconstrued words of a statute. It may even attach to a decision so palpably erroneous, as the California court once said of one of its prior decisions, that a lawyer who advised a client to rely upon it would thereby show his incapacity.39 And reliance may be disappointed by a decision which purports to distinguish as well as by one which expressly overrules.

The availability of the technique is established. It is urged even in courts which, like ours, have not yet applied it. It may be that it will never be used on a wide scale, for its use assumes that the court

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38 See Freeman, Protection Afforded Against the Retroactive Operation of an Overruling Decision, 18 Colum. L. Rev. 230 (1918).
39 Alferitz v. Borgwardt, 126 Cal. 201, 208, 58 Pac. 460, 462 (1899).
will consciously apply an unsatisfactory rule in deciding the rights of the parties before it. And, if the equities of the case at hand are strong enough to convince a court of the injustice of a rule, they are likely to be strong enough to induce change immediately and not just prospectively. But for the case where the element of actual reliance presses strongly, the *Sunburst* technique is a valuable tool to have at hand.\(^\text{40}\)

In what I have said I have used the term “precedent” to refer only to judicial decisions. That is the way in which working lawyers use it. And even writers who deal with the problems and the resources of the judge who is working on the frontiers of the law do not often speak of statutes. That is because the common law has drawn the principle which decides the future case from the facts and the decision of the past case. Common law courts have had an uneasy way with statutes. Legislation is grudgingly given its letter, but no more. The common law attitude, says Sir Frederick Pollock, “cannot well be accounted for except upon the theory that Parliament generally changes the law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds.”\(^\text{41}\)

Writing in 1908, however, Dean Pound suggested that the trend of the common law was toward a view more like that of the civil law, which finds its rules for decision in statutes. He predicted that common law courts would one day receive a statute “fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it . . . as of equal or coordinate authority in this respect with judge-made rules upon the same general subject.”\(^\text{42}\) Such an attitude indeed prevailed in England in early days under the doctrine of “the equity of the statute.” But Blackstone’s view of the common law as a completed, fully rounded system left no room for that doctrine. And so we find English judges saying in 1785: “We are bound to take the act of Parliament as they have made it; a *casus omissus* can in no way be supplied by a court of law for that would be to make law.”\(^\text{43}\) And


\(^\text{41}\) *Pollock, Essays in Jurisprudence and Ethics* 85 (1882).


\(^\text{43}\) See *Landis, Statutes and the Sources of Law*, 1934 Harvard Legal Essays 213, 235.
in this country, in 1797, we find: "The Act . . . being in derogation of the common law is to be taken strictly."\textsuperscript{44}

Chief Justice Stone, surveying the future of the common law in 1936, regretted that statutes were regarded as "in, but not of, the law." "Notwithstanding, their genius for the generation of new law from that already established," he said, "the common law courts have given little recognition to statutes as starting points for judicial law making comparable to judicial decisions."\textsuperscript{45} He looked forward to a day when statutes, like judicial decisions, would be used as social data, or as points of departure, in the common law technique of reasoning by analogy. And he spoke of "the ideal of a unified system of judge-made and statutory law woven into a seamless whole by the processes of adjudication." "On occasion," he said, "legislatures have made so bold as to direct that a statute shall be extended to cases plainly within its reason and spirit though not within the strict letter, a practice which if skillfully employed may yet restore to the courts a privilege which they renounced only because they have mistakenly regarded statutory enactments in some degree less a part of the law than their own decisions."\textsuperscript{46} I should like to explore the extent to which these prophecies are materializing.

The contrast between the impact of a statute and that of a common law decision upon the body of the law is graphically shown in Dean Landis' description of the effect of \textit{Rylands v. Fletcher}\textsuperscript{47} upon Anglo-American law. There the House of Lords decided that one who artificially accumulated water upon his land was absolutely liable for damage caused by its escape. The decision was based upon the analogy drawn from earlier cases which had dealt with the liability of the man who kept wild animals upon his land. The doctrine of \textit{Rylands v. Fletcher} has been important in our law since 1868, and the rule there announced has been applied in many situations. Dean Landis says:

\begin{quote}
Had Parliament in 1868 adopted a similar rule, no such permeating results to the general body of Anglo-American law would have ensued. And this would be true, though the act had been preceded by a thorough and patient inquiry by a Royal Commission into the business of storing large volumes of water and its concomitant risks, and even though the same Lords who approved Mr. Fletcher's claim had in voting "aye" upon the measure given reasons identical with those contained in their judgments. Such a statute would have caused no ripple
\end{quote}

