

MANITOBA LAW SCHOOL FOUNDATION ANNUAL LECTURE: 1966

NEW WAYS OF PRECEDENT

I am deeply sensitive to the great honour you have done me by inviting me to give this second of the Manitoba Law School Foundation Lectures. I know that I shall not contribute anything at all comparable, either as law or as literature, to the opening lecture delivered last year by Lord Devlin, who has won the respect and admiration of the Bench and the Bar in my country. But since my vanity would not permit me to decline the invitation, I must make the effort.

A diagnosis of the present condition of the doctrine of precedent has an uninviting sound. Certainly there are livelier topics. A discussion of recent developments in our law of obscenity, for example, would be more entertaining, and might even afford a basis for scholarly speculation as to the effect of repeated exposure to allegedly obscene materials upon the moral standards of judges. But the current happenings in the common law world with respect to the doctrine of precedent are so lively that I finally concluded, with the encouragement of Mr. Justice Freedman, that if a discussion of the status of precedent today should turn out to be dull, the fault would lie with the speaker rather than the subject.

The most dramatic occurrence of this century in this area of the law took place last summer, when the House of Lords announced through the Lord Chancellor that no longer would the House regard its earlier decisions as immutable — that the House of Lords would, in the future, feel free in appropriate circumstances to overrule its prior decisions.¹ The doctrine that the House is bound by its own earlier decisions which was thus repudiated in July of this year, was announced in 1898 in *London Tramways Inc. v. London County Council*.² In 1944 the Court of

1. The Lord Chancellor stated:

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

"Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

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

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

London Times, July 27, 1966, p. 10.

2. (1898) A.C. 375.

Appeal in *Young v. Bristol Airplane Company*,³ announced a similar lack of capacity to overrule its own prior decisions.

The relative newness of these limitations is illustrated by the remarks of Lord Justice Diplock in his presidential address before the Holdsworth Club:

"Where do you find the sources of the common law today? In the bold imaginative judgments delivered by a great generation of judges between the sixties and the nineties of the last century. It was these rather than the activities of parliament which transformed man's duty toward his neighbours as he emerged from a static, agricultural and aristocratic society to a dynamic, industrial and democratic one."

And his Lordship pointed out that,

"had the same attitude survived into the twentieth century, the same process of change would have continued to adapt the common law to the needs of contemporary society without the need for intervention by parliament. Yet, somehow, at the turn of the century the Courts seemed to have lost their courage. In the clash between precedent and flexibility precedent seemed to win the day."⁴

The evidence is clear enough so that even an outsider may venture that the doctrine of *London Tramways* never fit very comfortably into the common law. It has been subjected to criticism that has grown in intensity over the years. Professors Goodhart, Allen, Stone, Cross and others among the academics, and Lord Denning, Lord Evershed, Lord Diplock and others among the judges, have all voiced their dissatisfaction. As significant as the internal criticism, I would venture, is the fact that the doctrine was not accepted in other Commonwealth countries.

In recent years there have been many indications that the doctrine of *London Tramways* had not long to survive. In 1961, the Privy Council decided the case of the *Wagon-Mound*⁵ in which the earlier decision of the Court of Appeal in *Re Polemis*,⁶ decided in 1921, was rejected. Shortly thereafter the Lord Chief Justice made this significant comment on the decision in the *Wagon-Mound*:

"Before leaving that part of the case, I should say, in case the matter goes further, that I would follow, sitting as a trial judge, the decision in the *Wagon-Mound* case; or rather, more accurately, I would treat myself, in the light of the arguments in that case, able to follow other decisions of the Court of Appeal prior to the *Polemis* case, rather than the *Polemis* case itself. As I have said, that case has been criticized by individual members of the House of Lords, although followed by the Court of Appeal in *Thurogood v. Van Den Berghs & Jurgens Ltd.* I should treat myself as at liberty to do that, and for my part I would do so the more readily because

3. (1944) K.B. 718 (C.A.)

