St. John's Law Review

Volume 57
Number 1 *Volume 57, Fall 1982, Number 1*

Article 12

June 2012

Prior Decision on Statutory Construction Applied Retroactively

David L. Mogel

Prior decision on statutory construction applied retroactively

A judicial decision typically establishes the law governing causes of action that accrue before and after the decision is rendered, thereby operating both retrospectively and prospectively.[120] Some courts, however, have engaged in "retroactivity analysis" to determine whether a denial of retrospective effect is warranted.[121] At times, they have declined to give retroactive effect to their rulings, especially where the edict overturns long-standing precedent.[122] This "prospective overruling,"[123] it has been asserted,

---

[120] Gager v. White, 53 N.Y.2d 475, 483, 425 N.E.2d 851, 853, 442 N.Y.S.2d 463, 466 (1981); *see* Linkletter v. Walker, 381 U.S. 618, 622-26 (1965); Kremer v. Chemical Constr. Corp., 623 F.2d 786, 788 (2d Cir. 1980); National Ass'n of Broadcasters v. FCC, 554 F.2d 1118, 1130 (D.C. Cir. 1976); Incorporated Village of Northport v. Guardian Fed. Sav. & Loan Ass'n, 87 Misc. 2d 344, 348-49, 384 N.Y.S.2d 923, 927 (Sup. Ct. Suffolk County), *aff'd*, 54 App. Div. 2d 893, 387 N.Y.S.2d 1015 (2d Dep't 1976). Generally, a case is decided upon the law existing at the time of its adjudication, rather than upon the law which prevailed at the time of the occurrence being litigated. People v. Beckford, 102 Misc. 2d 963, 966, 427 N.Y.S.2d 908, 910 (Sup. Ct. Bronx County 1980); *see, e.g.*, People v. Bell, 50 N.Y.2d 869, 871, 407 N.E.2d 1340, 1341, 430 N.Y.S.2d 43, 44 (1980); People v. Patterson, 39 N.Y.2d 288, 296, 347 N.E.2d 898, 903, 383 N.Y.S.2d 573, 578 (1976), *aff'd*, 432 U.S. 197 (1977); People v. Baker, 26 N.Y.2d 169, 172, 257 N.E.2d 630, 632, 309 N.Y.S.2d 174, 177 (1970); People v. Donaldson, 25 N.Y.2d 38, 43, 250 N.E.2d 46, 49, 302 N.Y.S.2d 549, 552 (1969); People v. Albro, 73 App. Div. 2d 73, 75-76, 425 N.Y.S.2d 1000, 1002 (3d Dep't 1980); Garlock v. Pennsylvania Cent. Transp. Co., 53 App. Div. 2d 1006, 1006, 386 N.Y.S.2d 490, 491 (4th Dep't 1976).

[121] *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 636-40 (1965). Seminal in the area of retroactivity is the Supreme Court decision of Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932). In that case, the Court held that a Montana court, in refusing to apply a decision retroactively, did not infringe upon fourteenth amendment rights. *Id.* at 361-62. The Court stated that it was constitutionally permissible for a state to delineate the extent to which it would adhere to precedent that had been declared no longer valid. *Id.* at 364. *See generally* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960). Indeed, subsequent cases expanded the application of the nonretroactivity doctrine. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 639-40 (1965) (limiting retroactive effect of prior decision involving constitutional rights); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940) (extending retroactivity analysis to a decision declaring a statute unconstitutional).

[122] Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971); Gager v. White, 53 N.Y.2d 475, 483-84, 425 N.E.2d 851, 854, 442 N.Y.S.2d 463, 466 (1981); Incorporated Village of Northport v. Guardian Fed. Sav. & Loan Ass'n, 87 Misc. 2d 344, 349, 384 N.Y.S.2d 923, 928 (Sup. Ct. Suffolk County), *aff'd*, 54 App. Div. 2d 893, 387 N.Y.S.2d 1015 (2d Dep't 1976). New York courts have long recognized that a decision may be stripped of its retroactive effect. In Harris v. Jex, 55 N.Y. 421 (1874), for instance, the defendant paid two mortgages in legal tender notes. *Id.* at 422. Prior to the time of payment, however, a Supreme Court decision had indicated that the payee in such a transaction was entitled to receive payment in gold. *Id.* at 423. Although that decision was overruled prior to the trial in *Harris*, the Court of Appeals nevertheless stated that "[t]he plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land," *id.* at 424, and refused to apply retro-

tends to protect justifiable reliance upon established principles of law.[124] Recently, in *Gurnee v. Aetna Life & Casualty Co.*,[125] the

actively the overruling decision. *Id.* at 425.

