Prospective Overruling and Property Law

Cody Blake Bartlett

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Cody Blake Bartlett, Prospective Overruling and Property Law, 18 W. Res. L. Rev. 1205 (1967)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol18/iss4/8

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
Prospective Overruling and Property Law

Cody Blake Bartlett

The thesis underlying Mr. Bartlett’s article is that, in the property area, courts can best fulfill their dual purpose of protecting vested rights and modernizing judicial doctrines by the use of prospective overruling. For too long the courts have adhered to rules of law that are obviously erroneous, unfair, or outdated, the reason for this being that the judiciary’s function has been limited to the application of existing law because legislative action is supposedly a requisite for change. Through an analysis of Supreme Court cases in which prospective overruling has been utilized in other areas, several state court decisions which have made use of this “tool for judicial housecleaning” in property cases, and the suggestions of eminent legal writers, the author presents a cogent argument for the implementation of this device by the courts in the law of property.

AN INTERESTING CASE once arose in New Jersey. Among other things, the court said:

Appellants ask this Court to explicitly and expressly overrule the long established law of this state. This we decline to do. Such action would be fraught with great danger in this type of case where titles to property, held by bequests and devises, are involved. A change of the established law by judicial decision is retrospective. It makes the law at the time of prior decisions as it is declared in the last decision, as to all transactions that can be reached by it. On the other hand a change in the settled law by statute is prospective only.1

Is all or part of this quotation a true statement? Is it a good expression of what should be the judicial function? Does it even make any sense? The answer to these questions is that the above quotation is judicial rubbish.

In the first place, a court does not have to act this way unless it wants to. Like a neurotic person, a court may cause most of its problems by thinking that something is when it is not. Second, no legislature is going to act in a case like this one, a case in which the

1 Fox v. Snow, 6 N.J. 12, 14, 76 A.2d 877, 877-78 (1950). This case will appear several times later in this article. The most significant part of the case was the magnificent dissent by Chief Justice Vanderbilt, a judicial innovator in the common law tradition.
construction of a paragraph in a will is involved. The court thinks that the legislature should act, but the legislature will not trouble itself with things of this nature. As a result, nothing is done. The purpose of this article is gently to convince the reader that prospective overruling is a useful tool in the area of property law. But prospective overruling is more than that: it is judicial self-correction and the highest form of the common law tradition. These property problems, caused by rules that have outlived their usefulness or by decisions that were initially erroneous, were produced by the judicial branch. Why not let it correct them in a manner that will produce the least harm to settled interests and yet implement a better rule for the future?

Before defining terms or dealing with the material, a few words should be added about the construction of this article. Basically, it is the result of four cases decided in 1965 and two law review articles written in 1966. This suggests, as indeed is the case, that this is something new. More than that, it shows that prospective overruling is a device that will be used more and more in the future.

---

2 It is conceded at the outset that prospective overruling can be overworked. "But total rejection of prospective overruling is an unduly crippling limitation of judicial power." Keeton, Judicial Law Reform — A Perspective on the Performance of Appellate Courts, 44 TEXAS L. REV. 1254, 1265 (1966).

3 A few people have come to recognize that the legislature cannot, or will not, act in many situations. These enlightened few have therefore had a few words to say on the subject: "The most compelling argument for an active judiciary assumes that, while a . . . better agent of law reform, the legislature cannot or will not perform this function and therefore the courts must assume a dynamic role in the development of the law." Note, Prospective-Prospective Overruling, 51 MINN. L. REV. 79, 85 (1966).

4 However, we do not share the view that a court-made rule, however unjust or outmoded, becomes with age invulnerable to judicial attack and cannot be discarded except by legislative action." Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962).

5 We are satisfied that the governmental immunity doctrine has judicial origins. Upon careful consideration, we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments." Holytz v. City of Milwaukee, 17 Wis. 2d 26, 37, 115 N.W.2d 618, 623 (1962) (the legislature had rejected bills removing immunity). For similar words in a similar fact situation, see McAndrew v. Mularchuk, 33 N.J. 172, 193, 162 A.2d 820, 832 (1960).

6 The Supreme Court of Arizona, faced with the Holytz problem, had this to say: "When the reason for the rule no longer exists, the court's responsibility does not terminate because the legislature through indifference or otherwise has not acted." Hernandez v. County of Yuma, 91 Ariz. 35, 36, 369 P.2d 271, 272 (1962).
Two very important courts in the United States—the United States Supreme Court and the Court of Appeals of New York—have indicated that they will use it. In fact, the Supreme Court has used it. The Court of Appeals of New York, on the other hand, has not had a majority accept it; yet, an eager minority of that court has. The cases are *Linkletter v. Walker*[^4], *Tehan v. United States ex rel. Shott*[^5], and *Johnson v. New Jersey*[^6] in the Supreme Court and *Rosenstiel v. Rosenstiel*[^7] in the New York Court of Appeals. The two law review articles show current scholarly interest in the subject of prospective overruling. Professors Currier and Mishkin have covered the topic in a thorough manner.[^8]

### I. WHAT IS PROSPECTIVE OVERRULING?

#### A. A Definition

Although the term “prospective overruling” is to a certain extent self-defining, a clear statement of what is being covered is necessary:

Briefly stated, prospective overruling is the judicial technique by which a court—eager to overrule an outmoded precedent but reluctant to disappoint the expectations of the parties—applies that precedent in deciding the particular case before it but simultaneously announces that it shall consider the precedent as overruled in all future cases.[^9]

This, then, is what this article is all about.

In turn, the problems in this area are implied by another definition:

Is it ever proper for a court to follow a precedent of which it disapproves in disposing of the case at bar while at the same time announcing that in cases thereafter arising the precedent will no longer be followed but will be regarded as overruled?[^10]

#### B. A Judicial Half-Step

Prospective overruling involves problems that are separate from

those of “simple” overruling. In the latter situation the court must consider the purpose of stare decisis, a purpose which goes to the very heart of the judicial system. In the former situation the problems are presented only after it has been decided that overruling a previous decision is necessary. The problem here is that of line drawing. When the court has decided to overrule, it has determined, in the context of the case before it, that a rule should cease. Prospective overruling, on the other hand, deals with the situation in which the rule has ceased, but the question is whether the rule should be erased. It involves the question of what to do with the new rule. Two rules have collided; does one engulf the other or leave it in existence? Has the new rule blotted out the old one and covered past, present, and future, or does it just tack on to the end of the old rule and only cover the future? Acceptance of the latter parts of these two questions means a judicial half-step. Although prospective overruling may make it easier for a court to depart from precedent, it does not directly involve the question of precedent. Rather, it involves the process by which a court “legislates” to right its wrongs.

