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Retroactivity: What Can We Learn from the Odd Case of Michael Skakel

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“Retroactivity”: What Can We Learn from the Odd Case of Michael Skakel?

LEWIS KURLANTZICK

A case like that of Michael Skakel, in which a long time has elapsed between the time of the alleged offense and the time of legal proceedings, poses significant challenges for a legal system. Those challenges are not completely unexpected, as law operates in the flow of time, and a controversy may embrace a set of events and occasions for official decision occurring at many different points in the flow. The fact-finding process, of course, faces serious evidentiary difficulties; witnesses frequently have died, memories of others have faded, documents have disappeared. In addition, in the interim changes will have occurred in a variety of relevant bodies of law, including the statute of limitations, the rules of evidence, sentencing guidelines, and other directives governing the conduct of pre-trial, trial, and post-trial processes. Accordingly, decisions about what law to apply—the law in place at the time of the crime or the present law—must be made. The courts of Connecticut were faced with a number of these decisions in the course of the prosecution of Skakel. One of these decisions involved the question of whether Skakel could take an immediate appeal from the order transferring his case from a juvenile to an adult venue. The answer to that question was provided by the Connecticut Supreme Court in a unanimous opinion in In re Michael S.

The question at issue was whether the transfer order, the ruling transferring the defendant’s case from the juvenile to adult docket, was a “final

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1 See infra notes 11-15 and accompanying text (outlining the history of the Skakel case).
"judgment" and therefore immediately appealable. Stripped to its essentials, from the court’s perspective the disposition turned on whether the law of appeals as amended in 1986 or the appellate rules in place at the time of the alleged crime governed. The 1986 amendment treated a transfer order as a final judgment and authorized immediate appeal. The court concluded that the 1986 legislation is not to be applied "retroactively," the 1975 framework applies, and therefore an immediate appeal is not permitted.

The court’s decision in In re Michael S. is striking both for its summary character and its unconvincing reasoning. It glibly treats the issue presented—whether an immediate appeal was available—as if the answer were obvious. More fundamentally, it bespeaks an approach that addresses none of the considerations that properly bear on thoughtful resolution of a choice of law issue, such as the extent of justifiable reliance, the legitimacy of a claim of unfair surprise by a party, the purpose of the legislative change and how it is best effectuated, concerns of administrative feasibility, and the difference between the impact of a legal change on primary behavior and on remedial arrangements.

The cramped opinion is, in part, understandable in light of the manner in which the issue was framed and the court’s precedents on the issue of "retroactivity." Those prior decisions established the conceptual framework within which the court operated. But these precedents reveal a resort to categories of judgment which do not track well the values at stake in the cases and restrict the range of approaches to the problem. This lack of analytical fit is accompanied by a tendency to paint with too broad a brush when faced with the kind of challenge offered by the Skakel factual situation. Moreover, the court fails to explain why it is appropriate to look to legal directives enacted in a subsequent year to define the law in existence in a prior year. These defects will be illustrated by analysis of a hypothetical variant of the Skakel case along with the case itself. The recommended approach will then be applied to the resolution of a related case, In re

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4 Id at 318.
5 Id. at 318-20, 322. The present law, the product of a 1994 amendment, clearly provides that an immediate appeal cannot be taken. See CONN. GEN. STAT. § 46b-127 (2003) (avoiding addressing appeals, and the historical notes for 1994 say that the legislature deleted the "final judgment" provision). Thus, the legislature’s intent to remove the right to immediate appeal is clear. The 1994 change reversed the position established by the 1986 legislation that a transfer order was to be regarded as a final judgment for purposes of appeal. Id. Application of the present law was an analytically plausible option in the Skakel situation but was not considered. See infra note 22 and text accompanying notes 99-137.
7 Michael S., 784 A.2d at 322-23.
8 See id. at 321-23. In the discussion section of the opinion, the court does not address these considerations.
9 Id. at 322-323.
Daniel H. And that analysis, hopefully, will offer aid in the treatment of similar issues in the future.

Though Michael S. on first glance appears to be simply an aberrant criminal procedure case, in fact it has much to teach us about legal change, civil and criminal, and the determination of the temporal scope of legislation and judicial decisions.

I. A HYPOTHETICAL

Michael Skakel was accused of the October 1975 killing of fifteen-year-old neighbor, Martha Moxley. At the time of the killing Skakel was himself fifteen years old. Because of his age at the time of the charged offense, the matter was initially assigned to the superior court for juvenile matters. The State quickly moved to transfer the case to the adult Criminal Division of the superior court. After a set of hearings and the preparation of a report by a Juvenile Probation Services supervisor, the court granted the State’s motion to transfer.

Skakel filed an appeal, which the State moved to dismiss for lack of jurisdiction as premature. The State contended that an immediate appeal of the transfer order was not available and that the question of error could only be raised at the conclusion of the prosecution in the adult division if

11 Michael S., 784 A.2d at 318. Technically, he was charged, in January 2000, with delinquency in that he was alleged to have committed murder. Id.
12 Id. Skakel was thirty-nine years old at the time of his arrest. Id.
13 Id. In Connecticut, the superior court for juvenile matters has exclusive original jurisdiction over juveniles accused of delinquent acts. Conn. Gen. Stat. § 46b-121 (2003). A delinquent is a person who, prior to his sixteenth birthday, has violated or attempted to violate any federal or state law, order of the superior court, or local or municipal ordinance. Id. § 46b-120(1), (6). Although the same criminal statutes apply to both adults and juveniles, in most cases juveniles are subject to different procedures and sanctions than adults. See, e.g., id. § 46b-122 (requiring confidential proceedings; exclusion of persons from hearing); id. § 46b-124(b) (requiring anonymity; confidentiality of records of juvenile matters); State v. Torres, 206 Conn. 346, 358, 538 A.2d 185, 191 (1988) (discussing statutory safeguards protecting juveniles). The exception to this proposition involves the transfer of juveniles to the adult criminal court. Conn. Gen. Stat. § 46b-127 (2003).
14 Michael S., 784 A.2d at 318.
15 See In re Michael S., No. DL00-01028, slip op. at 1-7 (Conn. Super. Ct. Jan. 31, 2001). Judge Dennis concluded that there was reasonable cause to believe that Skakel committed the homicide, that there was no state institution designed for the care of children to which the court could commit Skakel that would be suitable for his care and treatment should he be found delinquent, that the facilities of the adult criminal division provided a more effective setting for the disposition of the case, and that the institutions to which that division may sentence a defendant were more suitable for the care and treatment of Skakel should he be found guilty. Id. at 2, 6-7. In ruling on the transfer motion, Judge Dennis applied the standards contained in the transfer statute in effect at the time of the offense. Id. at 1. Apparently, neither party objected to this application. Had the court applied the standards contained in the present transfer statute, there is no reason to think a different result would have been reached. Compare Conn. Gen. Stat. § 17-60a (1975), with Conn. Gen. Stat. § 46b-127 (2003).
16 Michael S., 784 A.2d at 319.
Skakel was convicted. Accordingly, the parties briefed and addressed two issues before the supreme court: first, whether Skakel had an immediate right to appeal the juvenile court’s decision transferring his prosecution to the adult division of the superior court, and second, whether the juvenile court erred in transferring his case to the adult division.

To sharpen the analysis I want to hypothesize a variation on the Skakel situation. Let us assume the court’s set of choices was limited to two: 1) the law in existence in 1975, as interpreted by pre-1986 judicial decisions, applied; or 2) the appeal statute as amended in 1986 applied.

Though the parties understandably assumed that application of the 1994 law, eliminating defendants’ right to interlocutory appellate review of transfer orders, was foreclosed in light of the supreme court’s decision in *In re Daniel H.*, the analysis presented in this essay will suggest that such a result is not at all obviously correct. The foreclosure rests on the view that 1975 law should apply without recognition that which law should apply is not an all-or-nothing issue but rather the appropriateness of application of 1975 or present law depends on the particular matter involved. The

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17 See id. The appellate court denied the motion to dismiss without prejudice. Id. The State and Skakel then jointly requested the case be transferred to the supreme court, a request which that court granted. Id.


19 Id. Because of the court’s holding that an immediate appeal could not be prosecuted, it did not have to consider the answer to this second question. In fact, Skakel was convicted, after a jury trial, in June 2002. David M. Herszenhorn, *Once Skakel Jurors Could Speak, Path to Conviction Seemed Clear*, N.Y. TIMES, June 12, 2002, at B1. As a result, the issue of the propriety of the transfer ruling has now been presented to the Connecticut Supreme Court in the course of Skakel’s appeal of his conviction. See Brief for Appellant at 63-67, State v. Skakel (Conn. filed Nov. 24, 2003) (No. S.C. 16844) (arguing that juvenile court erred in transferring case to adult criminal division of Superior Court).

20 The court apparently saw itself as facing a choice between these two options. However, the option of the 1986 amendment was being considered in a uniquely qualified way. That is, while the opinion is not as clear as it could have been on this point, implicitly the court had resolved the question of applicable law with a decision that 1975 law applied and the 1986 amendment, or at least one proposed interpretation of that amendment, was being looked to as a possible illuminator of the 1975 law.