4. Diplock, *The Courts as Legislators*, 20-21 (Presidential Address, the Holdsworth Club, 1965).

5. *Overseas Tankship (U.K.), Ltd. v. Morts Dock and Engineering Co., Ltd.*, (1961) A.C. 388.

6. *Re Polemis and Furness, Withy & Co., Ltd.*, (1921) 3 K.B. 560 (C.A.)

I think it is important that the common law, and the development of the common law, should be homogeneous in the various sections of the Commonwealth. I think it would be lamentable if a court sitting here had to say that while the common law in the Commonwealth and Scotland has been developed in a particular way, yet we in this country, and sitting in these courts, are going to proceed in a different way. However, as I have said, that does not strictly arise in this case."⁷

More recently, and since the announcement of the House of Lords, the editor of the *New Law Journal* pointed out that one of the consequences of the new freedom to depart from precedent is that,

"Commonwealth decisions that otherwise would be disregarded as being in conflict with prior decisions of the House, are likely to play a more important role in the future."⁸

It may be that under the new freedom enjoyed by the House of Lords there will be less change in the actual result of cases than might be anticipated, for ways of handling precedent may have been developed that blunted the cutting edge of the rule of *London Tramways*. I venture this suggestion upon the authority of Professor Rupert Cross, Vinerian professor at Oxford. In his article entitled *Stare Decisis in Contemporary England*,⁹ published in the *Law Quarterly Review* in April of 1966, Professor Cross pointed out that in recent years there has been a "considerable relaxation in the rigour with which the rule of *stare decisis* is applied . . ." and he suggested that "the process of relaxation [had] . . . gone far enough to call for a radical restatement of the English doctrine of precedent."

He concluded his article with the following observations:

"A friend once told the writer in jest that the English doctrine of precedent is a figment in the mind of the academic lawyers. Like all good jokes it was exaggerated because, subject to striking exceptions, the judges do consider the applicability of the rules of precedent to the problems with which they are concerned, but it must be admitted that the foregoing summary makes one wonder whether the spectacle of an English judge labouring under brutal fetters of a rigid doctrine of precedent is not something which, if it exists at all, exists only in the minds of academic lawyers.

Of course, it is another question whether it would not be better both for the judges who have to act on the exceptions to the rule of *stare decisis* which they create, and for the academic lawyers who have to keep pace with those exceptions, that there should be a simple rule that neither the House of Lords nor the Court of Appeal is absolutely bound by its own previous decisions."

During the reign of the rule of *London Tramways*, a period of nearly sixty years, there has been a striking development in the technique of handling precedent in the American courts which I should like to put before you. Its relevance is strongly

⁷ 73 L.Q. Rev. 160 (1962), quoting Lord Parker, C.J. in *Smith vs. Leech Brain & Co. Ltd.* (1962) 2 W.L.R. 153, 158.

⁸ 116 *New L.J.* 1131 (1965).

⁹ Cross, *Stare Decisis in Contemporary England*, 52 L.Q. Rev. 203 (1966).

suggested by the last paragraph of the Lord Chancellor's announcement:

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

A few prefatory observations are appropriate. The American doctrine of precedent has operated upon the theory described by Chief Justice Stone of the Supreme Court of the United States in his survey of the common law, written in 1936.¹⁰ The thought that he expressed is that the legal doctrine is itself under examination in every case as much as are the rights of the litigants. Under the common law system a controversy churned up by the raw facts of life is brought before a reviewing court composed of judges who are not specialists in the particular problem. These generalists decide the case and state the reasons for their decision. And in response to the new facts, to new arguments of counsel, to increased general or scientific knowledge as well as to its own decisions and those of other courts dealing with the same problem, or similar problems, the legal doctrine is reshaped, expanded or contracted, or perhaps discarded altogether. The great advantage of this continuous testing process lies in its capacity to produce for each generation the kind of law that suits its needs. The common law is constantly striving for consistency throughout all of its varying doctrines — a goal that is probably illusory but one which, in my opinion at least, is worthy of the quest.