C. "True" and "Untrue" Prospective Overruling

Once prospective overruling is separated from overruling, the variations within the former must be considered. Therefore, once it is decided that a case will be overruled and the further decision is made that it will be overruled prospectively, the question becomes: How prospective will it be? "A ruling which is purely prospective does not apply even to the parties before the court." This is Mr. Justice Clark’s view of prospective overruling, and Chief Justice Desmond of the New York Court of Appeals agrees. The definition that this article accepted as a starting point also states this; yet, “true” or “pure” prospective overruling is only one of the four forms that prospective overruling may take. They are: (1) denying the use of the new rule in the case changing the rule, the “pure” form; (2) using the new rule for the case that changed the rule, or giving the victor his fruits; (3) denying the use of the new rule in the overruling case and announcing that it will take effect on a future

---

12 The Linkletter situation is not “pure” prospective overruling, since the rule-changer got the benefit of the new rule. All the Supreme Court cases have used the Linkletter method.
date, that is, acting like a legislature in the most obvious way possible; and (4) using the new rule in the overruling case and announcing that it will take effect at a future date.\textsuperscript{14}

In any case in which a court has decided to act prospectively, it must be decided which variety of prospective overruling should be used. This is perhaps as important as deciding to use that method of overruling. The decision should not be on the basis of what is "true" or "pure" but on the basis of what will produce a just result in the case at bar. In the variations of prospective overruling, the court gets away from the question of the new rule for the future. Here, the court looks at the other part of its function. It has thought about the new rule for the future; now, the question is justice in the present case. This article is dedicated to the position that in the property area the second form of prospective overruling will usually work best. Like Judge Scileppi in the Rosenstiel case,\textsuperscript{16} the belief is that the rule should be immediately changed and the victor should have his victory. A word of caution: this is not a dogma. There are, no doubt, cases in which the victor should not get his spoils\textsuperscript{16} or in which the new rule should not begin with the date of the decision.\textsuperscript{17} If this is indeed the situation, the court should apply the variation that produces the most just result. That is one of the duties of any court.

\textsuperscript{14} Almost all of the prospective overruling cases adopt either form number one or form number two. For an example of form number three in a charitable or sovereign immunity case, see Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962). For an example of form number three in a Totten trust case, see Jeruzal v. Jeruzal, 269 Minn. 183, 130 N.W.2d 473 (1964). For an example of form number four in a sovereign immunity case, see Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). For an interesting and new variation of form number three, see Myers v. Drozola, 180 Neb. 183, 141 N.W.2d 852 (1966).

\textsuperscript{16} For an example, see Mr. Justice Harlan's concurring opinion in James v. United States, 366 U.S. 213, 241-48 (1961), in which he wanted a showing of actual reliance by the appellant before he would give the party benefit of the overruled decision. As this article later points out, reliance — especially in the property area — may well be the main factor upon which prospective overruling depends. See text accompanying notes 170-73 infra. Since this is so, there may be cases in which the victor should be denied the benefit of the new rule because there has been bona fide reliance; otherwise, without a showing of this reliance, he would get the benefit.

\textsuperscript{17} This might well be so in charitable immunity tort cases such as Molitor v. Kane-land Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968 (1960); Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960); and Kojis v. Doctor's Hosp., 12 Wis. 2d 367, 107 N.W.2d 1 (1961) where the courts might want to give the charity a reasonable time to obtain insurance coverage.
II. HISTORICAL OPPOSITION

A. Basis

Not an executive proclamation, not a legislative enactment, the common law was something else. It was considered something that had an independent existence and only had to be discovered and declared. Like America, it was sitting there all the time, waiting for someone to stumble across it. The bible for American lawyers at an earlier time stated the dogma as it existed. It also mentioned a problem that showed the weakness of this view: What happened when a judge found something that later turned out to be a judicial mirage?

It is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined.  

This statement of Blackstone's does at least separate the "simple" overruling problem from that of prospective overruling. Given his view of the precedent problem, however, the manner in which a decision is overruled follows: it can only be retrospectively overruled. Perhaps if Blackstone had known and dared to admit that law is only what the reason of the courts say it is, he would have been the first to advocate prospective overruling; however, as he said, courts are

---

18 BLACKSTONE, COMMENTARIES 69-70 (1769). Parts of this rather lengthy quote appear in many of the articles on prospective overruling. Since this particular part of Blackstone was the core of American jurisprudence for so long, it seems improper to reduce it to a line or two.

19 "From the declaratory nature of a judicial decision, Blackstone derived the necessity that the decision have retrospective effect. If the decision interpreted a law, then it did no more than declare what the law had always been." Note, supra note 9, at 907.
"not delegated to pronounce a new law, but to maintain and ex-
piud the old one." So the task for the courts was thought to be
finding the old law, hopefully the right old law.

America had its share of spokesmen for this view. How could it have been otherwise when Blackstone was American law? One of the best examples of this view was presented by George Sharswood in a speech given to the University of Pennsylvania Law School in 1854. Speaking of judge-made law, he said:

They are always retrospective, but worse on many accounts than retrospective statutes . . . [After discussing the constitutional protection of contracts, he continued:] There is no such constitutional provision against judicial legislation. It sweeps away a man's rights, vested, as he had reason to think, upon the firmest foundation, without affording him the shadow of redress. Nor could there, in the nature of things, be any such devised. When a court overrules a previous decision, it does not simply repeal it; it must pronounce it never to have been law. There is no instance on record in which a court has instituted the inquiry, upon what grounds the suitor had relied in investing his property or making his con-
tract, and relieved him from the disastrous consequences, not of his, but of their mistake, or the mistake of their predecessors.

Four things should be noticed in this statement. First, it is even more frightening than Blackstone's view because not even reliance seems to have troubled Sharswood. Second, this was in 1854. Was he correct in saying that there was no court that had inquired into the reliance of a "suitor"? About six years before, an Ohio court had apparently undertaken such an inquiry. Third, he was correct about one thing: retrospective court decisions have more harmful effects than retrospective legislation. Fourth, it is interesting that he used the term "judicial legislation." This would seem to imply that courts do make law.

The above theory of the judicial process was what our courts worked with. More than that, it was thought that it was the basis of the courts' power and prestige. In fact, many people would still say the same thing.

20 1 BLACKSTONE, op. cit. supra note 18, at 69.
21 Sharswood also edited Blackstone's Commentaries.
22 SHARWOOD, AN ESSAY ON PROFESSIONAL ETHICS 45-46 (5th ed. 1884).
23 Bingham v. Miller, 17 Ohio 445 (1848). This case seems to have been the first one in which prospective overruling was used. See text accompanying notes 48-53 infra.
24 Professor Mishkin is one of these. He spends a good deal of time talking about it. Mishkin, supra note 8, at 58-70. Blackstone seems to be good law to him. On the other side, Dean Levy says Blackstone's thinking is a "medieval carryover." Levy, Realist Jurisprudence and Prospective Overruling, 109 U. PA. L. REV. 1, 4 (1960). Professor Currier, as might be expected, goes along with Mishkin. The introduction to his
B. American Cases

The cases covered here should not be thought of as the only ones available. Unlike the other side, that is, cases which have used the prospective method, a consideration of the cases using and advocating the retrospective method could not attempt to be exhaustive. The place to start is with the Supreme Court of the United States and the first case in which the Court used the prospective method. Justice Miller, in dissent, could not go along with the methods of the majority. He was worried about different results in the Iowa state and federal courts. More than that, he seemed concerned about leaving the sacred dogma of Blackstone:

I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law and, in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859.