22 A third alternative was application of the present law. See supra note 5. Contemporary appellate rules do not permit an immediate appeal of a transfer order. See CONN. GEN. STAT. § 46b-127 (2003). These rules reflect the 1994 amendment which eliminated the defendant’s right to interlocutory appellate review of the order transferring him to the regular criminal docket. 1994 Conn. Pub. Acts 94-2, § 6 (Spec. Sess.).

23 237 Conn. 364, 366-68, 678 A.2d 462, 463-64 (1996) (holding that 1994 legislative decision to prohibit juvenile from taking interlocutory appeal from transfer order does not apply to juveniles charged with crimes that occurred prior to October 1, 1994).

24 See discussion infra Part III.
shift in the legal framework I wish to introduce is to posit that no legislative change occurred in 1994. In other words, in this scenario the rule permitting immediate appeal was introduced in 1986 and remains the law today.

Which choice should a court make—the law in existence in 1975 or the present law, put in place in 1986? More particularly, how should a court go about thinking about that choice?

A. Retroactivity

One approach to the choice is to think in terms of retroactivity. That is, was the 1986 amendment meant to apply to litigation the operative facts of which arose prior to 1986? The court in the Skakel case itself focused on the notion of retroactivity. But central dependence on this concept is unhelpful in reaching a conclusion as to the proper choice.

"Retroactivity" is itself an ambiguous term, one which may as likely confuse as enlighten. One sense of "retroactivity" refers to the application of a change in the law to proceedings which occurred prior to the change. A prime example is the reforms in constitutional criminal procedure announced in the 1960s by the United States Supreme Court. Thus, when the Court decided in Gideon v. Wainwright that the Constitution requires that indigent defendants facing imprisonment be supplied with a lawyer at no cost, that decision was then applied to prior cases, past concluded cases, which, as a result, were reopened. Though the Court struggled with the issue of which of its criminal procedure decisions should be applied retroactively and which should not, the term "retroactive" was being used to refer to concluded cases; and in that sense use of the 1986 appeal rule in Skakel's case obviously presents no question of retroactivity at all. Indeed, the Supreme Court's concern about the impact on the administration of justice of retroactive application of a new rule has no bearing in our

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25 In fact, in 1994 the legislature eliminated the right to an immediate appeal from a court order transferring a juvenile matter to the regular criminal docket. See supra note 5.
28 See, e.g., Stovall v. Denno, 388 U.S. 293, 297-98 (1967) (holding that the key to the question of retroactive application is the denial of a fair trial, where the integrity of the truth-determining process is seriously infected, and there is a need for correction of serious flaws in fact-finding process).
29 Thus, in that sense, it is obvious that the rule of immediate appeal is not being applied "retroactively," in that it only applies to judicial proceedings which take place after its enactment. Similarly, when the Federal Rules of Evidence are amended, the operating assumption is that the changes generally will apply to court proceedings taking place after the amendments' effective date, even though the operative facts of those disputes occurred prior to the amendments' effective date and even though the amendments made changes in some evidentiary rules. If that assumption is defensible, the application of the amended Rules is no more "retroactive" or questionable than would be the application of the 1986 appeal rule in our hypothetical Skakel case. See infra note 137.
30 See, e.g., Linkletter v. Walker, 381 U.S. 618, 637 (1965) (stating that the administration of justice will be taxed; disruptive hearings will be required regarding the admissibility of evidence long
Skakel hypothetical, where use of the 1986 appellate rule would not produce the kind of disruption of processing of current criminal calendars that troubled the Court. And conceptually, employment of the 1986 rule would appear to be no different than use of a changed pleading rule in a proceeding which commenced after the change, though the facts of the dispute predated the change in pleading.

This quick look at United States Supreme Court history suggests three propositions. First, the Court uses the terminology of "retroactivity" differently than the Connecticut Supreme Court uses it in Michael S. Second, there was never any doubt in the Court's jurisprudence that a new rule would be applied to proceedings commenced after its announcement. Third, if constitutional values were sufficiently strong, the rule would be applied retroactively, even though that might entail significant administrative cost.

The ambiguity and differential use of the term "retroactive" suggests that analysis of the central issues in our case might well be aided by avoiding use of the term entirely and by proceeding directly to the relevant considerations. The question would then become, simply: should the 1986 rule about final judgment and immediate appeal be applied, or should the appeal rule in place at the time of the alleged crime be applied, and what is the appropriate reasoning process by which the answer to that question is to be reached?
In my comments on retroactivity I do not mean to suggest that legislative communication about application is irrelevant. Should the legislature indicate that the enacted change is to be applied only in litigation involving operative facts arising after the enactment, there is no reason for a court not to follow that directive. But in the absence of such a statement—and such a legislative statement is a rare occurrence—a court should look to the considerations explored in this essay. At a minimum, analysis of the nature and consequences of legal change, and determination of the temporal limits of judicial and legislative lawmaking, will be furthered by understanding the concept of retroactivity as a spectrum or range of temporal options rather than a binary construct.\(^{37}\)

A variation of this point issues from examination of the court's observation, in a recent case, that application of a criminal law is retroactive if it changes the legal consequences of acts completed before its effective date.\(^{38}\) The problem is that any change—whether in the rules of pleading, evidence, or sentencing—literally alters the effects incident to previous activity. Thus, to be of utility the proposition must refer to consequences in a narrower sense. But then the question becomes: what consequences count and why?

B. Substance versus Procedure

Another analytical approach to the choice is to think in terms of the categories of substance and procedure. This approach, which is employed in the Michael S. opinion, would make the answer depend on whether the later rule is characterized as substantive or procedural. If the latter, it would be applied; if the former, it would not. But recourse to the language of "substance" and "procedure" for resolution of the central issue is no more illuminating than reference to retroactivity.\(^{39}\)

In the Michael S. opinion the court simply declares, in a single sentence, that the 1986 change is a substantive rather than a procedural one, and therefore it is not to be applied.\(^{40}\) No reasons are offered in defense of

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\(^{37}\) See Fisch, supra note 36, at 1069-72, 1087 n.191 (discussing the problems associated with the binary retroactivity construct, and with treating retroactivity in terms of bright-line categories).

\(^{38}\) See Michele A. Estrin, Retroactive Application of the Civil Rights Act of 1991 to Pending Cases, 90 Mich. L. Rev. 2035, 2061-62 (1992) (arguing that the substance-procedure distinction lacks content, and blurs the appropriate analysis to distinguish between objectionable and acceptable effects of retroactivity).

this declaration.\textsuperscript{41} Rather, in support of the conclusion the opinion cites \textit{In re Daniel H.}\textsuperscript{42} and \textit{In re Judicial Inquiry No. 85-01.}\textsuperscript{43} But those opinions also provide no analysis and themselves simply state the position that introduction of a right to appeal constitutes a substantive legal change.\textsuperscript{44}

Moreover, the principle of lenity dominates the court’s opinion and conclusion in \textit{In re Daniel H.}\textsuperscript{45} In short, the court has failed to respond adequately to two interrelated tasks: first, to explain why the issue of application of a change in the law should turn on whether that change is substantive or procedural; and second, to define the characteristics of a substantive as compared with a procedural change.

Admittedly, the substance-procedure distinction is an elusive one.\textsuperscript{46} And the answer given may differ depending on the purpose for which the question is asked.\textsuperscript{47} However, not only is the court’s position in \textit{Michael S.} not obviously correct, but it is counterintuitive, running counter to the conventional understanding of the categories. Put roughly, substantive rules control conduct outside the courtroom, and procedural rules control behav-

\textsuperscript{41} The court’s reference to the substance-procedure dichotomy is intertwined with its retroactivity discourse, for, it states, a statute which alters substantive rights ordinarily is not subject to retroactive application. \textit{See id.}

\textsuperscript{42} 237 Conn. 364, 678 A.2d 462 (1996).

\textsuperscript{43} 221 Conn. 625, 605 A.2d 545 (1992).

\textsuperscript{44} \textit{Id.} at 549. Not only does \textit{In re Judicial Inquiry No. 85-01} provide no analysis of the substantive-procedural characterization question, its particular circumstances offer limited support, at best, for the general proposition that a change in appellate rules is a substantive alteration. The petitioners in that case sought appellate review of a grand jury panel’s denial of their request for the release of evidence. \textit{Id.} at 546. The supreme court held that the statute in effect at the time when the grand jury filed its report, which contained no right of appeal, governed the case and dismissed the petition. \textit{Id.} The decision, though, offers insubstantial support for the general proposition because 1) the statute establishing a right of appeal itself said that it applied only to grand jury findings filed after its effective date and 2) the appeal provision could be seen as part of an integrated, comprehensive revision of the investigatory grand jury system, i.e., a package not to be implemented piecemeal.

\textsuperscript{45} See infra notes 119-25 and accompanying text.

\textsuperscript{46} Mistretta v. United States, 488 U.S. 361, 392 (1989) (finding the distinction a “logical morass” and finding dubious the assertion that the line between substantive and procedural rules is sufficiently clear to provide any workable distinction). Thus, the difficulties in assigning particular rules to the category of substance or the category of procedure is illustrated by a statute of limitations which prescribes that an action for negligence must be commenced within two years after the event. This prescription might be viewed as a rule of substance, for it expresses a firm condition on the plaintiff’s right to recover. On the other hand, it might be viewed as a rule of procedure, for it regulates a step in a lawsuit, the first step, the time within which suit must be initiated. \textit{See generally} Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (characterizing the statute of limitations and full faith and credit clause).