\textsuperscript{44} Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797).
\textsuperscript{45} Stone, \textit{The Common Law in the United States}, 50 HARV. L. REV. 4, 12, 14 (1936).
\textsuperscript{46} Id. at 12, 15-16.
in the processes of adjudication either in England or on the other side of the Atlantic, and the judicial mind would have failed to discern the essential similarity between water stored in reservoirs, crude petroleum stored in tanks, and gas and electricity confined and maintained upon the premises.\textsuperscript{48}

There has not been complete agreement as to precisely what is meant by the use of statutes by analogy. Ernst Freund had his view on this question,\textsuperscript{49} and more recent writers have used their own shadings of meaning. Because my present interest is with the materials available to a judge in deciding a case, I want to look broadly at the ways in which judges apply statutes beyond the letter of their terms, without concern for refinements of definition.

Some of the doctrines of the common law have been so long accepted that we tend to forget that their origin is statutory. The prescriptive period of twenty years of adverse possession came into the common law from an early statute of limitations. It appeared first unobtrusively, the lapse of time giving rise to a presumption of a lost deed, and over the years was converted into a rule of law. So with the presumption of death arising from seven years' unexplained absence, which was drawn from statutes dealing with remarriage when husband or wife had been absent for seven years, and with succession to property in the case of the vanished life tenant.\textsuperscript{50}

To turn to more modern instances, the issue in the recent Chinese sovereignty case was whether or not a counterclaim could be asserted against a sovereign government.\textsuperscript{51} There was no statute which related to the availability of a counterclaim against a sovereign government, immune from suit. Yet the decision turned upon other statutory provisions which related to the use of counterclaims and set-offs generally. The approach was foreshadowed, it seems to me, by the decision that a subsidiary of the Reconstruction Finance Corporation was not immune from suit.\textsuperscript{52} The usual provision which permits suability was omitted from the statute which created the particular agency, but the deficiency was supplied from other statutes.

There are other illustrations. Congress specifies a form of bill of lading to govern shipments by rail, and by analogy the requirements of that statute are read into bills of lading governing shipments by boat.\textsuperscript{53} In the \textit{Coronado Coal} case it is held that an unincorporated

\begin{itemize}
\item \textsuperscript{48} Landis, \textit{Statutes and the Sources of Law}, 1934 \textit{Harvard Legal Essays} 213, 221.
\item \textsuperscript{49} Freund, \textit{Interpretation of Statutes}, 65 U. Pa. L. Rev. 207 (1917).
\item \textsuperscript{50} See Thayer, \textit{Evidence}, 319 n.52 (1898).
\item \textsuperscript{52} Keifer & Keifer v. RFC, 306 U.S. 381 (1939).
\item \textsuperscript{53} South and Central American Commercial Co. v. Panama R.R., 237 N.Y. 287, 142 N.E. 666 (1923).
\end{itemize}
labor union may be sued in its own name, because it has so many of
the attributes of a corporation, which of course is suable by statute.54
And in the Hutcheson case a policy drawn from a statute regulating
injunctions in labor disputes governs decision as to the legality of
union conduct.55 In the United Mine Workers case56 four dissenting
justices would have found in the maximum penalty provision of the
War Labor Disputes Act a limitation upon the penalty to be imposed
for violation of an injunction, although the statute did not directly
bear upon the problem before the court. Statutes which prohibit strikes
against public utilities motivate decisions enjoining strikes against
hospitals, although the statutes are silent as to hospitals.57

These are scattered instances. Let us turn to a field where the
cases come in clusters. After the middle of the last century the Married
Women’s Acts gave to married women the right to own their separate
property, to contract, and to sue and be sued. Almost a hundred years
have passed, and areas of the law which were not directly mentioned
in those acts are still responding in lively fashion to their impact.
Can one spouse be guilty of stealing from the other? Can they conspire
together to violate the law? Is the crime committed by the wife in
her husband’s presence presumed to have been coerced by him? So
with the law of evidence. Are husband and wife still incompetent to
testify for or against each other, as they were at common law? And, in
the law of torts, can one spouse sue the other for negligent or wilful
injury, or does the common law barrier still exist? Is the husband
liable for his wife’s torts, as he was at common law? Has the common
law immunity of one spouse from an action by the other sufficient
vitality today to justify its importation into a wrongful death statute?
Is the husband’s common law immunity available to his employer when
the wife’s injury has been caused by her husband’s negligence during
the course of his employment?