Mr. Justice Miller should not be too severely criticized, since this has been the prevailing view of the Supreme Court. Further, he had some excellent support from one of the "great dissenters": "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retroactive operation for near a thousand years." Thus, two of the best statements of this view were in dissent. This might well be a result of the fact that it was so deeply ingrained in the members

---

25 Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175 (1863). The majority opinion is discussed in the text accompanying notes 45-47 infra.

26 Mr. Justice Miller's complaint about a statute or constitution meaning different things at different times. Of course they do and rightly so! Social conditions do change. Here, especially, it would appear to be the case; 1859 was two years before the Civil War, and 1863 was in the middle of it. This is an excellent reason for the meaning of a statute or constitution to be somewhat different from what it was four years before.

27 Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. PA. L. Rev. 650 (1962). He mentions this view in regard to constitutional interpretations; however, there was no need to limit it to that. Rather, this view of the Supreme Court was standard in all situations.

28 Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910). Yet, within twelve years, the Supreme Court was to rule that states could do this if they wished. Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).
of the Supreme Court that they did not have to articulate it except in a desperate attempt to swing others over to their minority views.

The effect of this view was to put the courts in a strange position: they could not change an old rule because undesirable effects would flow from its necessarily retroactive application; on the other hand, the courts themselves could not act prospectively because courts are not supposed to act that way. So judicial change was prevented because of the Blackstonian view and fear of judicial encroachment on the legislative sphere. The result was, instead of judicial action, judicial whimpering about the legislature's acting.

In *Crowley v. Lewis*, the question was whether a contract under seal could be enforced against persons who were not parties to the instrument on the theory that they were undisclosed principals. The court recognized that "thousands of sealed instruments must have been executed in reliance upon [a previous decision] ..." Therefore, it felt that it had no choice but to say: "We repeat that we do not feel at liberty to change a rule so well understood and so often enforced. If such a change is to be made it must be by legislative fiat." A similar statement was made by a concurring judge in a criminal case that prospectively overruled: "To approve their action [the majority's] is to sanction a usurpation by the judiciary of a legislative function. . . . To announce a rule of substantive law for the future is solely the function of the Legislature."

New Jersey has the unhappy honor of having had two recent cases which would have been ideal vehicles for prospective overruling but which instead turned into echoes of Blackstone. They are noteworthy, however, because of the brilliant dissents of Chief Justice Vanderbilt, who took rather a different view of the judicial process. Finally, it should be indicated how widespread this view was and what areas of law it encompassed. The answer seems to be all of them.

---

29 239 N.Y. 264, 146 N.E. 374 (1925).
30 Id. at 266-67, 146 N.E. at 374. This New York case presented a question with the same problem presented in Rosenstiel. The problem, of course, was reliance.
31 Id. at 266, 146 N.E. at 374.
34 He said: "The courts are under as great an obligation to revise an outmoded rule of the common law as the legislatures are to abolish or modernize an archaic statute." Reimann v. Monmouth Consol. Water Co., *supra* note 33, at 149, 87 A.2d at 332. In other words, let the branch of government responsible remove the problem.
III. THE SWING TOWARD PROSPECTIVE OVERRULING

A. Law Is Reason

The acceptance of prospective overruling stemmed from the acceptance of the view that law is reason. When examined in this light, it becomes clear that a court decision serves two purposes: (1) to produce a just result in the case at bar; and (2) to create a reasonable rule for the future. The traditional theory tended to mix these two functions together, and the result was an automatic retrospective operation of a decision. It has been suggested that the demands and realities of today's society require courts to act along with the legislature as conscious bodies for legal change. In fact, even a scholar who is, in most cases, critical of prospective overruling has admitted that a retrospective decision may be more offensive to other branches of government than one that is prospective.

Fortunately for jurisprudence, some men in the profession began to look away from the traditional view and find that law was not something already in existence. With this view came the increased use of prospective overruling. One man, Lord Nottingham, was far ahead of his time. He appears to have been the first man to suggest that a decision need not have retrospective operation: "But then in Chancery when men act according to an opinion which hath long been current for law, they are to be protected, although a later resolution have controlled the former current opinion . . . ." The date was June 1675! After making this statement, however, the method was not applied in the case under consideration. The reason was: "Besides 'tis one thing to purchase lands or leases upon a current opinion, another thing to suffer an escape or commit a wrong upon a current presumption, and since the judges have agreed in this resolution to prevent a mischief, it were unreasonable to let

35 "Because retroactive operation of decisions is inherent in the common law system, the hardship which it sometimes produces is ordinarily accepted as a necessary evil." Note, 47 Harv. L. Rev. 1403 (1934). This is an older view.
37 Levy, supra note 24, at 3.
38 Id. at 1. Dean Levy seems to limit his appeal (no pun intended) for a judiciary to act like a judiciary and not like a witch doctor, to the appellate level; yet, there is no reason to make an iron-clad rule that trial courts cannot use this handy tool. See text accompanying notes 133-35 infra.
39 Currier, supra note 8, at 230.
40 Pierce v. James, (Ch. 1675), reported in 73 Seld. Soc'y 182 (1954). I should like to thank Professor W. Barton Leach for calling this case to my attention. I would never have found it.
in that mischief again by equity." Although Lord Nottingham did not approve of prospective overruling in the criminal and tort areas, it was nevertheless a long time before another judge expressed similar thoughts.  

In addition, although Blackstone was the great advocate of the declaratory theory, he seems to have forgotten it in at least one situation in which he said that criminal laws must have prospective operation. Further, although not admitting it, Blackstonian judges would use the prospective method when they had to. Still, these small openings for realistic decision-making did not save the Blackstonian view from the criticism that was later to provide the foundation for a general assertion of the power to overrule prospectively.

B. The First Cases

The place to start is with the first decision of the United States Supreme Court in which the prospective method was used. The case was *Gelpcke v. City of Dubuque*, involving the question of the validity of municipal bonds. The Court did not have much to say: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." There was little in the way of explanation, but it is clear that reliance was the basic reason for the decision.

The first such decision in a state court had occurred fifteen years before. *Bingham v. Miller* involved the validity of legislative divorces. The court said that only courts could grant divorces; however, because of the problems that would result from invalidating

---

41 *Id.* at 183. As I understand it, the case involved the escape of a beggar; however, the important statement is that involving "land or lease." Lord Nottingham seemed ready to use the prospective method in such a case.