\textsuperscript{47} \textit{See Sun Oil}, 486 U.S. at 726-28 (holding that the distinction between substance and procedure depends on context). For example, the distinction may be drawn to resolve the conflicts-of-law question of which state’s law to apply, \textit{see}, e.g., \textsc{Eugene F. Scopes Et Al., Conflict of Laws § 3.8 (3d ed. 2000)}; or to determine whether a change in the law violates the ex post facto prohibition, \textit{see}, e.g., Miller v. Florida, 482 U.S. 423, 433 (1987); or to decide whether an enactment exceeds a rulemaker’s enabling authority, \textit{see}, e.g., Sibbach v. Wilson & Co., 312 U.S. 1 (1941); or to settle, under \textit{Erie}, whether federal or state law applies in a diversity action, \textit{see}, e.g., Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939).
ior within the courtroom. Under that schema a rule governing the appeal process would be deemed procedural.

The court's effort to distinguish between substantive and procedural rules may rest on an assumption that substantive rules give rise to reliance claims in a way that procedural rules do not. While that conclusion may be valid in certain circumstances, the distinction is not always a useful measure of reliance interests. Both kinds of rules can be outcome-determinative, and thus one is not inherently more important to a litigant than the other. Procedural rules affect the quality and degree of access to the legal system and therefore determine the protection provided by substantive rules and remedies.

C. The Relevant Values

In any case, the categorical substance-procedure division should be seen not as an end in itself but as a shorthand way of getting at the considerations that matter, including the nature of the change, the legal context into which it is introduced, and the extent of destabilizing influence on the legal structure that its application will produce. One of the relevant values is the protection of justifiable reliance. Courts, after all, have reason not to upset settled expectations. The idea of reliability of the law requires that law be sufficiently stable so that people may plan their affairs for the future with the expectation of being able to carry them out. Accordingly, two questions about party behavior need to be addressed. First, was there likely

48 GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 2 (2d ed. 1994). In other words, procedural rules constitute the mechanics of litigation, prescribing the method by which people may bring controversies before the courts and by which they must unfold and conduct those controversies once in the courts.

49 See Ex parte Collett, 337 U.S. 55, 71 (1949) (holding that there are diminished reliance interests in matters of procedure).

50 See infra notes 53-57 and accompanying text (explaining that there is no justified reliance interest in state).

51 See Landgraf v. USI Film Prod., 511 U.S. 244, 268-70 (1994) (Scalia, J., concurring) (holding that the answer to the question of temporal application of the statute does not lie in the ill-defined substance versus procedure distinction; holding a person liable for attorney's fees affects "substantive" right no less than holding him liable for compensatory or punitive damages, and legislative purpose and identification of the relevant activity the rule regulates are key).

52 Fisch, supra note 36, at 1087.

53 Thus, it is less likely procedural rules are ones that people will rely on in planning and conducting their primary, everyday activity.

54 This reliability idea not only represents a central social value but also constitutes an important social instrument. Any society which looks to make use of individual initiative must assure people that the law by which they act will remain substantially the same as at the time of action. However, as demonstrated infra, in this case no such action in reliance on the pre-1986 law—reliance warranting protection against disappointment—occurred. The situation is not one, for example, in which application of the 1986 rule would operate to impose liability on someone who has relied, in his primary behavior, on the preexisting law.
reliance on the prior law, or what reasonably appeared to be the prior law? Second, was the reliance of the character that should be credited; i.e., was the behavior of the sort that should induce sympathy from the legal system and therefore be viewed as legally significant?

What reliance might have occurred in our hypothetical, or similar cases? First, as an empirical matter, it is difficult to imagine the occurrence of party behavior representing substantial reliance on the prior appellate rule. Second, even if reliance occurred, it is not the sort of reliance which should be treated as giving rise to a claim of unfair surprise, and that conclusion is reinforced by the fact that the party that might have relied here is the state. Conceivably a prosecutor may have prepared his case seeking an order of transfer differently in the knowledge that the judge’s ruling could not be appealed immediately, for example by devoting less time to it. But such behavior appears unlikely since the order is subject to appeal at the end of the case and therefore he remains interested in providing a strong foundation for a ruling in his favor. Moreover, he knows that an adverse ruling by the superior court is similarly not immediately appealable, and therefore it is in his interest to make a concerted effort to obtain a positive ruling. In any case, if a prosecutor did rely on the prior law by preparing less vigorously, that is not the sort of reliance that is worthy of protection and that should give a court pause in deciding to implement a change. A persuasive claim of unfair surprise can not be made to protect a decision to offer a lesser prosecutorial effort.

A claim of unfair surprise is also dubious in this setting because a prosecutor could not confidently assume that the court would not apply the 1986 rule. The issue would hardly be a settled one, and an attentive lawyer would know that it was fairly open to difference of opinion. In sum, ap-
plication of the 1986 rule would not generate a legitimate fairness concern, and there is no hardship to be redressed here.\textsuperscript{59}

A second value at stake in this kind of case is identification of the purpose of the legislative change and consideration of whether that purpose would be served by application of the change in the instant case. Here the objectives are clear, and there is no doubt that they would be best effectuated by application of the change. The legislative purpose is to protect juveniles from adverse consequences of an erroneous transfer order that can never be remedied later. If tried in the juvenile court, the defendant is entitled to a confidential proceeding\textsuperscript{60} and is protected against being mixed with adult prisoners. If transferred, the trial can be public, and he can be jailed with adults. If it is claimed that a transfer order is in error, these important rights to privacy and segregation can be protected only if an appeal of the transfer order can be pursued before the case is actually tried. The 1986 change bespeaks a recognition that the injury to a juvenile that may result from his confinement in an adult detention facility as well as the exposure likely to follow from a transfer order are irreversible consequences of the ruling that cannot adequately be rectified at a later time, even if he prevails at trial in a regular criminal proceeding or on appeal from a judgment in such a proceeding.\textsuperscript{61} Clearly, the legislative purpose decision to be applied nonretroactively must establish new principle of law by deciding an issue "whose resolution was not clearly foreshadowed"); PAUL J. MISHKIN \& CLARENCE MORRIS, ON LAW IN COURTS 242-43 (1965).

In the court's approach, a central question is whether the 1986 amendment is seen as clarifying or changing the law. If an enactment is viewed as clarifying, the court is likely to apply it "retroactively." See In re Michael S., 258 Conn. 621, 628-29, 784 A.2d 317, 321-22 (2001). But why should whether an enactment is deemed clarifying or changing, rather than considerations of justifiable reliance and legislative purpose, determine the issue of retroactivity? Perhaps an operating assumption is that a clarifying enactment will likely occur shortly after the "erroneous" judicial decision, and therefore there will not be much time for reliance on the incorrect opinion. However, how quickly new legislation will be passed and therefore the extent of the opportunity for reliance will vary from case to case. Imagine the following scenario. The Connecticut Supreme Court interprets a statute. People rely on that interpretation. Within a relatively short period of time, the legislature passes a law "clarifying" the act that had been interpreted. What should matter, among other factors, in deciding whether the new legislation is to be applied to cases whose operative facts predate its passage is the character of that reliance, not whether the recent law is clarifying or changing. The critical question is whether the court's approach, the dichotomy it employs in its reasoning, gets at the values that matter. It is doubtful. See infra notes 94-98 and accompanying text.

\textsuperscript{59} See CONN. GEN. STAT. §§ 46b-122, 124, 146 (2003).

\textsuperscript{60} In re Bromell G., 214 Conn. 454, 460-61, 572 A.2d 352, 355 (1990); see Mar. 7, 1986 Hearing Before the Joint Standing Committee on the Judiciary, 1986 Sess. 826-27, 845 (Conn. 1986). In other words, if a transfer order is ultimately found erroneous on appeal after sentence has been imposed, a case can be remanded for further proceedings in the juvenile division. However, the element of privacy conferred by a juvenile proceeding could not be restored by a subsequent private trial or by subsequent segregated detention. Imprisonment of a juvenile in an adult correctional facility while awaiting trial or pending appeal of a conviction as a nonjuvenile offender may produce irreparable harm.

Even without a statutory right to segregation, though, a transferred juvenile offender need not necessarily be held while awaiting trial in a nonjuvenile facility, such as an adult prison. The Commis-
would be promoted by application of the 1986 change. Indeed, advancement of the identified interests depends not a whit on whether the operative facts of the alleged crime occurred before or after 1986. Moreover, application of the 1986 rule in our hypothetical case would not have a destabilizing effect on the legal structure. It would impose no significant administrative (or educational) costs. No unacceptable dislocation would take place, as this rule has been used on a regular basis for fifteen years.