[123] A court prospectively overrules when it enunciates a new rule of law to be followed only in future cases, thereby eliminating the decision's retroactive effect. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting,"* 51 MARQ. L. REV. 254, 254 (1968); *see* 55 WASH. L. REV. 833, 837 n.26 (1980). The technique is also called "sunbursting" after the Supreme Court decision endorsing its validity in Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932). Fairchild, *supra*, at 255.

[124] Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 644 (1967) ("reliance upon the earlier decision . . . is the fundamental justification for a prospective overruling"); *see* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1560 (1975); Note, *Prospective-Prospective Overruling*, 51 MINN. L. REV. 79, 82 (1966); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 912 (1962) [hereinafter cited as Note, *Retroactive Application*]. Reliance frequently is considered by the courts as a crucial factor in the retroactivity analysis. *See, e.g.*, Gager v. White, 53 N.Y.2d 475, 483-84, 425 N.E.2d 851, 854, 442 N.Y.S.2d 463, 466 (1981); People v. Morales, 37 N.Y.2d 262, 270, 333 N.E.2d 339, 344-45, 372 N.Y.S.2d 25, 32-33 (1975). In Hanover Shoe, Inc. v. United Shoe Mach. Corp., 377 F.2d 776 (3d Cir. 1968), for example, the Third Circuit, recognizing the potential "evils of retroactivity," stated: "[W]e think it erroneous to award damages for conduct manifestly pursued in the shelter of Supreme Court approval, at least until such time as subsequent decisions have clearly announced a change in the applicable law." *Id.* at 788-89; *see* Johnson v. New Jersey, 384 U.S. 719, 731 (1966); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 75, 246 N.E.2d 725, 731, 298 N.Y.S.2d 955, 963-64 (1969); Incorporated Village of Northport v. Guardian Fed. Sav. & Loan Ass'n, 87 Misc. 2d 344, 349, 384 N.Y.S.2d 923, 928 (Sup. Ct. Suffolk County), *aff'd*, 54 App. Div. 2d 893, 387 N.Y.S.2d 1015 (2d Dep't 1976); 55 WASH. L. REV., *supra* note 123, at 836 ("the primary mischief of the retroactive effect of overruling decisions has been its perceived tendency to frustrate reasonable reliance on precedent"). In addition to reliance, courts have examined other factors in their decisions to apply prospectively new rules of law. One such factor is whether the underlying purpose of the newly enunciated doctrine would be furthered by solely prospective application. *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971); Desist v. United States, 394 U.S. 244, 251-52 (1969); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965); People v. Morales, 37 N.Y.2d 262, 269, 333 N.E.2d 339, 344, 372 N.Y.S.2d 25, 32 (1975); People v. Graham, 76 App. Div. 2d 228, 230, 431 N.Y.S.2d 209, 211 (3d Dep't 1980); People v. Albro, 73 App. Div. 2d 73, 75, 425 N.Y.S.2d 1000, 1002 (3d Dep't 1980); People v. Wise, 104 Misc. 2d 77, 79-80, 427 N.Y.S.2d 691, 692-93 (Sup. Ct. Kings County 1980), *aff'd*, 82 App. Div. 2d 869, 440 N.Y.S.2d 266 (2d Dep't 1981). Other considerations that courts focus upon are the equitable consequences of retroactive application, *see Chevron Oil Co.*, 404 U.S. at 107; Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1177 (2d Cir. 1977); Childs v. Childs, 69 App. Div. 2d 406, 420, 419 N.Y.S.2d 533, 542 (2d Dep't 1979); Flushing Nat'l Bank v. Municipal Assistance Corp., 88 Misc. 2d 1047, 1050, 391 N.Y.S.2d 969, 971 (Sup. Ct. N.Y. County 1977); *In re* Martz, 102 Misc. 2d 102, 122, 423 N.Y.S.2d 378, 391 (Family Ct. Ulster County 1979); and the practical results of retroactivity upon the orderly administration of the law, *see, e.g., In re* D, 27 N.Y.2d 90, 96, 261 N.E.2d 627, 631, 313 N.Y.S.2d 704, 709 (1970) ("retroactive application . . . would substantially affect countless juvenile delinquency adjudications made on the prior standard"); People v. Colebut, 86 Misc. 2d 729, 737, 383 N.Y.S.2d 985, 991 (Sup. Ct. N.Y. County 1976) (retroactivity "would work a major dislocation in the ad-