42 This is because Lord Nottinghams are rare. He was a great judge because he was an innovator. His opinions sound as if they were written two hundred years later than they were. To an innovator, prospective overruling is bound to be interesting.

43 BLACKSTONE, op. cit. supra note 18, at 46.

44 Currier, *supra* note 8, at 216.

45 68 U.S. (1 Wall.) 175 (1863). Mr. Justice Miller's dissent in this case has already been mentioned in connection with the traditional view of the declaratory theory. See text accompanying notes 25-27 supra.

46 *Id.* at 206.

47 *Ibid.*. "Subsequent cases continued to stress the reliance which parties had placed on the only legal guides available at the time they entered a contract or other transaction." Note, *supra* note 9, at 919.


49 17 Ohio 445 (1848).
previous legislative divorces, the rule would apply only to the future. As in all divorce situations, of course, property was involved. The court also said that if only property rights were at stake, it would not be concerned about invalidating the legislative divorces already granted. What it was worried about was the children of second marriages, children who would be rendered illegitimate by a retroactive decision. So the court warned the legislature to make no future encroachments on the judicial power.

So far as the protection of property rights is concerned, Jones v. Woodstock Iron Co. is a decision to consider because it protected reliance in a property case, and because the court prospectively overruled a previous decision. It is an example of judicial housecleaning. Another early state court decision is interesting not because it overruled prospectively but because of the reason it gave for overruling retrospectively. An Iowa court had held void a state statute involving liquor control. The Supreme Court, in another case, upheld a similar statute in another state. While saying it was not bound to follow the Supreme Court, in McCollum v. McConnaughy the Iowa court said that it would. The court also held that it would apply the new rule retrospectively in that case, since “no property rights [have] been acquired in reliance on such previous decisions.”

C. Cardozo’s View

Mr. Justice Cardozo has been the judiciary’s greatest advocate of prospective overruling. The reason for this has been a matter of some debate. It has been suggested that his love for prospective overruling was the result of his personal experience at the Columbia Law School. When he started law school, the course lasted only two years. Columbia then changed the requirement to three years and applied the new rule to students already enrolled. Justice Cardozo refused to attend longer than two years, and he therefore never received a law degree. That this is the reason seems somewhat

---

80 Id. at 448-49.
81 Id. at 448.
82 Ibid.
83 Id. at 448-49.
84 95 Ala. 551, 10 So. 635 (1892).
85 141 Iowa 172, 119 N.W. 539 (1909).
86 Id. at 176, 119 N.W. at 541.
87 Note, supra note 9, at 911.
questionable in view of his opinions in MacPherson v. Buick Motor Co. 58 and Doctor v. Hughes, 59 both of which would have been ideal for the prospective approach. The better guess is that he borrowed the idea from Dean Wigmore 60 after these cases had been decided. 61 The really important thing is that he did get the idea from somewhere.

Cardozo's first recorded expression of the idea occurred in 1921: “I think it is significant that when the hardship is felt to be too great or to be unnecessary, retrospective operation is withheld.” 62 But his next statement on the subject did not occur until 1932 in a talk given to the New York State Bar Association: “The necessity for such adjustments will sometimes call for the continuance of an existing rule of law after its intrinsic error or inconvenience has declared itself in practice.” 63 Within one year, he wrote an opinion that made it constitutional for state courts to overrule prospectively. Great No. Ry. v. Sunburst Oil & Ref. Co. 64 involved a Montana freight-rate statute. The Supreme Court of Montana held that a previous ruling was erroneous and applied the rule of the previous case for the past, but not for the future. 65 The argument is often made that the retrospective operation of a decision violates the fourteenth amendment. In this case, however, the argument was made that prospective overruling violated that amendment. Mr. Justice Cardozo, writing for the majority stated:

This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. 66

58 217 N.Y. 382, 111 N.E. 1050 (1916).
59 225 N.Y. 305, 122 N.E. 221 (1919).
60 See Wigmore, Problems of Law: Its Past, Present and Future 81 (1920): “Just as the principles of non-retroactivity of laws and of non-impairment of obligation are flexibly applied where needed by the judges, so also stare decisis has only limited merit.”
61 Wigmore's influence on Cardozo is noted in Levy, supra note 48, at 9 n.28.
63 55 REPORT OF N.Y.S.B.A. 262, 294 (1932).
64 287 U.S. 358 (1932).
65 The previous case was Doney v. Northern Pac. Ry., 60 Mont. 209, 199 Pac. 432 (1921).
66 287 U.S. at 364. The case received favorable comment in Note, Retroactive Effect of an Overruling Decision, 42 YALE L.J. 779 (1933) and was criticized in Note, supra note 35, at 1403.
D. Approving General Statements

Finally, some independent general statements have been made approving prospective overruling as a legitimate court function. Chief Justice Vanderbilt and Judge Traynor have said that they would urge it on the highest courts of New Jersey and California, respectively.67 Long before that, Professor Kocourek proposed a statute authorizing prospective overruling.68 And it was not long until the legal encyclopedias came around.69 The broadest authorization occurs in the American Bar Association's Canons of Judicial Ethics. Canon 19 says that a judge "may contribute useful precedent to the growth of the law."70

IV. Property and Contract Cases

Since it is so difficult and arbitrary to try to separate property and contract cases,71 they will both be covered here. It has been said:

In general, as regards contracts, the liability of public officers, and property rights, decisions should operate prospectively so far as necessary to protect those who have relied on precedents now overruled or on statutes now declared unconstitutional, wherever granting such protection is feasible. Recent cases, except those involving property rights, have usually upheld this principle. . . . [A]s in criminal cases, there is such a dominant concern for personal rights that decisions are usually given an effect which will protect the individual.72

---

67 Dean Levy stated that he had received letters from them to this effect. Levy, supra note 48, at 23 n.73.
68 Kocourek, Retrospective Decision and Stare Decisis and a Proposal, 17 A.B.A.J. 180 (1931).
70 ABA CANONS OF JUDICIAL ETHICS No. 19. This has been snatched out of context, and so in fairness the full quotation should be included:
   In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law. Ibid.
   Dean Levy, in his article, feels that this is a general statement of acceptance of prospective overruling. Levy, supra note 48, at 4. While the article would allow a court to use the method, it does not appear to have been written with prospective overruling specifically in mind. See People v. Mallory, 147 N.W.2d 66, 83 (Mich. 1967) (concurring opinion) for an example of Canon 19's usefulness in judicial opinions.
71 "In a well-ordered society, protection of private property is the keystone." Robin speaking to Batman. Batman, "The Penguin Goes Straight, Part I," WNAC-TV Boston, March 23, 1966, 7:30-8:00 P.M. E.S.T. In the Gelpcke case Justice Miller had a very difficult time trying to separate property and contract cases. Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 214 (1863) (dissenting opinion).
72 Note, Prospective Operation of Decisions Holding Statutes Unconstitutional or
This quote is typical in that it points out two things. First, there is little or no serious objection to prospective overruling in the property area. Second, although the commentators talk about it, the courts do not seem to do it. People have relied on the system, and, because of this, courts are reluctant to overrule silly decisions. While scholars think that this is the perfect place for prospective overruling in the property area, for some reason or other the courts have lagged behind. Professors Currier and Mishkin have had some harsh things to say about prospective overruling in the constitutional-criminal area; yet, they are firm supporters of the method in the property area. Now, the only problem is to find some courts that have tried it.