What I have said and what I am about to say might lead you to believe that the common law in the United States is completely lacking in the important virtue of predictability, and I should state at once that that is not the case. The areas with which I shall be concerned are the troubled areas of the law — areas that might be described as pathological — in the sense that there is acute dis-satisfaction with the actual operation of existing doctrine. These are the areas that are of greatest importance to a legal system, and of greatest interest to those who are concerned with its workings.

The particular development of which I wish to speak is the greatly increased use, in the United States, of the technique of

10. Stone, *The Common Law in the United States*, 50 *Harv. L. Rev.* 4 (1936). See also Paul Freund, in *Law and Philosophy*, 289. (N.Y. Univ. Press 1964), "Science, too, may furnish an analogue to the overruling of precedent. As every experiment tests in principle, according to Duhem's theorem, not only the hypothesis under direct scrutiny but the whole antecedent pattern of which this is a part, so in the law a re-examination of antecedent rules and principles is, in principle, open when a new set of facts is presented for decision, and it becomes a matter of judgment how radical the re-examinations shall be."

prospective overruling of a judicial decision. Ordinarily a legislative change in the law has prospective effect only. If a statute is to operate retroactively the legislative purpose that it should do so must be distinctly expressed. Even then the statute must be able to surmount our constitutional prohibitions against impairment of the obligation of contracts, and objections based upon the due process clauses of our constitutions, before it can be given retroactive effect. But when a change in the law is brought about by the overruling of an earlier judicial decision the assumption has been that it must be given retrospective effect.

There is not time to develop the considerations underlying this difference in result. Let me state, without attempting a full analysis, that it was largely a product of the Blackstonian theory that judges do not make law, but only declare what has always been law. Thus the change that occurred when a judicial decision was overruled was regarded not as a change in the law but simply a correction of an earlier misreading of it. During the present century this theory of the law has been rejected, due largely to the work of a group of scholars who are collectively referred to as the American school of realistic jurisprudence. It has come to be recognized that judges do make law. This recognition has focused attention upon the considerations that justify a court in overruling an earlier precedent,¹¹ and it has eliminated a theoretical barrier to prospective overruling.

Scholarly research has revealed a few early instances of prospective overruling and even one or two early discussions of the technique. In 1917 the idea was described by Dean Wigmore of Northwestern University as an "interesting experiment,"¹² and shortly thereafter a colleague of his, Professor Albert Kocourek, drafted a statute to govern the use of the technique.¹³ Then in 1932 Mr. Justice Cardozo referred to the practice with favor and intimated that the power to overrule prospectively existed without statutory sanction.¹⁴ 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.¹⁵

11. The literature is voluminous. See Llewellyn, *The Common Law Tradition* (1960); Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 *Sup. Ct. Rev.* 211; Keeton, *Creative Continuity in the Law of Torts*, 75 *Harv. L. Rev.* 463 (1962); Traynor, *La Made Vite, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 *U. Chi. L. Rev.* 223 (1962); Schaefer, *Precedent and Policy* (1955), reprinted 34 *U. Chi. L. Rev.* 3 (1966).

12. Wigmore, editorial preface to *Science of Legal Method*, xxxvi-xxxix (Modern Legal Philosophy Series, No. 9, 1917).

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

14. Cardozo, *New York State Bar Address*, 1932 *N.Y.S.B.A. Report* 263, 295.

15. *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 *U.S.* 338, 77 *L. ed.* 330 (1932).