New York Court of Appeals, despite applying retroactivity analysis,[126] held that a prior decision on a question of statutory interpretation should be applied retrospectively.[127]

In *Gurnee*, two actions involving identical issues were consolidated on appeal.[128] Both plaintiffs were injured in automobile accidents, and each thereafter lost wages in excess of $1,000 per month.[129] In accordance with New York State Insurance Department regulations then in effect interpreting section 671 of the Insurance Law,[130] each plaintiff's insurance carrier paid $800 per month as first-party benefits, the maximum amount payable for lost wages.[131] The Court of Appeals subsequently decided *Kurcsics v. Merchants Mutual Insurance Co.*,[132] which rejected the Superintendent of Insurance's interpretation of the applicable no-fault law and established that an injured plaintiff is entitled to a maximum of $1000 per month for lost earnings.[133] The plaintiffs there-

---

ministration of justice"). Finally, it should be noted that constitutional issues may override any other factors and mandate either retroactive or nonretroactive application. *See, e.g.*, Gager v. White, 53 N.Y.2d 475, 484, 425 N.E.2d 851, 854, 442 N.Y.S.2d 463, 466 (1981); *In re* "S", 63 Misc. 2d 253, 257, 311 N.Y.S.2d 927, 931-32 (Family Ct. Kings County 1970) ("[p]roof beyond a reasonable doubt is *fundamental to due process* and . . . goes to the integrity of the fact-finding process and the fairness of the trial. It must therefore be granted retroactivity as a constitutional principle") (emphasis in original).

[125] 55 N.Y.2d 184, 433 N.E.2d 128, 448 N.Y.S.2d 145 (1982).

[126] *Id.* at 191-94, 433 N.E.2d at 130-31, 448 N.Y.S.2d at 147-48.

[127] *Id.* at 190, 433 N.E.2d at 129, 448 N.Y.S.2d at 146.

[128] *Id.* at 184, 433 N.E.2d at 128, 448 N.Y.S.2d at 145.

[129] *Id.* at 190-91, 433 N.E.2d at 129, 448 N.Y.S.2d at 146. Morris Gurnee, one of the plaintiffs, was injured in November 1977, in an accident involving a car insured by Aetna Life & Casualty Company. *Id.* at 190, 433 N.E.2d at 129, 448 N.Y.S.2d at 146. He claimed that, as a result of his injuries, he lost wages in excess of $3,200 per month. *Id.* Moshe Weinreich was injured in July 1975, in an accident involving an automobile insured by State-Wide Insurance Company, and, he, like Gurnee, claimed lost wages of at least $1,000 per month. *Id.* at 191, 433 N.E.2d at 129, 448 N.Y.S.2d at 146.

[130] [1982] 11 N.Y.C.R.R. § 65.6(n)(2)(xi). Section 671(1)(b) of the Insurance Law provides that "basic economic loss" includes "loss of earnings from work which the injured person would have performed had he not been injured . . . up to one thousand dollars per month." N.Y. INS. LAW § 671(1)(b) (McKinney Supp. 1982). The section further states that "first party benefits" do not include "twenty percent of lost earnings pursuant to paragraph (b) of subdivision one." *Id.* § 671(2)(a). The Superintendent of Insurance interpreted section 671 to mean that the $1,000 monthly limitation should be reduced by the 20-percent offset, thereby resulting in a maximum payable first-party benefit of $800 per month. [1982] 11 N.Y.C.R.R. § 65.6(n)(2)(xi).

[131] 55 N.Y.2d at 190-91, 433 N.E.2d at 129, 448 N.Y.S.2d at 146.

[132] 49 N.Y.2d 451, 403 N.E.2d 159, 426 N.Y.S.2d 454 (1980).