A related body of law, that of evidence, points to the desirability, in deciding whether a new rule is to be applied to the case at hand, of attending to the character of the rule and the purpose of the change rather than to references to "retroactivity" or "substance versus procedure." Imagine a change in the law of hearsay so that evidence previously inadmissible is now admissible. For example, prior inconsistent statements of a non-party witness, which previously were admissible only for impeachment purposes, may now be used substantively as probative of the facts contained in the statements. Should this rule be applied in a trial of a dispute the operative facts of which occurred prior to the change in the evidentiary rule? As we have seen, in one sense, such application would be "retroactive," and in another sense it would not. But what should fuel the analysis are considerations of legislative purpose and reliance. And since here, presumably, the legislature, or court, opted for the change in order to admit reliable and relevant evidence in order to improve the accuracy of the adjudicative process, and since it is difficult to see any reliance on the prior rule at the stage of primary behavior, the new rule should apply. Conversely, imagine the legislature has narrowed a privilege, such as the doctor-patient privilege, which previously existed. Again, the legislative decision is based, in part, on a determination that the fact-finding process would be aided by the change, but here there may well have been serious behavioral reliance on

62 More generally, prescriptions about the availability of interlocutory appeals constitute a legislative determination about the efficiency and/or fairness of the adjudicative process. See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 643-45 (5th ed. 1998). And effectuation of that determination does not depend on whether the operative facts of a case occurred prior to the date of the legislative enactment.


64 See State v. Whelan, 200 Conn. 743, 749-59, 513 A.2d 86, 90-92 (1986) (holding a prior inconsistent statement, where written and signed, admissible to prove truth of matters asserted therein; although previously only admissible to impeach a witness); COLIN C. TAIT, HANDBOOK OF CONNECTICUT EVIDENCE 681-85 (3d ed. 2001).
the prior rule. So the better result would be that the new rule not apply.\textsuperscript{65}

In \textit{Edelstein v. Department of Public Health & Addiction Services},\textsuperscript{66} the court recognized a doctor-patient privilege.\textsuperscript{67} It applied the privilege to the case at hand and to subsequent proceedings, including proceedings whose operative facts predated the \textit{Edelstein} decision.\textsuperscript{68} One might argue that such application runs counter to the view of reliance presented in this essay and erroneously deprives the court of relevant evidence. However, the result may be defensible if one views the court’s decision not as a judicial dictate but rather as a recognition of a pre-existing relationship of trust and confidence that has socially evolved. From that perspective the court’s ruling is as much about recognizing and validating an existing social fact as “creating” a legal relationship and rule. But in either case the relevant considerations are the legislative purpose (or judicial rationale if the change was made by a court), the character of the rule, and the possibility of unfair surprise. References to “retroactivity” or “substance versus procedure” are, at best, a way to move our thinking to those central considerations.

Reference to legislative objective underscores another important consideration. The 1986 change presumably reflects a legislative determination that the new rule is an improvement. This view that the new rule improves the operation of the system supports the application of that rule to as broad a class of cases as possible. A court would frustrate the purposes of the legislation by refusing to apply it to precisely the kind of situation demonstrating the need for the amendment.\textsuperscript{69} And note that the approach to the resolution of our hypothetical that looks to legislative purpose, justifiable reliance, and administrative impact treats these concerns as analytically key without regard to whether or not the new statute is deemed a “clarifying” enactment.\textsuperscript{70}

D. \textit{Age of the Defendant}

But what of the age of our hypothetical defendant? In seeking to buttress its conclusion in the \textit{Skakel} opinion, the Connecticut Supreme Court argues:

\textsuperscript{65} When the Federal Rules of Evidence were promulgated, Congress provided a safety valve to take care of some of these kinds of situations. The Rules were to apply to proceedings pending at the time of their effective date “except to the extent that application of the rules ... would work injustice, in which event former evidentiary rules apply.” Pub. L. No. 93-595, 88 Stat. 1926 (1975).

\textsuperscript{66} 240 Conn. 658, 692 A.2d 803 (1997)

\textsuperscript{67} Id. at 805-07.

\textsuperscript{68} See id. (finding that although privilege was legislatively created in 1990, it applies to communications made prior to 1990).


\textsuperscript{70} See infra notes 94-98 and accompanying text.
[T]he only effect of retroactive application of the amendment would be to allow persons who, like the respondent, are charged with committing murder as juveniles before 1986 to appeal directly from transfer orders. None of those persons is now a juvenile. Retroactive application of the amendment, therefore, would entail all of the 'delays and disruptions attendant upon intermediate appeals' . . . without advancing the underlying purpose of the amendment [to protect juveniles' privacy and insure their segregation during pretrial and trial proceedings].

But this reasoning is problematic on a number of accounts. First of all, it is not uncommon for a person who is appealing a transfer ruling to no longer be a juvenile at the time his appeal is heard or decided. Thus, though Skakel is obviously an extreme case, the transfer-order appellant who is no longer a juvenile is not at all an unusual case under the framework established by the 1986 amendment. Second, what would be the dividing line? The juvenile offender who is arrested when he is twenty years old? Twenty-five years old? Thirty years old? The court can offer no

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72 See State v. Torres, 206 Conn. 346, 349, 538 A.2d 185, 186 (1988) (adjudicating a case where defendant, fifteen at time of alleged offense, was nineteen or twenty years old at time of appellate decision); cf. State v. Kelley, 206 Conn. 323, 323-26, 537 A.2d 483, 484-85 (1988) (deciding a case where defendant was fourteen at time of crime and eighteen or nineteen at time of appellate decision). To support its argument, the court notes that the "problem" presented by aging juveniles was recognized by the legislature when it enacted the 1994 law deleting the final judgment language from section 46b-127. Michael S., 784 A.2d at 323 n.11. Thus, Senator Jepsen observed that by the time an appeal from a transfer order is taken, "the juvenile is no longer a juvenile." Id. And Representative Graziani noted that the child is typically over sixteen by the time the appeal is decided. Id. Yet the deletion of the final judgment language and the prohibition of an immediate appeal hardly solve this "problem." Imagine the scenario where a juvenile is arrested, a transfer hearing held, and the case transferred to the regular criminal docket. An immediate appeal of the transfer is precluded. After the trial in superior court is concluded and a final judgment entered, the defendant now appeals the propriety of his transfer from juvenile to adult court, as this point in time represents his first opportunity to contest that decision on appeal. By the time the appeal is resolved, the defendant is no longer a juvenile. Cf. State v. Belcher, 51 Conn. App. 117, 119, 721 A.2d 899, 900 (1998) (deciding a case where defendant was fourteen years old at time of crime and nineteen years old at time of appellate decision). Of course, under the regime established by the 1994 law, the transfer issue may become moot; for example, the defendant may be acquitted in the superior court proceeding, and therefore there will be no appeal. However, if there is an appeal of the validity of the transfer and it is successful, it is even more likely than under the 1986 law that the person who ultimately stands trial in juvenile court will no longer be a juvenile.

73 See generally Brief of the Respondent-Appellant at 20, In re Michael S., 258 Conn. 621, 784 A.2d 317 (2001) (No. SC 16556); Reply Brief of the Respondent-Appellant at 1-2, In re Michael S., 258 Conn. 621, 784 A.2d 317 (2001) (No. SC 16556) (stating court's posture when applied to interpretation of transfer statute produces automatic transfer rule for anyone charged with juvenile offense after attaining age of majority; if increase in age affects likelihood of transfer, or availability of procedural benefit, State might opportunistically delay in filing charges until individual is eighteen to increase chance of transfer).
principled distinction between these cases. This line of reasoning is defective and does not support rejection of application of the 1986 change.\footnote{In fact, the interest in confidence might still be served in some measure in the case of an older defendant, if that person is not a member of a family with the notoriety of the Skakels. Similarly, the value of differential treatment of antisocial behavior by juveniles, i.e., that a juvenile be held accountable for his actions but be permitted to move on with (hopefully) a better life and that move be facilitated by the private character of the juvenile proceedings, may still be furthered with an older defendant.} Moreover, application of the 1986 change, and the reasoning offered here for that result, do not violate any policy of clear statement.\footnote{As a matter of institutional design, in various situations it is socially desirable to insist that a legislature speak with special clarity if it wishes to direct a departure from established general principles and policies of law. In effect, these presumptions say to the legislature, "If you mean this, you must say so plainly." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1209 (1994). In these situations, wise policy argues against giving words an unusual meaning even though that meaning may be linguistically permissible. One familiar and longstanding policy of clear statement requires that words which mark the boundary between criminal and noncriminal conduct should speak with more than ordinary clearness. \textit{Id.} at 1376-77.} For example, the direction in favor of strict construction of penal statutes does not caution against such a decision.\footnote{The doctrine that penal statutes should be strictly construed has generally been accepted as a corollary of the principle of \textit{nullum crimen sine lege}. \textit{Id.} at 492. ("Strictly" in this context means narrowly or least expansively, not "severely"). In its unquestioned application, this doctrine forbids the extension of a criminal statute by analogy to cover conduct which cannot by any stretch of "interpretation" be brought within its terms. \textit{Id.} But it also expresses a policy in favor of a narrower rather than a broader interpretation of a criminal prohibition even when the broader interpretation is permitted by the language. \textit{Id.} This counsel against giving words an unusual meaning even though that meaning may be linguistically permissible is an expression of the broader requirement that words which mark the boundary between criminal and noncriminal conduct should speak with more than ordinary clarity. \textit{Id.} at 1376-77.} Indeed, the result is one that is solicitous to the defendant.