These, and many more, are live questions in the law today. Different
answers are given by different courts. But, whatever answer is given,
it rests upon an appraisal of the effect of the Married Women’s Acts.
The radiations from those statutes cover a breadth not even suggested
in their language.

Another use of statutes to govern conduct beyond their letter is so
commonplace as to go almost without notice. A statute prohibits certain
conduct and provides a penalty by way of fine or imprisonment for its

violation. It contains no suggestion as to civil liability. Yet everywhere the breach of such a statute which causes harm to another can give rise to civil liability. Dispute will center upon whether or not a particular statute should be so applied, but the propriety of the technique which extends the statute beyond its words goes unchallenged.

The new way with a statute which Dean Pound predicted is not yet here. But it is clear, I think, that the common law’s insulation from statutes is thinner than it was. The shift has not been pronounced; the instances are still sporadic. But such a shift in attitude can be measured accurately only from a perspective more remote than ours. I should guess that the pace will accelerate as advocates become alert to the possibility that decisions in common law cases can be influenced by principles drawn from the statutes.

I have spoken of precedents and of some of the factors which move a court to adhere to a precedent or to depart from it. Having gone so far, I am unable to go further and indicate what weight is to be assigned to each of these factors in a particular case. Not only that—I must mention another pervasive ingredient which further complicates the problem.

The forces and factors which I have mentioned are not weighed in objective scales. Each judge will have his individual reaction to the value of a particular precedent. Each will respond in his own degree to the pressure of the facts of the case. And each will make his own appraisal of the weight to be given to the other considerations I have mentioned.

There is nothing new in the notion that the personality of the judge plays a part in the decision of cases. Cardozo pointed out that on the Court of Appeals in his day there were ten judges, of whom only seven sat at a time. “It happens again and again,” he says, “where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time.” 88 And, again, in speaking of the subconscious forces that shape judgments, he says: “There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations.” 89

Perhaps there has been a lack of candor. I do not think so. Rather it seems to me that we lack the ability to describe what happens. I have tried to analyze my own reactions to particular cases. When I have tried in retrospect, I have doubted somewhat the result, for the tendency is

89 Id. at 167-68.
strong to reconstruct along the lines of an assumed ideal process. William James said, "When the conclusion is there we have already forgotten most of the steps preceding its attainment." And, when I have tried to carry on simultaneously the process of decision and of self-analysis, the process of decision has not been natural. I suspect that what is lacking is not candor but techniques and tools which are sensitive enough to explore the mind of man and report accurately its conscious and subconscious operations.

So far as I am aware, decision with me has not turned upon the state of my digestion. And, if I have reached decision by means of a hunch, it has been a hunch with a long-delayed fuse, for often I have started confidently toward one conclusion, only to be checked and turned about by further study. Cardozo has described an experience which I think is familiar to every judge:

I have gone through periods of uncertainty so great, that I have sometimes said to myself, "I shall never be able to vote in this case either one way or the other." Then, suddenly the fog has lifted. I have reached a stage of mental peace. I know in a vague way that there is doubt whether my conclusion is right. I must needs admit the doubt in view of the travail that I suffered before landing at the haven. I cannot quarrel with anyone who refuses to go along with me; and yet, for me, however it may be for others, the judgment reached with so much pain has become the only possible conclusion, the antecedent doubts merged, and finally extinguished, in the calmness of conviction. It was actually this experience, I am confident, that was intended to be compressed into the phrase "judicial hunch."

If I were to attempt to generalize, as indeed I should not, I should say that most depends upon the judge's unspoken notion as to the function of his court. If he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.