[133] *Id.* at 458-59, 403 N.E.2d at 163, 426 N.Y.S.2d at 458. The Court in *Kurcsics* ruled that a covered person is entitled to 80 percent of actual lost earnings, up to a maximum recovery of $1,000 per month, *id.* at 458, 403 N.E.2d at 163, 426 N.Y.S.2d at 457-58, reason-

upon brought suit against their respective insurance carriers to recover the difference between the two maximum amounts.[134] Special term granted the defendants' motions to dismiss for failure to state a cause of action, ruling that *Kurcsics* should not be applied retroactively.[135] The Appellate Division, First and Fourth Departments, affirmed in each case.[136]

The Court of Appeals reversed,[137] holding that there was "no persuasive reason" to prohibit retroactive application of the *Kurcsics* decision.[138] Writing for a unanimous Court, Chief Judge Cooke initially questioned the applicability of retroactivity analysis to a decision of first impression interpreting statutory language, since such analysis typically was restricted to cases overruling prior decisional mandates.[139] The Court, however, found it unnecessary to resolve this question, as it determined that "traditional" retroactivity analysis nevertheless would dictate that *Kurcsics* apply retroactively to the plaintiffs' petitions.[140] Balancing the three factors that the Supreme Court has determined are relevant to the retroactivity inquiry,[141] the Court first observed that *Kurcsics* involved

---

ing that the legislature did not intend to limit recovery to $800, *id.* A dissenting opinion urged that "a plain reading" of the statute compelled a contrary result. *Id.* at 460, 403 N.E.2d at 164, 426 N.Y.S.2d at 459 (Gabrielli, J., dissenting).

[134] 55 N.Y.2d at 190-91, 433 N.E.2d at 129, 448 N.Y.S.2d at 146.

[135] Gurnee v. Aetna Life & Casualty Co., 104 Misc. 2d 840, 845, 428 N.Y.S.2d 992, 995 (Sup. Ct. Erie County 1980). Applying the standards enunciated by the United States Supreme Court, *see infra* note 141 and accompanying text, the *Gurnee* Court initially noted that the *Kurcsics* panel had referred to the litigation as "a question of first impression." 104 Misc. 2d at 842-43, 428 N.Y.S.2d at 994; *see* Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 454, 403 N.E.2d 159, 160, 426 N.Y.S.2d 454, 455 (1980). It further noted that since the purpose of the legislation was to ensure victim compensation, retroactivity was contraindicated to avoid the possible insolvency of insurers and the consequent loss of future benefits that might result from insurers being held for retroactive payments. 104 Misc. 2d at 843, 428 N.Y.S.2d at 994. Moreover, retroactive application, the court concluded, would entail "substantial inequitable results." *Id.* at 844, 428 N.Y.S.2d at 994.

[136] Gurnee v. Aetna Life & Casualty Co., 79 App. Div. 2d 860, 437 N.Y.S.2d 944 (4th Dep't 1980) (unanimous decision); Weinreich v. State-Wide Ins. Co., 80 App. Div. 2d 756, 437 N.Y.S.2d 994 (1st Dep't 1981).

[137] 55 N.Y.2d at 195, 433 N.E.2d at 132, 448 N.Y.S.2d at 149.

[138] *Id.* at 194, 433 N.E.2d at 131, 448 N.Y.S.2d at 148.

[139] *Id.* at 191, 433 N.E.2d at 130, 448 N.Y.S.2d at 147. The Court noted that retroactivity analysis generally had been utilized "where there has been an abrupt shift in controlling decisional law." *Id.*

[140] *Id.*

[141] *Id.* at 192-93, 433 N.E.2d at 130-31, 448 N.Y.S.2d at 147-48; *see* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). In *Chevron*, the Supreme Court delineated the three factors of retroactivity analysis as follows:

First, the decision to be applied nonretroactively must establish a new principle of

merely the construction of statutory language rather than the establishment of a new principle of law.[142] Additionally, stated the Chief Judge, the legislative intent of ensuring swift and full compensation for motor vehicle accident victims would be better served by giving retroactive effect to the *Kurcsics* ruling.[143] Finally, the Court concluded that because no-fault insurance requires plaintiffs to relinquish their right to sue for pain and suffering incurred in minor injuries, it would be manifestly inequitable to deny them their statutory quid pro quo by permitting only a partial recovery for their covered economic loss.[144]

The Court of Appeals decision in *Gurnee* represents New York's first significant encounter with the standards of retroactivity analysis previously enunciated by the United States Supreme Court.[145] Other courts, particularly the federal courts of appeals,

---

> law, either by overruling clear past precedent . . . or by deciding an issue of first impression . . . . Second, . . . [the court must look] "to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, . . . [the court should take into account] any inequity imposed by retroactive application.