What is the purpose of this strict construction doctrine? One objective is to insure that people have been given fair warning of the law’s commands before they are stigmatized as criminals. This concern for fair warning refers to the formulation and interpretation of rules and directs that their scope and content be clear and specific.\footnote{\textit{Model Penal Code} § 1.02(1)(d) (Proposed Official Draft 1962) (stating that the "general purposes of the provisions governing the definition of offenses are . . . to give fair warning of the nature of the conduct declared to constitute an offense"); KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION 60, 206-07 (1999) (discussing textual meaning when the implications of the directly applicable text are not clear).} But the foundation of this principle of lenity goes beyond a concern for fair notice. It reflects a recognition of the separation of legislative and judicial functions, and a sensitivity to the liberty of potential defendants. The maxim, then, represents an institutional means of reinforcing the appropriate role of courts in the enforcement of criminal statutes as detached, dispassionate, perhaps even
slightly reluctant, enforcers of the legislature's commands.  

Acceptance of the conclusion that application of the 1986 statute is the correct choice in our hypothetical would not necessarily be inconsistent with the statute of limitations decision in State v. Skakel, where the superior court applied the statute of limitations in existence at the time of the offense rather than the statute of limitations in place at the time of trial, nor would it be in conflict with the decision in In re Daniel H., where the court concluded that the post-1994 rule about lack of immediate appeal, in place at the time of the hearing and transfer order, was not to be applied to juvenile defendants whose alleged offense occurred prior to 1994, but rather the appeal rule in existence at the time of the offense was to be applied.

In a statute of limitations case important values of repose come into play, values not at stake in In re Michael S. In fact, Skakel declined to argue for the application of the contemporary statute of limitations not only because of judicial precedent but because that statute disfavored his interest, as it clearly provides no time limit on the prosecution of the kind of offense with which he was charged. Instead, the focus of the dispute was on the correct interpretation of the statute of limitations in place in 1975, the defendant arguing it imposed a five-year limit, the prosecutor disagreeing, and the judge agreeing with the prosecutor. Similarly, in In re Daniel H., though one might well in the end disagree with the decision,

78 See MISHKIN & MORRIS, supra note 58, at 380-83 (explaining that “policies . . . against judges made crimes also imply that doubt as to whether the legislature intended certain conduct to be prohibited should be resolved in favor of non-criminality”); see also United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, J.):

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.


81 See generally State v. Crowell, 228 Conn. 393, 462 A.2d 678 (1994) (holding that statutes of limitation are to be construed liberally in favor of the accused).

82 See CONN. GEN. STAT. § 54-193(a) (2003):

[N]o person may be prosecuted for any offense, except a class A felony, involving sexual abuse, sexual exploitation or sexual assault of a minor except within thirty years from the date the victim attains the age of majority or within five years from the date the victim notifies any police officer . . . provided if the prosecution is for a violation of subdivision (1) of subsection (a) of section 53a-71, the victim notified such police officer or state's attorney not later than five years after the commission of the offense.


84 See discussion infra Part III, (discussing whether In re Daniel S. was correctly decided).
the principle of lenity expressed in the directive that penal statutes be strictly construed arguably is relevant. The result is an outcome solicitous to the defendant. That policy plays no role in In re Michael S., a decision which is not solicitous to the defendant.

II. In re Michael S., Retroactivity, Clarifying Enactments, and Overruling

At first glance it might appear that the Michael S. case itself presented our hypothetical, as the court’s opinion focused on the 1986 amendment and the 1975 appellate rule, as judicially construed. In fact, the question decided, and briefed, was more limited. The choice throughout a case like Skakel—indeed, the challenge such a case presents to the legal system—is between the law in effect at the time of the alleged offense and the law in effect at present. Similarly, our hypothetical forced a choice between the appellate rules in existence in 1975 and those deemed to be in operation today. However, in a prior case, In re Daniel H., the Connecticut Supreme Court had held that the present law, the product of the 1994 enactment by which the legislature eliminated the right to an immediate appeal from a court order transferring a juvenile mat-

85 Lawrence M. Solan, Should Criminal Statutes Be Interpreted Dynamically?, 2002 Issues in Legal Scholarship: Dynamic Statutory Interpretation 8, ¶ 4, at http://www.bepress.com/cgi/viewpoint.cgi?article=1027&context=ils (last visited Jan. 16, 2004) (on file with the Connecticut Law Review) (explaining how, to Chief Justice Marshall in United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820), “lenity was necessary both to protect against judicial incursion into the legislature’s domain and to ensure that defendants receive fair notice that their conduct may be subject to prosecution and criminal sanctions”). While judicial application of the principle of lenity is erratic, the interpretation of criminal laws, nevertheless, is constrained. Id. ¶ 5.


87 In the case of appellate rules the law in 1975 and the law today are the same—an immediate appeal from a transfer order cannot be taken. As previously noted, the statute in place in 1975 with respect to juvenile appeals has been amended several times. In 1975 a person aggrieved by a final order of the juvenile court had a right to appeal. Following a supreme court decision interpreting the statute, that an order of the juvenile court transferring a proceeding to the adult superior court was not a “final judgment” for purposes of appeal and was not an appealable interlocutory ruling, the legislature in 1986 amended the juvenile transfer statute, CONN. GEN. STAT. § 46b-127, to state that an order “transferring a child from the docket for juvenile matters to the regular criminal docket of the superior court shall be a final judgment for purposes of appeal.” 1986 Conn. Pub. Acts 86-185, § 2 (codified at CONN. GEN. STAT. § 46b-127 (1987)) (repealed 1994). In 1994 the legislature again amended the juvenile transfer statute and removed the provision that a transfer order is a final judgment for purposes of appeal. 1994 Conn. Pub. Acts 94-2 § 6 (Spec. Sess.) (codified at CONN. GEN. STAT. § 46b-127 (2003)).
ter to the regular criminal docket, does not apply to juveniles who were charged with offenses that occurred prior to October 1, 1994, the effective date of the amendment. This decision that the present rules about interlocutory appeal are to apply only "prospectively" amounts to a choice that the law with respect to appellate rules at the time of the alleged offense will govern rather than the present law.

Accordingly, the question before the court in Michael S., as it defined it, was not that presented by our hypothetical—a choice between the 1975 law and the present law. Rather, having implicitly chosen the 1975 law as applicable via In re Daniel H., the issue was whether, and to what extent, the 1986 enactment provided illumination or instruction as to the content of the 1975 law to be applied. Initially, the notion of looking to legal directives enacted in 1986 to define the law in existence in 1975 appears, at least, peculiar. In fact, a focus on a subsequent enactment and an inquiry as to its retroactivity is misguided. That approach not only runs counter to one of the presumable justifications for choosing 1975 law as applicable—real (or imputed) reliance by the defendant—but also is at odds with a prime objective of the legal system—uniformity of decision with respect to those who have behaved similarly at the same point in time. A few examples should make these critical points clear.

Imagine two people who have been involved in automobile accidents in 1975. In that year contributory negligence is the accepted doctrine in the state's tort law. In 1977 a legislative enactment substitutes a pure comparative negligence rule for that of contributory negligence and explicitly states that the change is retroactive, i.e., it applies to cases the operative facts of which arose prior to the date of the enactment. In 1979, the legis-

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89 Michael S., 784 A.2d at 319-20.
90 The point being made here is independent of the source of the legal change. That is, it would have force as well if the change in the contributory negligence rule were made by the judiciary rather than the legislature.
91 Pure comparative negligence refers to an approach that looks to the relative fault of the parties and adjusts the recovery accordingly. See MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW & ALTERNATIVES 440 (7th ed. 2001). If both parties are negligent, the plaintiff's damages are reduced, but unlike contributory negligence, not to zero. So if the plaintiff is five percent at fault, his judgment will be decreased by five percent. Similarly, if the plaintiff is ninety percent at fault, he can still recover ten percent of his damages. Id.
92 Typically the extent of retroactive effect, and the possibility of unfair surprise, will be limited by the operation of a number of legal doctrines, most notably the statute of limitations and the rules of res judicata and collateral estoppel, which protect interests in reliance, finality and repose. These long-established principles of adjudication restrict the degree to which nominally retroactive rules affect prior events.

A legislature concerned about retroactive impact and intent on moderating that effect may resort to devices such as grandfathering, phase-in periods, post-enactment effective dates, and compensation.
Retroactivity and the Skakel Case

Lature enacts a qualified version of comparative negligence instead and again states that the change is retroactive. The first person’s case comes to trial in 1977, the second person’s in 1979. It would be ill-advised for a court that has decided that the law at the time of the accident (1975) is controlling to highlight the retroactive character of the enactments and to apply the pure comparative negligence rule to the first person and the qualified version to the second person. Such an injudicious approach would run counter to the aspiration of formal justice to uniform treatment of similar cases.

The same critique applies if we consider rules of appeal rather than changes in tort law. To determine the content of the rules about final judgments and interlocutory appeal in 1975, it is improper to consider a subsequent enactment, for example a 1986 statute, and ask whether it is retroactive. Let us be clear. The contention here is not that faced with a choice between application of 1975 or later law—our earlier hypothetical—the court should opt for 1975 law. Rather, the point is that having opted for 1975 law (and having characterized rules about appeal as substantive), the court should not look to enactments subsequent to 1975 and ask whether they are retroactive in order to determine the content of the law it will apply. Such judicial behavior is inconsistent with a prime rationale for the choice of 1975 law as governing and raises the possibility of inconsistent treatment of similarly situated litigants.

A. Clarifying Statutes

The notion of a clarifying statute provides another possible rationale for the practice of a court looking to enactments subsequent to the critical time of behavior in order to determine the law to apply to that behavior. A clarifying statute is one whose purpose is to make plain the meaning of a previous act, for example to clear up ambiguities in a prior statute. It stands in contrast to an enactment designed to change existing law. If a statute is viewed as clarifying, the Connecticut Supreme Court will typically apply it retroactively.