Let me begin my discussion of the technique of prospective overruling by putting before you two American cases, one civil, the other criminal. The first is an Arkansas case which involved an instalment sale contract. The constitution of the state of Arkansas prohibited interest at a rate higher than ten percent per annum. In numerous earlier decisions the Supreme Court of Arkansas had held that a particular form of instalment contract which provided for interest, insurance and carrying charges did not amount to usury. Now, in an action to enforce liability against the purchaser under such a contract, the Court determined that the aggregate of the charges superimposed upon the principal obligation amounted to interest in excess of ten per cent in violation of the constitutional provision, and that its earlier decisions, in which a contrary conclusion had been reached, were erroneous.¹⁶ What was the court to do?

The second case arose in New Mexico during the depression. In order to stimulate attendance at movies during that period, a great many theatre's employed a practice known as "bank night". In most of the American states there are either statutory or constitutional provisions which prohibit lotteries — a reflection I suppose of our Puritan background. The question arose as to whether or not "bank night" violated those statutory and constitutional provisions. One of the earliest cases came before the Supreme Court of New Mexico and the court concluded that "bank night" was not a lottery.¹⁷ The question then came on for decision in numerous other courts throughout the country. Additional arguments were developed and soon the consensus became apparent that "bank night" was a lottery. The question was brought again before the New Mexico court. This time the court had the benefit of the judgment of many other courts, and it now concluded that its first decision was wrong, and that "bank night" was a prohibited lottery.¹⁸ What was the court to do?

In each case the court applied the existing precedent to the case before it, but announced that in the future it would apply a different rule. The great advantage of this technique is that it protects those who have relied upon the earlier decision of the court without tying the hands of the court as to the future. Mr. Justice Cardozo pointed out many years ago that 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."¹⁹

16. *Hare v. General Contracting Co.*, 220 Ark. 601, 249 S.W. 2d 973 (1952).

17. *City of Roswell v. Jones*, 41 N.M. 258, 67 P. 2d 286 (1937).

18. *State v. Jones*, 44 N.M. 623, 107 P. 2d 324 (1940).

19. Cardozo, *The Growth of the Law*, 122 (1924).

Unquestionably, however, there was heavy reliance in the two cases I have described, and there is reliance in many, many instances; the problem becomes one of the weight to be given to the element of reliance in the context of each situation.

The kind of prospective overruling used in the Arkansas and New Mexico cases, which has been called "pure prospectivity", has been attacked upon several grounds. First, it is said to be legislative in character to the extent that it changes the law. It is, but any overruling decision would be legislative, whether it operated prospectively or not. Indeed, a common law decision on a question of first impression is legislative in the sense that it prescribes a rule of conduct to govern future occurrences. Second, it is urged that "pure" prospective overruling, as applied in the two cases I have described, amounts to no more than *dictum* since the court's overruling of its prior decision has no effect upon the litigants immediately before it. Related to this objection is the criticism that since the litigant whose plight and whose arguments brought about the change in the law does not benefit from that change, other litigants would have no incentive to seek judicial change.

In part to meet this latter objection, and in part, I suppose, because of the desire of a court that its ruling should have immediate concrete effect, a modification of pure prospective overruling has developed. Under this variation, the immediate litigant is given the benefit of the change in the law that he has brought about but as to all others the new rule of decision will have prospective effect only.

In recent years in the United States, tort doctrines of immunity have been vigorously attacked in court after court. Governmental immunity from tort liability,²⁰ the immunity of charitable corporations²¹ and intrafamily immunities²² have all been critically examined. In some of these cases the technique of pure prospectivity has been modified so that the individual litigant who successfully challenges the doctrine of immunity is permitted to recover. My own court followed this technique with respect to the doctrine of governmental immunity.²³ It has been criticized. Professor Robert Keeton of Harvard has pointed out:

"Such selective retrospective application produces distinctions perhaps more difficult to justify than either wholly prospective or

20. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P. 2d 457, 11 Cal. Rptr. 89 (1961), on subsequent rehearing sub nom., *Corning Hosp. Dist. v. Superior Court*, 57 Cal. 2d 488, 370 P. 2d 325, 20 Cal. Rptr. 621 (1962).