V. TIME AND CHANGE — JUDGE-MADE LAW: PROSPECTIVE OVERRULING 1965

A. One Court Thinking Seriously About It: Herein of New York

In Rosenstiel v. Rosenstiel all six members of the Court of Appeals of New York were ready to innovate; in fact, they had no

Overruling Prior Decisions, 60 HARV. L. REV. 437, 447-48 (1947). Despite what was said, the article found that the prospective method had not been used in cases involving contract rights in property (id. at 442-43) or involving tax sales. Id. at 444-46.

Professor Currier reasons as follows:

Thus a change in property law fairly cries out for prospective overruling. This is so first because of the obviously great societal interest in stability in this area, in lands titles, for instance. Reliance too is a particularly strong value here. In property transactions, unlike tort situations, men tend consciously to rely on existing law. To disappoint expectations reasonably based on such deliberate reliance would clearly be unsound. On the other hand, though prospective limitation of an overruling decision in the property field applies different rules to persons in somewhat similar situations, it impairs the values of equality and the image of justice only slightly. First, there is a rational basis for discriminating between persons who transferred or acquired property prior to the overruling decision and those who did so afterwards. Those who did so before might and ought to have expected that their transaction would be governed by the old rule, and this is not true of those who did so afterwards.


Professor Mishkin has said:

There are some contexts in which protection of reliance might go to preventing significant change, and in those circumstances outright prospective limitation may be justified. However, these tend to involve contract or property rights, areas which do not normally constitute a substantial factor in the business of the Supreme Court. Mishkin, The Supreme Court 1964 Term, 79 HARV. L. REV. 56, 70-71 (1965).

choice. The Court of Appeals had never passed on the question before, but many lower New York courts had. In such a situation, the person who relies on the lower court decision is generally considered to have done so at his peril.76 Besides encouraging a change in the appellate process by advocating prospective overruling, Rosenstiel became the first case in the United States to recognize Mexican divorces. More specifically, the court held that it would recognize foreign divorces based on grounds not good in New York when one party personally appears and the other is represented by an authorized attorney.77

For over twenty-five years, the Supreme Court of New York, at Appellate Division and Special Term, had recognized these divorces. No decision in New York had ever refused to accept the validity of a divorce in the Rosenstiel situation. There were, however, decisions against validity where there had not been this degree of personal contact or personal submission. As the matter stood, thousands of people would have had their personal and property relations seriously affected if the court of appeals were to invalidate the Rosenstiel case and apply the new rule retroactively. The majority of four gave a blanket approval to these Mexican divorces.78

The part of the case that is of the greatest interest is the minority opinions. Chief Justice Desmond, concurring in part, urged that these collusive divorces not be accepted in the future.79 He was concerned with the public interest, both in allowing such divorces to continue and in overturning many final divorce decrees.80 Judge Scileppi, dissenting, agreed with Chief Justice Desmond and expressed the view that, because of New York public policy, these divorces were void.81 He also stated, however, that prospective overruling should only be used in "the most compelling circumstances."82

Rosenstiel shows that at least two members of the Court of Ap-

---

76 Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 YALE L.J. 907, 947 (1962). After the Rosenstiel decision in the appellate division and before the court of appeals had rendered its decision, it was said that it was "almost inconceivable" that the court of appeals would hold the way that it eventually did. VON MEHREN & TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 919 (1965).
77 16 N.Y.2d at 74, 209 N.E.2d at 713, 262 N.Y.S.2d at 91.
78 Ibid.
79 Id. at 75, 209 N.E.2d at 713, 262 N.Y.S.2d at 92.
80 Id. at 78, 209 N.E.2d at 715, 262 N.Y.S.2d at 94-95.
81 Id. at 86-87, 209 N.E.2d at 720, 262 N.Y.S.2d at 102. The last part of what he said — about nobody being hurt — is not true. No matter what is done in a court decision, someone will always be "hurt." What he should have said is that the fewest deserving people would be hurt by his method.
82 Id. at 87, 209 N.E.2d at 721, 262 N.Y.S.2d at 102.
peals of New York are willing to use the prospective method. The question is whether the other members might find it worthy of use in another fact situation. Judge Fuld is one of the majority of four who has recorded his views on judicial change. Where commercial and property interests are involved, he has said:

In such areas, any change of decision made by the courts would necessarily be retroactive in application, and the courts have rightly been loath to announce new rules which would adversely affect transactions entered into in reliance on previously declared doctrines.83

Since the legislature does not make law retroactively, Judge Fuld implies that such changes should be left to the legislature. But could not a man like Fuld, a man who likes to innovate, be shown that the prospective method is a useful judicial tool?84 Maybe he and others on the court of appeals will be won over when the right fact situation presents itself.85

New York had in fact used the prospective method many years before in the property area. Harris v. Jex86 involved an action to foreclose a mortgage. Relying on a decision of the Supreme Court, the plaintiff had refused to accept legal tender notes in payment of the mortgage. The Supreme Court later reversed itself but the liens were held not to be discharged because “plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land.”87 In effect, then, the court of appeals applied the Supreme Court decision prospectively. It would therefore seem that the New York courts have the authority and the desire to use the prospective method should the proper case present itself.

B. A State in Love With It: Herein of Kentucky

There are scattered cases in many states,88 but only Kentucky seems to have adopted what may be called a consistent pattern. For this reason, the development in that state will be traced. World

84 In the conflict of laws area, Judge Fuld has shown that a new idea can win him over. In Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 135 (1961), he felt that prior cases precluded the use of the “center of gravity” theory. His later opinion in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) fully accepted this theory.
85 Dean Levy has complained about the New York courts not using the prospective method. See Levy, supra note 48, at 23-25.
86 55 N.Y. 421 (1874).
87 Id. at 424.
88 See Snyder, supra note 48, at 130 n.101 for a collection of the pre-1940 cases.
Fire & Marine Ins. Co. v. Tapp\textsuperscript{80} was an action on a fire insurance policy. Previous Kentucky rulings were not followed, and it was held that an "iron safe clause" was valid; however, this did not have retroactive effect, nor did it apply to contracts already in existence because there had been reliance on the prior decision.\textsuperscript{90} Rather, it only applied to contracts made after the date of decision.\textsuperscript{91}

The Tapp court cited Eagle v. City of Corbin\textsuperscript{92} and Payne v. City of Covington,\textsuperscript{93} both of which were municipal bond cases,\textsuperscript{94} Eagle dealing with a statute and Payne with the state constitution.\textsuperscript{95} These cases were the first in which Kentucky had used the prospective approach. Sunburst\textsuperscript{86} was also cited.