93 Partial comparative negligence systems deny any recovery to a plaintiff whose own negligence passes some threshold level, such as 50%. See Franklin & Rabin, supra note 91, at 440.

94 Edelstein v. Dep’t of Pub. Health & Addiction Servs., 240 Conn. 658, 667-70, 692 A.2d 803, 807-09 (1997) (quoting State v. Magnano, 204 Conn. 259, 284, 528 A.2d 760, 772 (1987)) (stating that “[w]here an amendment is intended to clarify the original intent of an earlier statute, it necessarily has a retroactive effect”); see also Ayers v. Allain, 893 F.2d 732, 754-55 (5th Cir. 1990) (stating that retroactive application of a statute is appropriate where congressional action constitutes a return to previous law). Whether the 1986 statute should be characterized as “clarifying” or not was the focus of the appellate argument in In re Michael S.

To some extent this dichotomy is an exercise in semantics. The clarifying statute also “changes existing law” in that it alters, or corrects, the current judicial interpretation of the terms of the prior statute. In addition, the effect of the enactment on the future is the same no matter what classification is used to characterize the “change.”
Functionally, a court faced with a clarifying statute is in the same posture as a court confronted with the overruling of a precedent, whether an interpretation of a statute or a common law ruling. The questions for the court are whether to overrule, giving due weight to the values underlying stare decisis, and, if so, whether to do so prospectively or retroactively. The character of these questions is the same whether or not the conviction of error issues from a clarifying statute. Similarly, the interests to be considered in determining whether to limit the change to prospectivity, in particular the reliance of a party, do not differ. And a presumption of retroactivity is no more or less justified if illumination comes from a clarifying statute rather than a lawyer's brief.

In addition, why should whether an enactment is deemed clarifying or changing, rather than considerations of justifiable reliance and legislative purpose, determine the issue of retroactivity? Perhaps an operating assumption is that a clarifying enactment will likely occur shortly after the "erroneous" judicial decision, and therefore there will not be much time for reliance on the incorrect opinion (and that any reliance that occurs will not be creditworthy). However, how quickly new legislation will be passed and therefore the extent of the opportunity for reliance will vary from case to case. Imagine the following scenario. The Connecticut Supreme Court interprets a statute. People rely on that interpretation. Within a relatively short period of time, the legislature passes a law "clarifying" the Act that had been interpreted. What should matter, among other factors, in deciding whether the new legislation is to be applied to cases whose operative facts predate its passage is the character of that reliance, not whether the recent law is clarifying or changing. And these points remain independent of the chosen theory of lawmaking, i.e., whether one conceptually views the court as engaged in declaring the true meaning of the act or as overruling a prior precedent. The critical question is whether the court's approach, focusing on the dichotomy between changing and clarifying, gets at the

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95 See infra note 96.
96 A clarifying enactment, though, may provide evidence that the prior ruling was unstable and contested and therefore reliance on it was risky.
97 The utility of the clarifying category also depends, of course, on its administrability. That is, the decision to employ the category in judicial reasoning rests, in part, on a judgment about whether a court can determine its application consistently. Put more simply, how sure are we that a court can correctly distinguish a clarifying from a changing enactment regularly? See generally Brief for Appellee at 12-13, In re Michael S., 258 Conn. 621, 784 A.2d 317 (2001) (No. SC 16556) (arguing that contrary inferences may be drawn from an amendment in the wake of a controversial judicial opinion). Compare DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1388 (10th Cir. 1990) (holding that the Restoration Act was a new law and did not revive prior law), with Lussier v. Dugger, 904 F.2d 661, 666-67 (11th Cir. 1990) (finding that the Restoration Act was restorative and signified a return to previous law). The prospect of ill definition and inconsistent decisions points to costs not only for litigants and public decisionmakers but also for private actors, such as lawyers faced with the task of counseling clients.
values that matter. It appears not.98

In short, characterization of a statute as "clarifying" or not provides little, if any, aid in analyzing the choice of law issue and answering the question of the statute's temporal reach.

III. *In re Daniel H.* Redux

Was *In re Daniel H.*,99 the case which framed the issue in *In re Michael S.*, correctly decided? How should it have been decided? Using the approach suggested in this essay, what were the relevant considerations?

The facts of the case and the issue presented were straightforward. Daniel H. was charged with an offense that occurred prior to October 1, 1994.100 More precisely, he was accused of murder in connection with a shooting that took place on June 26, 1994.101 The State moved to transfer his case from the juvenile to the regular criminal docket.102 Following a hearing, which was held after October 1, 1994, the court ordered the matter to be transferred to the regular criminal docket.103 The defendant then appealed the trial court's transfer order.104

The issue was whether an immediate appeal from the transfer order was available. Prior to the amendment of the law in 1994, such an interlocutory appeal was permissible.105 However, in 1994 the legislature amended the law to eliminate the right to an immediate appeal; the effective date of this amendment was October 1, 1994.106 Thus, this legislative change occurred subsequent to the date of the defendant's alleged offense but prior to the court's hearing and transfer order. Accordingly, the question for the court was whether to apply the contemporary law, the law in existence at the time of the transfer hearing, or the law in effect at the time the offense was committed. The contemporary law forbade an immediate

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98 See supra note 54 and accompanying text. At best the approach directs attention indirectly to the matter of reliance. See supra note 96. Functionally, whether it is sensible to ask whether an enactment is clarifying depends on why one is asking the question.

100 Id. at 464.
101 Id. at 464 n.3.
102 Id. at 464.
103 Id. at 464-65.
104 Id. at 465. The defendant initially appealed to the appellate court, which, applying the 1994 statute, dismissed the attempted appeal of the trial court's transfer order for lack of jurisdiction. Id. The case then moved to the supreme court, which reversed the appellate court's dismissal, holding that the 1994 amendment was inapplicable to the defendant. Id.
105 Id. at 466.
106 Id. at 463-64. Prohibition of an immediate appeal from a court's transfer order remains the law today. See supra note 87.
appeal. The prior law permitted one.\textsuperscript{107}

The considerations of legislative purpose and reliance point towards application of the present law. The 1994 amendment presumably reflects a legislative judgment that the new rule is an improvement, that it advances the efficiency and/or fairness of the adjudicative process.\textsuperscript{108} As noted previously, recognition that the new rule prohibiting interlocutory appeals improves the operation of the process supports the application of the 1994 amendment to as broad a class of cases as possible.

Accordingly, to bar an immediate appeal by Daniel H. serves the legislative objective. And clearly, choice of the contemporary rule imposes no substantial administrative costs.

Analysis of the possibility of justifiable reliance in this setting also provides justification for application of the contemporary appellate rule. The notion that the defendant’s primary behavior—the homicide—was influenced by the appeal rule is incredible. Theoretically, such reliance is conceivable. Imagine a situation where certain conduct is proscribed by the criminal law with a set sanction for violation of the prohibition. The defendant engages in the prohibited conduct. Subsequent to his conduct the sanction is increased. From the perspective of deterrence this increase in the severity of the penalty is of no significance.\textsuperscript{110} Deterrence looks forward rather than backwards; what matters is the “price” facing the potential violator as he contemplates pursuit of the criminal activity.\textsuperscript{111} Accordingly, as a theoretical matter, the price facing Daniel H. included the appellate rule in place along with the penalties for homicide. However, as a practical matter, it would be unrealistic to believe that he placed any reliance on it in fashioning his behavior.\textsuperscript{112}

The reliance concern remains insubstantial when focus shifts to the de-

\textsuperscript{107} At stake, of course, is the timing of a permitted appeal of the transfer decision. The 1994 amendment does not eliminate the defendant’s opportunity to appeal the issue, but provides that the appeal must await the point in time when the defendant is sentenced.

\textsuperscript{108} See supra note 62 and accompanying text.

\textsuperscript{109} See supra note 69 and accompanying text.

\textsuperscript{110} A legislature may rationally choose to increase the sanction for other reasons, for example, to satisfy victims, their families, or the more general populace. But one reason cannot be to deter conduct that has (or has not) already occurred. See Fisch, supra note 36, at 1069 (discussing the retroactivity of the liability rule in the distribution and wealth context).

\textsuperscript{111} This same point grounds the proposition that retroactive application of extension of the copyright term of protection—provision of the lengthened period to works in existence—offers no incentive effect. See ROBERT L. BARD & LEWIS KURLANTZICK, COPYRIGHT DURATION: DURATION, TERM EXTENSION, THE EUROPEAN UNION, AND THE MAKING OF COPYRIGHT POLICY 181-82 (1999) (noting that work for which term is extended has already been produced).