21. *Kojis v. Doctors Hosp.*, 12 Wis. 2d 367, 107 N.W. 2d 131, modified on rehearing, 107 N.W. 2d 292 (1961); *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W. 2d 1 (1960).

22. *Balts v. Balts*, 142 N.W. 2d 68 (Minn. 1966); *Goller v. White* 20 Wis. 2d 402, 122 N.W. 2d 193 (1963).

23. *Meallor v. Kaneland Community Unit Dist.* No. 302, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959).

wholly retrospective overruling. It would seem not at all unfair to reward this benefactor of legal doctrine from a public source, particularly since the reward amounts only to compensation for accidental harm he has suffered. But by the device used, the unfortunate institution that happens to have the test case brought against it bears the cost of the reward, while institutions similarly situated in all other material respects escape the cost. Moreover, the reward is bestowed on the plaintiff for being first in time in the appellate court — first, that is, after the ripening of a potential readiness of the court to overrule the precedent in question. Other plaintiffs, even those whose claims arise from the same accident in which this plaintiff was injured and whose cases may have been delayed for a variety of fortuitous reasons, go uncompensated.²⁴

Another variation in the technique of prospective overruling was employed by the Supreme Court of Minnesota in a case in which the issue was the immunity of school districts from tort liability. The court did not allow the immediate litigant to recover, but announced that, subject to legislative changes, it proposed to abrogate the doctrine of immunity after the adjournment of the next session of the Minnesota legislature.²⁵

The technique employed by the Minnesota court suggests the interaction between court and legislature which I think is a significant consequence of prospective overruling. For example, after the California Supreme Court overturned what remained of governmental immunity,²⁶ the California legislature revised its statutory law in a comprehensive form that was ultimately followed in other states, including my own.²⁷

It is, in my view, as much a part of the judicial process to focus attention upon problems as to solve them for all time. Of course, the legislative reaction is not always predictable, nor is it always satisfactory. Some years ago the New York Court of Appeals was called upon to determine the continuing vitality of the rule of tort law that conferred immunity upon the husband in negligence actions brought by his wife — interspousal immunity. The New York court decided to abide by the old rule.²⁸ The New York legislature promptly reacted, and provided that the wife might sue the husband.²⁹ Some years later our court in Illinois was confronted with the same problem. We decided to profit by the New York example and we held that the wife might sue her husband, thus overturning the old doctrine of interspousal

24. Keeton, *Creative Continuity in the Law of Torts*, 75 *Harv. L. Rev.* 463, 491 (1962).

25. *Spanel v. Mounds View School Dist.*, 262 *Minn.* 279, 118 *N.W. 2d* 795, 803 (1962).

26. *Muskopf v. Corning Hosp. Dist.*, 55 *Cal. 2d* 211, 359 *P. 2d* 457, 11 *Cal. Rptr.* 89 (1961), on subsequent rehearing sub nom., *Corning Hosp. Dist. v. Superior Court*, 57 *Cal. 2d* 488, 370 *P. 2d* 325, 20 *Cal. Rptr.* 621 (1962).

27. See Cobey, *The New California Tort Liability Statute*, 1 *Harv. J. Legis.* 16 (1964). See *Ill. Rev. Stat.* 1965, ch. 85, para. 1-101 to 10-101.

28. *Mertz v. Mertz*, 271 *N.Y.* 468, 3 *N.E. 2d* 597 (1936).

29. *N.Y. Laws* 1937, ch. 669 para. 1 (*N.Y. Domestic Relations Law* para. 57), now *General Obligation Law* par. 3-313(2).

immunity.³⁰ Again the legislative response was prompt, and a statute provided that in Illinois a wife might not sue her husband for a negligent tort.³¹

Despite the unpredictability of legislative response to judicial change,³² I think that interaction between court and legislature is valuable, particularly because in many situations those who are adversely affected by the existing doctrine — the injured plaintiff in the tort action for example — have no lobby which can give them an effective voice before the legislature. Legislative bodies need a stimulus to consider the kind of problems that give rise to prospective overrulings.