I do not feel that because it is impossible to place a precise value upon each of the elements which enter into the process of decision it is

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60 JAMES, PRINCIPLES OF PSYCHOLOGY 260, quoted in CARDOZO, PARADOXES OF LEGAL SCIENCE 61 (1928).
61 CARDOZO, PARADOXES OF LEGAL SCIENCE 80-81 (1928).
therefore futile to attempt to enumerate them. It is important that advocates be aware of them, so that cases can be brought more sharply into focus. And it is even more important that judges be conscious of them. If it is true, as I think it is, that in many cases the law stands at a crossroad, the men who choose the path for the future should make the choice, so far as they can, with an awareness of the elements that determine their decision.

Precedent speaks for the past; policy for the present and the future. The goal which we seek is a blend which takes into account in due proportion the wisdom of the past and the needs of the present. Two agencies of government are responsible for the proper blend, but each has other responsibilities as well. The legislature must deal with the ever increasing details of governmental operations. It has little time and little taste for the job of keeping the common law current. The courts are busy with the adjudication of individual controversies. Inertia and the innate conservatism of lawyers and the law work against judicial change.

I think that no one can look closely at the field on which precedent and policy meet without sensing the need for a closer liaison between the two agencies which are charged with the task of making the adjustments. From such an examination came Cardozo's idea of a ministry of justice, and so the New York Law Revision Commission was born.

The present judicial article in Illinois, whatever be its other shortcomings, has a unique provision designed to achieve the needed liaison. In substance it provides that judges of courts of record shall annually report in writing to the justices of the Illinois Supreme Court "such defects and omissions in the laws as their experience may suggest" and that the judges of the Illinois Supreme Court shall annually "report in writing to the governor such defects and omissions in the constitution and laws as they may find to exist, together with appropriate forms of bills to cover such defects and omissions in the laws."62 The origin of the provision is not inspiring. Judges' salaries as fixed by the constitution of 1848 were very low. In 1869 a statute was passed which imposed upon the judges the duty of pointing out redundancies and inconsistencies in the statutes and which provided that each judge should receive $1,000 per annum for that service.63 It was understood that the purpose was to increase the judges' salaries. The constitutional provision was the subject of debate in the convention. The last remarks before it was finally adopted were these:

62 Ill. Const. art. VI, § 31.
63 Ill. Laws 1869, ch. 40, §§ 1-4.
This provision will be very useful if the judges do their duty. We would thus be enabled to make our laws plain, for judges like to have the laws plain after they get on the bench, however intricate they may desire them when they are off the bench. We will be enabled to abbreviate and simplify the law, and in fifteen years we will have the most perfect laws and rules of judicial procedure in America.\textsuperscript{64}

The prophecy was not realized, but I still feel that the provision is an admirable tool for the purpose. It provides a simple but formal mechanism by which the judiciary can communicate to the legislature its suggestions for changes in the law.

The provision has not often been utilized. I suspect that its disuse may be due to the fact that it imposed on judges the duty of drafting statutes to make effective the changes which they suggest. Judges are not generally at home in the field of legislative draftsmanship, and for almost fifty years after the adoption of the constitutional provision no professional statutory drafting agency existed. By the time such an agency was established, the habit of disuse had become ingrained. More is needed, too, than just mechanical assistance in drafting. Competent research on a broad scale is essential, and that function the court can hardly undertake by reason of the pressure of its other obligations.

In very recent years, however, the court has made effective use of the constitutional provision in particular instances. It is prepared, I think, to go much further along this line. A formal public agency charged with the obligation of revision of the law would be desirable. But operation under the constitutional provision need not await the creation of such an agency. The resources of the law schools are available, I am sure. And I hope they will be drawn upon. The practical machinery by which the gap between the past and the present may be lessened is at hand. The fault is our own if it is allowed to remain idle.\textsuperscript{65}

\textsuperscript{64} Debates, Illinois Constitutional Convention of 1870, at 1495.

\textsuperscript{65} Section 31 of article six of the Constitution of 1870 was repealed in the new article six of the Illinois Constitution which became effective January 1, 1964. In its place section 19 of article six of the present Judicial Article was included. That section contemplates that the annual judicial conference for which the new Judicial Article makes provision is to meet annually, and the Supreme Court is to report on the suggested improvements that emanate from the Judicial Conference in each legislative year.