\textsuperscript{112} A reliance claim appears equally weak when we shift jurisprudential perspective from economics to Legal Process. See infra notes 114-18 and accompanying text. Of course, one might also argue that to the extent that the impropriety of his behavior is conceded, little weight should be accorded to a reliance claim, particularly a claim of reliance on other than a norm of primary conduct. See MISHKIN & MORRIS, supra note 58, at 86 (discussing reliance on precedent).
fendant's preparation for and trial of the transfer issue. As with the prose-
cutor in our original hypothetical,\(^{113}\) it is difficult to conceive the existence
of lawyer behavior constituting substantial reliance on the rule permitting
immediate appeal. After all, the result to be sought, a result which makes
any reference to immediate appeal moot, is to secure an order which retains
the case in juvenile court. Again, if in some way the rule induced a deci-
sion by the lawyer to offer less effort, that is not the type of reliance that
should be treated as grounding a persuasive claim of unfair surprise. In
addition, the defendant's lawyer could not take for granted that the con-
temporary rule would not be applied. That issue was unsettled. In short,
application of the rule prohibiting appeal would not produce a legitimate
fairness concern, and there is no justifiable reliance to be protected here.

The reliance concern also appears weak when viewed from another
perspective. Henry Hart and Albert Sacks, whose work provides the foun-
dation for the Legal Process School,\(^ {114}\) draw a sharp distinction between
primary and remedial law.\(^ {115}\) Building on this distinction, they assess dif-
ferently the consequences of change in these two bodies of law; in particu-
lar, the legitimacy of claims of unfair surprise is appraised differently if the
asserted reliance is on a primary norm as against a remedial provision. Put
starkly, surprise goes to conduct, not to remedy. If one's primary duty is
clear, concern about unfair surprise is misplaced in the face of a change in
the remedial law.\(^ {116}\) Put less strongly, for a court (or legislature) to add to
the consequences when a primary duty is breached is less troublesome than
to change a primary duty.\(^ {117}\) Even if one is skeptical about this sharp dis-
tinction,\(^ {118}\) and therefore does not believe that a concern over surprise is
automatically resolved by the existence of a primary norm, such as a
criminal statute, the approach is helpful in evaluating claims of reliance.

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\(^{113}\) See supra notes 55-59 and accompanying text.

\(^{114}\) See William N. Eskridge, Jr. & Philip P. Frickey, An Historical and Critical Introduction to
HART & SACKS, supra note 75, at li.

\(^{115}\) Hart and Sacks define the terms as follows: Every general directive arrangement contemplates
something which it expects or hopes to occur when the arrangement works successfully. This is the
primary purpose of the arrangement, and the provisions which describe what this purpose is are the
primary provisions. The provisions of an arrangement which indicate what happens in the event of
noncompliance or other deviation are called the remedial provisions. HART & SACKS, supra note 75, at
122-25 (discussing primary law and remedial law).

\(^{116}\) See id. at 60, 62, 458-66; Estrin, supra note 39, at 2073-75 (holding defendant has no en-
trenched right to preserve particular remedies); see generally Landgraf v. USI Film Prods., 511 U.S.
244, 296-97 (1994) (Blackmun, J., dissenting) (asserting that remedial legislation, because it does not
alter the nature of existing rights and claims, is more commonly and appropriately retroactive).

\(^{117}\) For Hart and Sacks, unlike the law-and-economics analyst, a criminal prohibition is not just a
matter of calculation. Compare POSNER, supra note 62, at 242-43, with HART & SACKS, supra note 75,
at 60, 465-66.

\(^{118}\) I am dubious. Hart and Sacks present the notion of primary duty as a unitary phenomenon. In
fact, it is not a unitary phenomenon to be deduced solely from a statute's words; custom and enforce-
ment bear on it as well.
And again, the upshot is that virtually no reliance interests, which would preclude application of the contemporary appeal rule, are at stake in Daniel H.'s situation.

Considerations of legislative purpose, reliance, and administrative feasibility, then, strongly support choice of the 1994 rule. What can be said against this conclusion? In its opinion in the actual case, in which the court opted for the application of the prior rule permitting an immediate appeal, the court refers for support to the policy of strict construction of penal statutes.119 Though the criminal character of the case is significant for judicial decision-making, this maxim's insistence on linguistic clarity has no relevance in this setting. The caution is directed to a court engaged in the act of interpretation, the attribution of meaning to a particular set of words. It instructs as to what meaning should be viewed as linguistically permissible and as to what meaning should be chosen between two linguistically permissible readings of the rule.120 The direction is that judicial resolution of residual uncertainty in the meaning of penal statutes be biased in favor of the accused. But a prescription of strict construction is inapt here because the meaning of the 1994 amendment is crystal-clear. Indeed, no Connecticut court, in In re Daniel H. or any other case, has ever expressed doubt about the meaning of the words of the 1994 enactment or about their import.121 The clarity of the enactment raises the speculation that the reference to strict construction is a makeweight for a result that appeared correct to the court on other grounds.

The court’s reference to strict construction, however, may implicate interests other than, or in addition to, linguistic. Beyond a concern about fair warning of prohibited conduct, it appears to be expressing a policy of clear statement, a presumption that says to the legislature, if you mean this, you must say so plainly. More particularly, it indicates that retroactive application of the 1994 enactment must be supported by “clear and unequivocal expression of legislative intent.”122 The concept and articulation of policies of clear statement—judicial insistence that departures from established legal principles be clearly announced—can be supported as elements of a desirable approach to statutory interpretation and as expressive of a proper view of the constitutional relationship between court and legislature.123 The problem, though, is the undiscriminating judicial focus here on retroactivity. The issue in In re Daniel H. was whether to apply the appeal rule established in 1986 or the contemporary rule instituted in 1994. As previ-

120 See supra notes 75-76.
121 See supra notes 22, 87. The legislative history is clear about the purpose of the 1994 enactment. See 37 CONN. H.R. PROC. 9954-56 (1994); 37 CONN. S. PROC. 3630 (1994).
122 In re Daniel H., 678 A.2d at 467.
123 See HART & SACKS, supra note 75, at 1209-10, 1376-77.
ously noted,\textsuperscript{124} it is doubtful that analysis of this central question will be usefully aided by a discourse about retroactivity. That discourse may well miss the relevant considerations. Put differently, if the court is to make helpful use of the idea of a policy of clear statement, it must paint with a finer brush. After all, there is no doubt that a legislative enactment which changed the number of days from a defendant’s request within which a prosecutor has to produce a witness list or which altered the time within which a speedy trial motion is to be decided would be applied “retroactively” to the adjudication of cases the operative facts of which preceded the enactment, and there would be no insistence by a court that this enactment speak with more than ordinary clarity before it be so applied. The point is that the need is to define what kinds of changes warrant a policy of clear statement and why. The court has not produced that definition and justification.\textsuperscript{125}

In addition to its reliance on a principle of lenity in various forms, the court defends its conclusion about the choice of law by raising the concern that application of the 1994 amendment would create the risk of opportunistic behavior resulting in differential treatment of similarly situated parties. The opinion reads:

Moreover, the state’s theory of retroactivity in this context would be contrary to our presumption that in enacting laws, the legislature does not intend to accomplish bizarre results. . . . The state’s proffered interpretation could lead to the anomalous situation in which two individuals, having committed similar offenses on the same date, would be afforded significantly different treatment based upon, at best administrative accident or, at worst, manipulation by the parties, regarding when the transfer order was entered. “Presumably, the legislature did not intend to invite such manipulation of the judicial docket . . . .”\textsuperscript{126}

But are the court’s anxieties warranted? The fear of manipulative be-

\textsuperscript{124} See supra text accompanying notes 34-37.

\textsuperscript{125} The court’s attitude might be viewed as expressive of a principle of lenity, rooted in concern for personal liberty, that when in doubt in a criminal case a court should decide for the defendant. While the concern for liberty is legitimate, that approach appears too expansive. If “doubt” is understood to refer to a situation where the defendant offers a plausible claim, for example that the pre-1994 appeal rule should be applied, the unacceptable implication of the directive would be that all such claims are to be decided in favor of the defendant. On the other hand, if “doubt” refers to uncertainty by the court in analyzing the choice of law issue, the question then becomes what level of uncertainty triggers the prescription and how is that level of uncertainty to be defined.

\textsuperscript{126} In re Daniel H., 237 Conn. 364, 378, 678 A.2d 462, 469 n.11 (1996) (quoting State v. Burns, 236 Conn. 18, 26, 670 A.2d 851 (1996)).
behavior appears far-fetched. Imagine a prosecutor who operates within a framework which permits interlocutory appeals but who would prefer to function in a universe in which immediate appeals are not permitted. It is conceivable that he might delay filing his motion to transfer, but he would do so in anticipation of legislative action. In other words, he would have to predict statutory change and the content and timing of that change. Such prognostications are uncertain, and opportunistic behavior based on these prophecies is unlikely. Once the new rule is put in place, it would apply to all subsequent transfer motions, and there would be no opportunity for manipulation. Moreover, the prosecutor’s latitude in timing his motion to transfer is significantly constrained, as he has a limited amount of time after the juvenile arrest to argue for transfer. Accordingly, the professed concern about manipulative activity is unwarranted.

In the converse case, defendant’s counsel would be similarly constrained by the need to predict legislative action and by the rules dictating time limits in the processing of transfer requests. Indeed, his opportunity for manipulative behavior would appear even more limited since, within the parameters set by the rules, the prosecutor controls the timing of the filing of the transfer motion.