From what has been said I think it is apparent that what justifies prospective overruling, in any form, is the element of reliance upon existing legal doctrine. In the Arkansas case the contract was made by the seller in reliance upon existing precedent which had upheld its validity. In the New Mexico case, when the proprietor of the theatre conducted a "bank night", the Supreme Court of New Mexico had said it was legal to do so. These are clear cases, but there are others in which opinions may differ as to the significance of reliance. Is a prospective overruling justified, for example, on the ground that if a charitable hospital had known that it was going to be held liable for its negligent torts, it could have insured against the risk? Of what significance is the extent of potential exposure to liability? Does it make a difference, for example, in a case involving the tort liability of school districts, that the statute of limitations does not run against a minor child until after he has attained his majority? Questions of this kind will increasingly engage the attention of legal scholars. Whatever may be their conclusions as to the quality of particular kinds of reliance, reliance upon existing law will remain the justification for prospective overruling.

Quite recently the Supreme Court of the United States has used the technique of prospective overruling in three cases involving constitutional law and criminal procedure, and I would question whether in any of the three cases appropriate recognition was given to the element of reliance. The first case involved the exclusion of evidence that is the product of an illegal search. Since 1914 the federal courts in the United States have applied what we call the "exclusionary rule" of evidence: evidence that

30. *Brandt v. Keller*, 413 Ill. 503, 109 N.E. 2d 729 (1953).

31. Ill. Rev. Stat., 1965, ch. 68, par. 1.

32. Disagreements between courts and legislative bodies as to the prospective or retroactive effect to be given a particular judicial decision have been infrequent, but they present unique problems. See Schaefer, Chief Justice Traynor and the Judicial Process, 57 Cal. L. Rev. 11, 17-20 (1965).

is the product of an illegal search is not admissible.³³ About half of the States followed that doctrine, which the Supreme Court held in *Wolf v. Colorado*,³⁴ decided in 1949, was not binding upon the States. In 1961, in *Mapp v. Ohio*,³⁵ the Supreme Court of the United States again considered that question, overruled *Wolf v. Colorado*, and held that the federal exclusionary rule was binding upon the States. The effect to be given to this decision was a matter of serious concern, of course, in those States that had not followed the exclusionary rule. Hundreds, perhaps thousands of criminals would be set free in those States if the rule was to be applied retroactively.

In 1965, in *Linkletter v. Walker*,³⁶ the Supreme Court considered the retroactivity of its decision in *Mapp v. Ohio*. The search with which the Court was concerned in *Linkletter* had occurred prior to the Court's decision in *Mapp v. Ohio*. A normal prospective application of the overruling decision of *Mapp v. Ohio* would not have affected the validity of that search, for it was made in reliance upon *Wolf v. Colorado*, the overruled decision. But the Supreme Court did not adopt that view. Rather it decided that the exclusionary rule should apply to all state court convictions, except those in which "the judgment of conviction was rendered, the availability of appeal exhausted," and the time for review in the Supreme Court had elapsed, before *Mapp v. Ohio* was decided.³⁷ The date thus chosen is wholly unrelated to any element of reliance. It was apparently chosen because the Supreme Court had previously applied its decision in *Mapp v. Ohio* to cases in the line of direct review, as defined in *Linkletter*.³⁸

In April of 1965, the Supreme Court overruled another earlier decision,³⁹ and now held that comment upon the failure of a defendant to testify in a criminal case violated his constitutional privilege against self-incrimination.⁴⁰ In January of 1966, the Court considered whether its overruling decision should be given retroactive effect.⁴¹ It held that the decision should be prospective, and it selected the same determinative date that it had used with respect to search and seizure, — a date conditioned upon the stage that the case had reached in the appellate process when the overruling decision was handed down. Again that date is un-

33. *Weeks v. United States*, 232 U.S. 383, 58 L. ed. 652 (1914).