Chevron, 404 U.S. at 106-07 (quoting Linkletter v. Walker, 381 U.S. at 629) (citations omitted).

[142] 55 N.Y.2d at 192, 433 N.E.2d at 130, 448 N.Y.S.2d at 147. *Chevron* dictates that a decision either must overrule settled precedent or resolve an issue of first impression "whose resolution was not clearly foreshadowed." Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971). The *Gurnee* Court acknowledged that the Superintendent of Insurance had promulgated a contrary regulation prior to *Kurcsics*, 55 N.Y.2d at 192, 433 N.E.2d at 130, 448 N.Y.S.2d at 147, but evidently did not view this as establishing "clear past precedent," *see id.*; *Chevron*, 404 U.S. at 106. Moreover, the Court rejected the argument that *Kurcsics* had presented a novel issue whose resolution was not clearly predictable, 55 N.Y.2d at 192, 433 N.E.2d at 130, 448 N.Y.S.2d at 147, noting that the language of section 671 suggested the result reached in *Kurcsics*, *id.*

[143] 55 N.Y.2d at 192-93, 433 N.E.2d at 130-31, 448 N.Y.S.2d at 147-48. The Court recognized that retroactive application of *Kurcsics* would conflict with the legislative intent behind no-fault insurance, namely, to ease insurance coverage costs and court congestion stemming from the proliferation of vehicular accident suits. *Id.* at 192, 433 N.E.2d at 130, 448 N.Y.S.2d at 147. The Court reasoned, however, that the overriding goal of the legislation was to ensure "*full*" compensation for accident victims. *Id.* (emphasis in original). Hence, Chief Judge Cooke ruled, the purpose of the legislation would be better served by retroactivity. *Id.* at 193, 433 N.E.2d at 131, 448 N.Y.S.2d at 148.

[144] *Id.* The Court "[s]wep[t] aside the insurers' arguments that [retroactive] imposition of the $1,000 per month limit would create severe financial hardships for carriers whose premium rates were based upon a potential liability of only $800," Shayne & Dachs, "Kurcsics' " *Final Chapter*, N.Y.L.J., March 9, 1982, at 1, col. 1, reasoning that the unfairness to the injured parties far outweighed any financial difficulties imposed upon the defendants, 55 N.Y.2d at 193, 433 N.E.2d at 131, 448 N.Y.S.2d at 148. Moreover, the Court observed, the statute of limitations already had relieved a portion of the insurer's liability. *Id.*

[145] It appears that no substantial examination of the *Chevron* standards had been undertaken prior to *Gurnee* at other than the trial court level. In one case, Incorporated Vil-

have treated the first factor, whether the decision in question alters established legal principles, as a threshold inquiry which, if not satisfied, automatically mandates retroactive application.[146] New York, however, apparently has joined the ranks of other jurisdictions that tend to apply the test in a factor-balancing manner.[147] It is submitted that this is the preferable approach insofar

---

lage of Northport v. Guardian Fed. Sav. & Loan Ass'n, 87 Misc. 2d 344, 384 N.Y.S.2d 923 (Sup. Ct. Suffolk County), *aff'd*, 54 App. Div. 2d 893, 387 N.Y.S.2d 1015 (2d Dep't 1976), the court held that retrospective application of a prior decision was not warranted, citing various policy and equity considerations. 87 Misc. 2d at 350, 384 N.Y.S.2d at 928. The court noted that the issue was one "of first impression 'whose resolution was not clearly foreshadowed.' " *Id.* (quoting *Chevron*, 404 U.S. at 106). In Flushing Nat'l Bank v. Municipal Assistance Corp., 88 Misc. 2d 1047, 391 N.Y.S.2d 969 (Sup. Ct. N.Y. County 1977), the court read *Chevron* as suggesting a "flexible treatment" of retroactivity analysis. *Id.* at 1050, 391 N.Y.S.2d at 971. Further, in Kroul v. Kroul, 99 Misc. 2d 1031, 417 N.Y.S.2d 847 (Dist. Ct. Nassau County 1979), the court indicated that should a statute be held unconstitutional, "pragmatic" factors would dictate that it apply prospectively only, citing *Chevron* in support of its determination. *Id.* at 1032, 417 N.Y.S.2d at 848. Finally, the appellate division in Childs v. Childs, 69 App. Div. 2d 406, 419 N.Y.S.2d 533 (2d Dep't 1979), cursorily addressed the *Chevron* standards in denying retroactive effect to a United States Supreme Court decision, ruling simply that "[the decision] overruled clear past precedent relied upon ceaselessly and that retroactive application . . . would produce chaotic, inequitable results." *Id.* at 420, 419 N.Y.S.2d at 542.