Mutual Life & Acc. Ins. Co. v. O'Brien\textsuperscript{97} was another insurance contract case. The question involved what was meant by the phrase "occupation for gain or profit" under a disability policy. Overruling a prior decision, the court broadened the meaning of the policy provision, but the change was prospective only and did not apply to the case at bar.\textsuperscript{98} In the Tapp case, the court had also denied the victor the benefit of a new rule.\textsuperscript{99} In both cases, the victor was an insurance company which could benefit from the new rule at a later time, and denying it the benefit of its victory was the most just result in such a situation.\textsuperscript{100} The insurance company tried to draw a distinction between a statutory provision and a court decision, saying that only in the former should a court overrule prospectively.\textsuperscript{101} Relying heavily on Tapp, the court did not accept this argument.\textsuperscript{102}

In Hanks v. McDanell\textsuperscript{103} the Kentucky Court of Appeals moved

\begin{footnotes}
\item[80] 279 Ky. 423, 130 S.W.2d 848 (1939).
\item[90] 9 Id. at 431, 130 S.W.2d at 852.
\item[91] 10 Ibid.
\item[92] 275 Ky. 808, 122 S.W.2d 798 (1938).
\item[93] 276 Ky. 380, 123 S.W.2d 1045 (1938).
\item[95] These bond cases have been a fertile area for prospective overruling. Gelpcke and Chicor were also bond cases in which the United States Supreme Court used the prospective approach.
\item[97] 296 Ky. 815, 177 S.W.2d 588 (1943).
\item[98] 11 Id. at 824, 177 S.W.2d at 592.
\item[99] World Fire & Marine Ins. Co. v. Tapp., 279 Ky. 423, 130 S.W.2d 848 (1939).
\item[100] What Professors Hart and Sacks call the "institutional litigant" is covered in the text accompanying note 150 infra.
\item[101] 296 Ky. at 824, 177 S.W.2d at 592-93.
\item[102] 12 Id. at 825, 177 S.W.2d at 593.
\item[103] 307 Ky. 243, 210 S.W.2d 784 (1948). Professor Mishkin considered Hanks
\end{footnotes}
squarely into the property area with prospective overruling. The case involved a will provision. The so-called “biting rule” provided that, when a person had been conveyed property in fee simple, the fee could not be cut down by a gift over after the grantee’s death. The court said that this rule could no longer be applied, since it conflicted with giving effect to the testator’s intent. However, the court preserved all vested rights acquired under the old rule: “The cautionary rule against overruling prior cases settling rules of property, to which we have referred, becomes eliminated when the overruling opinion reserves such rights by giving that opinion only prospective effect, as was done by us in Payne and other opinions.”

The use of prospective overruling, at least in the way that the court used it in Hanks, did not eliminate all of the difficulties. In Stewart v. Morris the court said that the new rule was “mistakenly applied” in the Hanks case, where the court had given the victor his spoils. And the problems were not over yet. In Boyd v. Gray the District Director of Internal Revenue was having difficulty with the new rule of Hanks, as clarified by Stewart. The new rule was applied, and, as a result, the marital deduction was held to have been lost. The case was appealed and later remanded to the district court. This time, the effect of the Technical Amendments Act of 1958 was considered and the marital deduction was granted. If nothing else, the Boyd case shows that not even prospective overruling can avoid these tax troubles. Besides the tax difficulties there was much complaint over the construction problems produced by Hanks but none over the judicial method utilized by the court.

C. A Court With a New Love Affair: Herein of Minnesota

The Supreme Court of Minnesota has been making the most in-
teresting experiments with prospective overruling. Before coming to the property cases, the tort area is worth mentioning. In *Baits v. Baits*, parent-child tort immunity was abolished. The new rule was applied in that case, and the court held that it would be used for all torts occurring after the date of that decision.

*Spanel v. Mounds View School Dist. No. 621*, a case prospectively abolishing charitable tort immunity, employed a different method of prospective overruling. The victor was denied the fruits of his victory, and the new rule was held ineffective until the 1963 Minnesota legislature adjourned. As was pointed out above, this involves action similar to that of a legislature in the most obvious way but also gives the legislature a chance to act. It prevents the awkward occurrence of having a new court rule exist until the legislature enacts still a different rule or reinstates the old one. It is cooperation between the court and the legislature.

The Supreme Court of Minnesota was to use this method in the property area. In *Jeruzal v. Jeruzal* the question was whether a Totten trust was subject to the widow’s statutory share. The court said:

> Because of such widespread use of Totten trusts and the reliance which attorneys have doubtless placed on our previous more general decisions on marital fraud, we will be guided here, and in other cases in which the trust becomes absolute by the death of the depositor before the end of the next session of the legislature, by our previous decisions.

In other words, these trusts were good until the legislature adjourned. Further, once more the victor did not get what he had won. And, finally, it is interesting to note that reliance was not shown in *Jeruzal* but was assumed.

It has been suggested that the Minnesota court will apply the

---

112 142 N.W.2d 66 (Minn. 1966). This case, involving a conflict of laws, was filled with innovation. In *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the "center-of-gravity" approach was used.

113 264 Minn. 279, 118 N.W.2d 795 (1962).

114 It has been named "prospective-prospective overruling." Note, *Prospective-Prospective Overruling*, 51 MINN. L. REV. 79 (1966).

115 See text accompanying notes 13-14 *supra*.

116 269 Minn. 183, 130 N.W.2d 473 (1964).

117 *Id.* at 195, 130 N.W.2d at 481. About the "new" type of prospective overruling: "Prospective-prospective overruling represents a significant departure from previous concepts of overruling and is an important part of the legal process of those jurisdictions adopting it. Note, *supra* note 114, at 81-82. For a collection of articles that have at least mentioned this form of prospective overruling, see *id.* at 82 n.14.

same method to invalidate revocable inter vivos trusts that are used to defeat the statutory share of the widow.\textsuperscript{119} The court in \textit{Jeruzal}, however, specifically stated that it was only talking about Totten trusts.\textsuperscript{120} In any event, the Supreme Court of Minnesota has shown that it knows when and how to use a judicial tool.