34. 338 U.S. 25, 93 L. ed. 1782 (1949).

35. 367 U.S. 643, 6 L. ed. 2d 1081 (1961).

36. 381 U.S. 618, 14 L. ed. 2d 601 (1965).

37. *Id.* at 622 n.5, 14 L. ed. 2d at 604 n.5.

38. See 381 U.S. at 622, 14 L. ed. 2d at 604.

39. *Adamson v. California*, 332 U.S. 46, 91 L. ed. 1903 (1947).

40. *Griffin v. California*, 380 U.S. 609, 14 L. ed. 2d 106 (1965).

41. *Toban v. United States ex rel. Shott*, 382 U.S. 406, 15 L. ed. 2d 453 (1966).

related to reliance upon the overruled decision, which occurred when the comment was made at the trial. The date selected was relevant only because the Court had already committed itself to retroactivity to that extent by applying its new decision to cases pending on appeal.⁴²

The third instance of prospective limitation in this area of the law concerned the interrogation of a criminal suspect while in police custody. In 1964 the Supreme Court had held in *Escobedo v. Illinois*⁴³ that a suspect's request that his attorney be present during interrogation must be granted. The Court had used sweeping language, and there was uncertainty as to the scope of its decision. In June of 1966 the Court again considered the problem, and now held, in *Miranda v. Arizona*, that before a suspect is interrogated he must be advised of his right to counsel, and that if he is unable to afford a lawyer one will be appointed for him. And if the suspect requests counsel, no interrogation may proceed in his absence.⁴⁴

The requirement was new, and the opinion in *Miranda v. Arizona* was silent as to its retroactive effect. One week later, however, in *Johnson v. New Jersey*,⁴⁵ the Court held that the rules laid down in *Miranda* should apply only to cases in which the trial was commenced after June 13, 1966, the date of the *Miranda* decision. Again, it seems to me, the Court has failed to give due weight to the element of reliance in determining prospectivity. Reliance upon existing decisions occurred when the interrogations took place. And if the interrogations were conducted in accordance with existing constitutional requirements, the fortuitous date upon which the subsequent trial is commenced seems irrelevant.

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This sketch of the development of the technique of prospective overruling in the United States has emphasized the problems, and minimized the advantages of the technique. Lord Justice Diplock's statement of the basic advantages, made prior to the Lord Chancellor's announcement, remains valid:

"But judge-made law, as I have pointed out, is in theory retrospective. A precedent which reverses or modifies a previous precedent is applicable in all cases which are tried subsequently even though they arise out of acts done before the new precedent was laid down. This is unjust, and because it is unjust it is itself a factor which makes the courts more hesitant than they would otherwise be to correct previous errors or to adapt an established

42. See 382 U.S. at 409 n.3, 15 L. ed. 2d at 455 n.3.

43. 378 U.S. 478, 12 L. ed. 2d 977 (1964).

44. 384 U.S. 438, 16 L. ed. 2d 694 (1966).

45. 384 U.S. 719, 16 L. ed. 2d 882 (1966).

rule of conduct to changed conditions. And yet the rule that a new precedent applies to acts done before it was laid down is not an essential feature of the judicial process. It is a consequence of a legal fiction that the Courts merely expound the law as it has always been. The time has come, I suggest, to reflect whether we should discard this fiction."⁴⁶

MR. JUSTICE W. V. SCHAEFER*

46. Diplock. *The Courts as Legislators*, 17 (Presidential Address, The Holdsworth Club, 1965).

*Of the Supreme Court of Illinois. The 1967 Manitoba Law School Foundation Annual Lecture will be by Mr. Justice Leslie Scarman of the English Court of Queens Bench, Chairman of the Law Reform Commission, on September 25th, 1967. The subject of the lecture will be *Law Reform - Lessons From the British Experience*.