[146] Kremer v. Chemical Constr. Corp., 623 F.2d 786, 789 (2d Cir. 1980) ("unless the first factor is satisfied there is no occasion to consider the other two"); United States v. Bowen, 500 F.2d 960, 975 (9th Cir. 1974) ("[t]he first step in deciding whether a case is to have retroactive effect is to apply a threshold test to determine whether the decision establishes a new rule"), *aff'd*, 422 U.S. 916 (1975); Jordan v. Weaver, 472 F.2d 985, 996 (7th Cir. 1973), *rev'd on other grounds sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974); *see* Desist v. United States, 394 U.S. 244, 248 (1969) (retrospectivity analysis appropriate where decision represented a "clear break with the past"); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 499 (1968) (decision not constituting "avulsive change which caused the current of the law thereafter to flow between new banks" applied retroactively); Ferguson v. United States, 513 F.2d 1011, 1012-13 (2d Cir. 1975) ("[r]etroactivity analysis is appropriate for cases departing radically from precedent . . . . But it is irrelevant to that application of well-established principles to varying fact situations whch represents the bulk of judicial decision-making"). Justice Stewart, who authored the *Chevron* decision, made it clear in Milton v. Wainwright, 407 U.S. 371 (1972), that the first factor was intended as a threshold inquiry, by stating that "[a]n issue of the 'retroactivity' of a decision . . . is not even presented unless the decision in question marks a sharp break in the web of the law." *Id.* at 381 n.2 (Stewart, J., dissenting). Several state courts also have adhered to this view. *See, e.g.*, Wiggins v. State, 275 Md. 689, 701, 344 A.2d 80, 98 (1975); Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 622, 375 A.2d 1285, 1289 (1977). In Crabtree v. St. Louis-San Francisco Ry., 89 Ill. App. 3d 35, 411 N.E.2d 19 (App. Ct. 1980), the court clearly indicated that a decision that did not establish a new rule of law would be applied retroactively. *Id.* at 42, 411 N.E.2d at 24; *see* Mertes v. Lincoln Park Fed. Sav. & Loan Ass'n, 34 Ill. App. 3d 557, 559-61, 340 N.E.2d 25, 26-27 (App. Ct. 1975).

[147] The *Gurnee* Court ruled that retroactive application was mandated by consideration of "all the applicable criteria." 55 N.Y.2d at 194, 433 N.E.2d at 131, 448 N.Y.S.2d at 148. Other courts have exhibited a similar inclination to weigh the three *Chevron* factors equally.

as the tripartite evaluation better assures that reliance interests will be protected, the primary purpose underlying retroactivity analysis.[148] Indeed, given a decision that usurps substantial justified reliance upon established rules, but nonetheless fails to constitute a significant upheaval in the law, the federal paradigm seemingly would require retrospectivity,[149] while under the Court's approach the likelihood of solely prospective operation would still exist.[150]

It is suggested further that the less restrictive approach taken by the *Gurnee* Court is appealing from a theoretical as well as a policy standpoint. Underlying the retroactive application of law has been the traditional notion that an overruling court simply enunciates the law as it has always existed.[151] By making retro-

---

See, e.g., Alexander v. Orford School Dist., 117 N.H. 641, 644-46, 377 A.2d 127, 130-31 (1977); Bradbury v. Aetna Casualty & Sur. Co., 19 Wash. App. 66, 68-70, 573 P.2d 395, 396-97 (Ct. App. 1978); Kurtz v. City of Waukesha, 91 Wis. 2d 103, 109, 280 N.W.2d 757, 761 (1979). Some courts have rejected the threshold test favored by the federal bar. *See, e.g.*, State v. Carpentieri, 82 N.J. 546, 550-51, 414 A.2d 966, 968 (1980) (decision need not constitute sharp break in the law to be denied retroactive effect, at least in the area of the application of the exclusionary rule); Olson v. Dillerud, 226 N.W.2d 363, 369-70 (N.D. 1975) (whether decision was foreshadowed is not dispositive but "[r]ather, these factors must be weighed with the other considerations bearing on the issue"); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 455-56, 546 P.2d 81, 91 (1976) (the majority "has ignored *Chevron's* use of the 'New principle of law' . . . criterion, which is the main factor used in civil cases") (Stafford, C.J., dissenting in part, and concurring in part); *see* Bershefsky v. Commonwealth, 491 Pa. 102, 111-12, 418 A.2d 1331, 1336 (1980) (Nix, J., dissenting).