\textbf{D. What the Federal Courts Think of It: Herein of Miscellaneous Cases}

\textit{Gelpcke v. City of Dubuque}\textsuperscript{121} was one of a number of municipal bond cases and the first case in which the Supreme Court was to use the prospective approach. In \textit{Chicot County Drainage Dist. v. Baxter State Bank},\textsuperscript{122} the same issue and the same method appeared. Bondholders who in a previous case did not question the validity of a statute raised the question of its constitutionality. The Supreme Court held that it was prohibited by the doctrine of res judicata from considering the question of constitutionality, even though the Court, since its initial action, had declared that the statute was unconstitutional.\textsuperscript{123}

The prospective method has also been urged in a court of appeals tax case. \textit{Commissioner v. Hall's Estate}\textsuperscript{124} dealt with the question of whether an inter vivos trust would be included in the grantor's gross estate. The majority held that there was not a tax due.\textsuperscript{125} Judge Frank, dissenting, felt that there should be an estate tax in this situation but would have remanded this case to see whether there had been reliance on a previous decision.\textsuperscript{126}

These cases show that various judges and courts have exercised what they have a constitutional right to exercise and have limited a property decision to prospective effect. The questions suggested by these cases are: Why have not more courts done the same in areas where it would be useful? Why have not more judges innovated to create a judicial tool for their courts that would allow them to innovate more? The focus of this article now will move away from

\textsuperscript{119} \textit{Id.} at 79 n.83.
\textsuperscript{120} 269 Minn. at 196, 130 N.W.2d at 482.
\textsuperscript{121} 68 U.S. (1 Wall.) 175 (1863).
\textsuperscript{122} 308 U.S. 371 (1940).
\textsuperscript{123} \textit{Id.} at 378.
\textsuperscript{124} 153 F.2d 172 (2d Cir. 1946).
\textsuperscript{125} \textit{Ibid.}
\textsuperscript{126} \textit{Id.} at 174.
V. THE WHY NOTS AND THE PROPOSALS

A. The Problems

There are two basic problems to be solved once it is determined that prospective overruling is a valid exercise of judicial power. The first relates to the treatment of cases involving the same question. Prospective overruling takes care of all cases that arise after the date of decision, but what about the cases that are, at the time of decision, in different postures before other courts? And what about the case that changes the rule? The second problem is a determination of what court, or courts, in the system should be allowed to use this method.

First, the case in progress will be one of the following: (1) a case in court; (2) a case in trial; (3) a case on appeal; (4) a case with judgment final; (5) a case occurring partly before and partly after (similar to the situation in Linkletter v. Walker)\(^{128}\) or (6) a case arising from the same transaction (like the situation in Molitor v. Kaneland Community Unit Dist. No. 302).\(^{129}\) The case in court, that is, the case in which the rule is changed, is the one over which the most controversy has raged. In general, it is best to apply the new rule to the case that changes the old rule. In other words the victor should be given the fruits of his victory. This solves many of the problems of prospective overruling and also answers some of the arguments against it.\(^{130}\)

---

\(^{127}\) Before we leave the property area, it is interesting to see that a court can admit that it was wrong and make changes. In the following case it should be noted that a change was made even though people in the same situation had received different, unfavorable, and incorrect treatment. In Lovering v. Lovering, 129 Mass. 97 (1880), a gift to a group of the testator’s grandchildren was held void. Later, another group of grandchildren sought to claim their share under the same clause in the same will. In this case, Dorr v. Lovering, 147 Mass. 530 (1888), counsel for the grandchildren did a thorough job and found the persuasive case of Cattlin v. Brown, 11 Hare 372 (Ch. 1853), a case which neither the court nor counsel had noticed in the first case. As a result, the grandchildren in Dorr took their share. This is an illustration of what good counsel and a good court can do.

Some courts even have two opposing lines of authority over certain legal questions. Although this is not recommended judicial behavior, it at least shows that changes can be made (although hopefully by accident in this situation). For such a result in cases involving the Rule in Shelley’s Case, compare People v. Emery, 314 Ill. 220, 145 N.E. 349 (1924), with Aetna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N.E. 669 (1911).

\(^{128}\) 381 U.S. 618 (1965).

\(^{129}\) 24 Ill. 2d 467, 182 N.E.2d 145 (1962).

\(^{130}\) The appropriateness of this solution is discussed later in this section, after the
The next group of problem cases involves those concerned with the same question but which are being brought into court at slightly different times. They may be in trial, on appeal, or with judgment final. The first two categories present difficult problems and necessitate some arbitrary line-drawing. With the last group, that is, the judgment final cases, the parties are not entitled to the benefit of the new rule because their cases were decided under the old law, the law that was fit for that time. Even if the statute of limitations has not run, they should not be resurrected. But with those still in the courts, it is difficult to talk in the abstract. It is best to set down no concrete rule; instead, the courts should wait for a proper fact situation to present itself. At most there will be few of these so that the problem of flooding the courts should not appear as it might if cases with judgment final were allowed to be reopened.

In general, it would appear to be most reasonable to apply the new rule to all cases which have not become final by the time of the new decision. When a decision has become final, the parties have been placed in a position of certainty. For better or worse their rights have been adjudicated for all time. But with those cases which are still being actively litigated, the difference between them and the overturning case becomes less significant. The main difference is that of timing, for their cases might well have been the ones to change the rule. When a case has become final, it is apparent that no rule change will be brought about; therefore, the courts have a reasonable basis for giving the benefit to active cases but not to final ones on which the statute of limitations has not yet run.

Linkletter v. Walker\textsuperscript{181} illustrates another serious problem. The defendant was arrested after Miss Mapp, but his judgment was final before the Supreme Court decided her case. The problem, then, is that of the time of the "occurrence" and of the final court decision. Again, it seems safe to establish a rule that will apply in most cases without closing the door to possible fact situations that would require a different method. Such a rule would make the date of the decision, not that of the transaction involved, the crucial date. In other words, the method that was used in \textit{Linkletter} is most acceptable.

One case shows a situation in which the time of the occurrence,

\textsuperscript{181} 381 U.S. 618 (1965).

various arguments against prospective overruling have been considered. See text accompanying notes 167-69 infra.
not the decision, should control. This was Molitor.\textsuperscript{132} The problem was that other cases had arisen from the same transaction. Initially, the court tried to take the position that the date of the decision controlled, but litigation showed the unfairness of this result; therefore, those in the same transaction were also allowed the benefit of the new rule.\textsuperscript{133} In such a situation, courts should make the new rule applicable to those who are, in effect, in the same position as the party who caused it to be changed.

The second major problem is this: Which courts should have this power? Although it will mostly be done on the appellate level, there is no reason why the lower courts cannot make use of this judicial tool. In State v. Koonce\textsuperscript{134} a trial court showed that it could use the method and use it very well. There is no reason for the highest court of any jurisdiction to say that the lower courts may not prospectively overrule when the proper case has been presented to the trial court. All courts should feel free to use it whether or not it has been urged on the court by a party.

B. Arguments Against Prospective Overruling

The arguments against prospective overruling run as follows: (1) it is dictum; (2) it is a legislative function; (3) appeal incentive is destroyed; (4) there is no restraint on the judiciary; and (5) courts are to decide issues after they arise.