A related serious question is whether a decision to apply the contemporary rule in this kind of situation raises the possibility not of opportunistic behavior by the parties but of legislative abuse of power and therefore warrants a prophylactic response. Legislatures (and government officials) can abuse their power by singling out particular individuals or groups (e.g., those accused of a certain kind of criminal behavior) for adverse treatment. Concern about this kind of targeting of persons grounds the constitutional restriction on bills of attainder, punitive legislative acts directed against individuals. The prohibition of such bills is supported by a conviction

127 The possibility of different treatment of the same behavior occurring on the same day is inevitable whenever a change in the law occurs. Imagine two robberies (or breaches of contract) taking place on January 1, 2003. The first robber is apprehended and tried in 2003. The second robber is apprehended and tried in 2005. In 2004 a change in the hearsay rule (or in pleading requirements) is enacted and applied in the trial of the second robber. The difference in practice is fortuitous, not the result of prosecutorial nefariousness. However, since formal justice is a central value, to say that such events are inevitable is not to say they are not sometimes worrisome. The basic questions, then, are what kinds of differential treatment should be minimized and how should the system effect this minimization. See supra text accompanying note 38 (analyzing how any change alters the effects incident to previous activity, and questioning what consequences count and why).

128 Indeed, under present law the case of a child charged with the commission of a capital felony, a class A or class B felony—the kind of offense involved in Skakel’s case—is automatically transferred to the adult criminal docket provided the offense was committed after the child attained the age of fourteen. CONN. GEN. STAT. § 46b-127 (2003).

129 U.S. CONST. art. I, §§ 9, 10.

130 The prohibition of ex post facto legislation and the takings clause may also be viewed as a response to this concern. Louis Kaplow, Transition Policy: A Conceptual Framework, 13 J. CONTEMP.
that punitive measures should be imposed by rules of general application. Does the issue in In re Daniel H. implicate these kinds of concerns about governmental regularity? The legislation involved in the case—and similar kinds of legislation—evidence nary a hint of irregularity. At stake is not an act of oppression by lawmakers who know exactly which individuals they are affecting. The prescription is in appropriately general terms. And the legislative history makes clear that the enactment was not a legislative lynching designed to burden certain individuals or groups unfairly, but, rather, was driven by concerns about the efficiency of the adjudicative process. Thus, application of the contemporary rule in the case would not violate important norms of governmental regularity.

Finally, in a footnote the court suggests that application of the 1994 amendment would raise significant concerns about the amendment’s constitutionality in that it arguably makes the punishment for a crime more burdensome after its commission and therefore might be found to be an ex post facto law. This suggestion is dubious. Obviously, there is no entitlement to be tried by the exact same corpus of law that existed at the time of the offense, and the United States Supreme Court has upheld a number of retroactive procedural changes lightening the prosecutorial burden which were far more consequential than the appeal rule change put in place by the 1994 legislation.

In addition, Collins v. Youngblood, the case cited by the court in support of its assertion, holds that the Ex Post Facto Clause condemns legislation which punishes as a crime an act previously committed that was innocent when done; makes more burdensome the punishment for a crime, after its commission; or deprives one charged with a crime of any defense available at the time when the act was committed. The citation to the case, thus, is hardly persuasive, as the 1994 amendment falls into none of these categories as defined by the Supreme Court. More fundamentally, “retroactivity” was at stake in a significantly different sense in Collins than
in *In re Daniel H.*. In *Collins* the defendant had been convicted, and his conviction had been upheld on direct appeal. Accordingly, in ruling on collateral review that retroactive application of the Texas statute permitting judicial reformation of an improper verdict did not violate the Ex Post Facto Clause, the Supreme Court was dealing with a case that had already gone to final judgment. The potential dislocation from a contrary decision in this kind of situation is far greater than in *In re Daniel H.* where the initial proceeding is ongoing and where, as we have seen, interests in reliance and repose are virtually nil. Accordingly, the court's suggestion is unmeritorious.

In sum, *In re Daniel H.* was wrongly decided, and by implication the contemporary rule prohibiting immediate appeal of a transfer order, the product of the 1994 amendment, should have governed the adjudication of Michael Skakel's case as well. None of this analysis gainsays the potential dangers from "retroactive" application of a statute in a particular case. But the task is to identify the damaging case, using apt criteria. And *In re Daniel H.* is not such a case.\(^\text{137}\)

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\(^{137}\)The failure to establish a proper framework and to focus on the relevant considerations appears elsewhere in the court's jurisprudence as well. A good example is the opinion in *State v. Troupe*, 237 Conn. 284, 677 A.2d 917 (1996), which addressed, and limited, the constancy of accusation doctrine. In that case the court held that 1) a hearsay report of the victim's accusation can be used to bolster the victim's credibility but not to prove the facts reported; and 2) the report is to be confined to the fact and timing of the accusation of rape and is not to include the details of the alleged attack. *Id.* at 928-29.

The court then announced that it would not order a new trial and that its modification of the rule would only be applied "prospectively" that is, to "cases in which the constancy of accusation testimony has not yet been admitted into evidence on the date of the publication of this opinion." *Id.* at 305. Before analyzing the court's justification for this limitation, it is worth noting its use of the term "prospective", as the use underlines a previous point about the ambiguity and confusion of the terminology of retroactivity. *See supra* text accompanying notes 26-38. The court here uses "prospective" to refer to the situation in which a rule is employed in litigation which takes place after the rule has been announced. In this usage there is no reference to when the operative facts of the case occurred. Under this meaning of "prospective", use of the 1994 appeal rule in Skakel or Daniel H.'s case (or the 1986 appeal rule in *In re Michael S.*) would be prospective. Indeed, there would be no question of retroactivity because the new rule of appeal would only apply to judicial proceedings which took place after its enactment. (If the court is comfortable with the use of the new evidence rule in future litigation the operative facts of which predated announcement of the modified rule, why is it not similarly comfortable with the use of the new appellate rule in litigation the operative facts of which predated the rule's enactment? As we have just seen, both applications can be deemed "prospective".)

Having determined that a change in the constancy of accusation doctrine was called for, why did the court limit its application and not order a new trial? The court argues that the decision was based on policy considerations and not on constitutional grounds. *Troupe*, 677 A.2d at 929. But why should that distinction be determinative? The Constitution, after all, only provides a set of minimum safeguards. Moreover, the court's decision presumably reflects a belief that the accuracy of the adjudicative process will be enhanced by the more restrictive rule; since the additional details are pure hearsay and highly prejudicial, the fewer details the better. Not all sub-constitutional evidentiary (and procedural) rules are rooted in the pursuit of accuracy. For example, the rule that permits hearsay testimony in the situation where the defendant has disabled the declarant is primarily grounded in the notion that one should not benefit from one's wrongdoing. *State v. Henry*, 76 Conn. App. 515, 532-33, 820 A.2d
The case of Michael Skakel both points up the systemic complexities produced by a prosecution years after the alleged offense and underlines the recurrent issue of dealing with changes in the law. The Connecticut Supreme Court's approach to the question of change is analytically deficient; and the result is a confusing and noncohesive treatment of the issue. The categories it employs in responding to the choice of law issue are indistinct, lend themselves to arbitrary application, and do not force attention to the important interests at stake. The court would do better if it addressed those interests—justifiable reliance, legislative purpose, administrative impact—directly in deciding whether to apply the contemporary rule or that in existence at the time of the party's behavior. Utilization of that approach to determination of the temporal scope of a statute would have resulted in employment of the present rule on immediate appeal in the cases of both Daniel H. and Michael S.

1076, 1081 (2003); Fed. R. Evid. 804(b)(6). However, the revision of the rule announced in Troupe is aimed at improvement of the process in its search for truth. As such, it is hard to fathom why the revised rule should not be applied to the defendant (and to cases on appeal). See generally State v. Marshall, 246 Conn. 799, 807-10, 717 A.2d 1224, 1228-29 (1998).

The court offers an additional argument for its decision by reference to the reliance interests involved: "Moreover, to apply our new rule retrospectively would place unreasonable burdens on the state and on victims whose constancy of accusation testimony was admitted in justified reliance on our prior consistently applied law." Troupe, 677 A.2d at 929 n.21.

While attention to the question of reliance is analytically apt, the court's statements about reliance appear confused or incorrect. It is hard to fathom why the State's burden would be any different, any more unreasonable, than in any other case where a reversal occurs and a new trial is ordered. The prosecution has the necessary evidence, as it previously did, and will introduce it with the limitation on testimony about details of the alleged attack. No curtailment of investigation has occurred due to reliance on the constancy of accusation doctrine. In short, the State has no justifiable reliance claim which would appropriately forestall the order of a new trial. Its only "burden" is to now conduct a prosecution with a restriction that the court has decided is necessary to further the integrity of the trial.

Reference to the victim's unreasonable burden is no more persuasive. The victim's testimony would be no different on retrial. Under the constancy of accusation rule the victim must first testify that she had made prompt and constant accusations to others, implicating the accused. Witnesses can then bolster her testimony by testifying to the fact that the victim had, in fact, told them of the sexual assault. The revision introduced by Troupe affects the testimony of these witnesses. It limits their testimony to the fact that the victim had made an accusation; they may not also report the details of the alleged attack. Troupe, however, affects not at all what is permissible or impermissible testimony by the victim. Any reliance on the prior rule affected the testimony of the witnesses, not of the victim. Again, the "burden" is to participate in a prosecution with a restriction that the court has determined is required to enhance the integrity of the adjudicative process.

The court, then, appropriately considers the possible relevance of reliance interests, but offers a defective analysis of the reliance issue and fails to provide a satisfactory justification for the temporal limitation it imposes on its ruling.