[148] *See supra* note 124 and accompanying text. In *Gurnee*, the Court afforded *Kurcsics* retroactive effect, evidently feeling that the insurers' reliance upon the administrative ruling was outweighed by other equitable considerations. 55 N.Y.2d at 193, 433 N.E.2d at 131, 448 N.Y.S.2d at 148. It is submitted that the significance of the Court's decision, however, lies in its approach to the *Chevron* standards, rather than in its factual consideration. *See infra* notes 149-151 and accompanying text.

[149] *See supra* note 146 and accompanying text.

[150] It is suggested that if the first factor is not viewed as a threshold inquiry, decisions not constituting radical departures from prior law nonetheless may be examined with respect to policy and equity considerations, thereby leaving open the possibility of solely prospective operation. Indeed, at least one court has stated that "[a]ny broader reading of *Chevron* [i.e., other than as a threshold test] would require courts to engage in the balancing process demanded by the second and third factors whenever a recognized legal principle . . . had been applied—or not applied—to a situation not precisely covered by previous decisions." Kremer v. Chemical Constr. Corp., 623 F.2d 786, 789 (2d Cir. 1980). Hence, construing the test as a three-factor balancing one expands its potential application. *See id.*

[151] The common-law theory underlying the retrospective application of judicial decisions is that the superseding ruling does not change the law, but rather, correctly states it, thereby making the prior incorrect exposition void ab initio. *See* 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 70 (London 1765). As Blackstone has stated:

> But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the

spectivity more difficult to achieve, however, the Court's approach to retroactivity analysis reflects the contemporary awareness that courts in fact do create new law[152] and that affected reliance interests should be protected.[153] Indeed, the Court of Appeals in *Gurnee* appears to have adopted an approach to retrospectivity analysis which is both consonant with the underlying policy rationale of retrospectivity and consistent with modern jurisprudential reality.

David L. Mogel

> former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined.

Id. (emphasis in original). This doctrine, commonly known as Blackstonian retroactivity or declaratory theory, *see* Munzer, *Retroactive Law,* 6 J. LEGAL STUD. 373, 374 (1977), posits that an overruling court simply declares "what the law has always been." *Id.*; *see* People v. Morales, 37 N.Y.2d 262, 267-68, 333 N.E.2d 339, 342-43, 372 N.Y.S.2d 25, 30 (1975); Note, *Retroactive Application, supra* note 124, at 907-08. Hence, a decision establishing new law is accorded retroactive effect unless the cause of action to which it is to be applied is barred by a statute of limitations, an accord and satisfaction, or res judicata. Fairchild, *supra* note 123, at 254.

[152] As early as 1869, the theory of retroactive case application underwent criticism. John Austin, for example, derided "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing . . . from eternity, and merely *declared* from time to time by the judges." 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 655 (London 1869) (emphasis in original). A more contemporary critic, Justice Traynor, referred to the notion that the law "had been there all along in the bushes" as a fable. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility,* 28 HASTINGS L.J. 533, 535 (1977). Indeed, the basic assumption of declaratory theory—the existence of a body of predetermined, immutable law—has little to recommend itself. Munzer, *supra* note 151, at 375; *see* DeMatteis v. Eastman Kodak Co., 520 F.2d 409, 410 (2d Cir. 1975). The modern trend is to recognize that the judiciary does, in fact, create new law. As one commentator has stated, "the creative theory of law must be regarded as the most widely accepted view of the judicial process." E. BODENHEIMER, JURISPRUDENCE 439 (1974). Additionally, the practice of prospective overruling, whereby courts decline to give retroactive effect to their rulings, *see supra* note 123, is itself a recognition of the fact that the courts create new law. Mishkin, *Foreward: The High Court, the Great Writ, and the Due Process of Time and Law,* 79 HARV. L. REV. 56, 58 (1965) *see* Linkletter v. Walker, 381 U.S. 618, 623-25 (1965).

[153] *See supra* note 124 and accompanying text; *supra* text accompanying note 148.