The big argument — in fact, the one that overlaps arguments (2) and (5) above — is that any prospective overruling is nothing more than dictum. The purest expression of this argument appeared in a student comment on Payne v. City of Covington.\textsuperscript{135} With the zeal that can be displayed only by a law student, he said: “If this is true, the statements to the effect that prior decisions are overruled are pure dictum in the truest sense of the word.”\textsuperscript{136} The best answer to this statement — and that is all that it can be considered, for it makes no argument—is: “But what is the significance of that fact?”\textsuperscript{137} This question points out that saying it is dictum is nothing more than high-grade name-calling. Nothing has been

\textsuperscript{133} 24 Ill. 2d at 470, 182 N.E.2d at 146-47.
\textsuperscript{134} 89 N.J. Super. 169, 214 A.2d 428 (Super. Ct. 1965).
\textsuperscript{135} 276 Ky. 380, 123 S.W.2d 1045 (1938). See text accompanying notes 92-96 supra.
\textsuperscript{136} Case Comment, 28 Ky. L.J. 351, 354 (1940).
\textsuperscript{137} MISHKIN & MORRIS, op. cit. supra note 103, at 308.
said, except that such language in a decision fits into the neat little compartment that has been labeled dictum. It is clean and neat; it is mechanical; but it does not answer any questions or make any arguments. It is legitimate criticism when some reason is added to it. The reason is that when a party who was not present in court is prevented from appearing to have his day in court, the decision should be considered dictum as to him.138 This is where the dictum objection has its only thrust: there may be cases in which a court will feel that a man in a certain situation has been denied his day in court. Then, what the court previously said might well be considered dictum so far as this specific person is concerned. Otherwise, mere name-calling does not do much because the term "dictum" really does not mean much.139 Professor Mishkin considered such prophecies to be superior to, and a substitute for, prospective overruling.140 Dean Levy calls such statements "warnings" and says that since courts issue them all the time, there is no reason to diminish the importance of prospective overruling by calling them dicta.141

The legislative-function argument ties in closely with those re-

---

138 Id. at 310.
139 Note, Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions, 60 HARV. L. REV. 437, 440 (1947): "The real objection to calling such pronouncements dicta lies rather in the fact that, as prophecies, they are unquestionably entitled to be given more significance than remarks made in passing."
140 Mishkin & Morris, op. cit. supra note 103, at 302.
It seems rather difficult to draw the line between prospective overruling and mere "prophecies." In a case involving a change in the law relating to bona fide purchasers of usurious notes, an Arkansas court spoke in terms of "caveat," but really prospectively overruled: "We give this caveat prospectively, so as not to entrench on property rights acquired by reason of our previous opinions, and this caveat applies to all transactions entered into after this opinion becomes final." Hare v. General Contract Purchase Corp., 220 Ark. 601, 610, 249 S.W.2d 973, 978 (1952).
141 Levy, Realistic Jurisprudence and Prospective Overruling, 109 U. PA. L. REV. 1, 21 (1960). Professor Robert E. Keeton had this to say about the dictum and closely related advisory-opinion arguments:

They fail to take due account of the fact that consideration of the prospectively applied rule was legitimate because it could have been made dispositive of the litigation before the court. That a different line of reasoning might have produced the same result the court reached does not deprive the judicial opinion of its quality as the court's own explanation of its considered choice concerning the potentially dispositive rule.

Keeton, Judicial Law Reform — A Perspective on the Performance of Appellate Courts, 44 TEXAS L. REV. 1254, 1265 (1966). To those who wish to persist with dictum name-calling, he adds:

It is then a dictum especially useful in predicting future decisions, since it almost certainly will be fortified as holding the next time the question comes before the court. In short, if we look to fact and function rather than to form, prospective overruling by courts is not the exercise of a basically new power, but only a modified exercise of a familiar power. Id. at 1266.
lating to dictum and courts deciding issues after they arise.\textsuperscript{142} In fact, these are really three forms of the same view, one which produces the constitutional overtones that are to be discussed later in this section.\textsuperscript{143} For this reason, nothing will be said about the legislative-function argument at this point. Rather, the other strong argument against prospective overruling will be considered.

This argument concerns what has been called "appeal incentive."\textsuperscript{144} If all the courts in a jurisdiction are known to use prospective overruling, then the argument might better be called "litigation incentive." "Indeed, the recognition of even a substantial possibility of such limitation will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases."\textsuperscript{145} This is Professor Mishkin speaking; yet, in another piece of writing by him,\textsuperscript{146} he stated the answer to this argument. He said that in most cases there would be no harm because the person would still be going all out for a complete victory.\textsuperscript{147} Further, he implied that even in cases where prospective overruling does discourage litigation, it does not matter because it is not for the courts to try to stimulate judicial business.\textsuperscript{148} Rather, this is something that should be legitimately left to the legislature.\textsuperscript{149}

The two considerations that Professor Mishkin did not discuss involve the so-called "institutional litigant"\textsuperscript{150} and the possibility of

\textsuperscript{142}Prospective adjudication raises difficult problems concerning the nature of a court's functions; persuasive arguments can be made that courts are badly suited for the general determination and proclamation of future rules and, indeed, that for them to do so violated the Constitution's grant to the judiciary only of power over "cases" and "controversies." Cox, \textit{The Supreme Court, 1965 Term}, 80 HARV. L. REV. 91, 140 (1966).

\textsuperscript{143}This is the best statement of the reason behind the legislative function argument. The reasons are seldom stated, but, rather, seem to be assumed. "Rarely have courts explained their reluctance to overrule well-established case law, preferring to rely on the conclusory phrase 'only the legislature can legislate.'" Note, \textit{supra} note 114, at 84.

\textsuperscript{144}Judge Scileppi, dissenting, and Chief Justice Desmond, concurring, were concerned about this in \textit{Rosenstiel v. Rosenstiel}, 16 N.Y.2d 64, 88, 78, 209 N.E.2d 709, 721, 715, 262 N.Y.S.2d 86, 103, 94-95 (1965).


\textsuperscript{146}MISHKIN \& MORRIS, \textit{ON LAW IN COURTS} (1965).

\textsuperscript{147}Id. at 311.

\textsuperscript{148}Id. at 312.

\textsuperscript{149}Id. at 310-14.

\textsuperscript{150}HART \& SACHS, \textit{THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW} 623 (tent. ed. 1958). Professor Mishkin does mention institutional litigants in his article. He said that that is an "inadequate excuse" if other non-institutional litigants are discouraged. Mishkin, \textit{supra} note 145, at 61 n.20.
the victor getting the benefit of the new rule. Both of these considera-
tions involve the question of fairness to the successful party in
court. It would be possible to have one rule for institutional litigants (not giving the victor his fruits) and a converse rule for non-institutional litigants. This would produce fairness in the individual case. Of course, a blanket application of giving the victor the benefit of the new rule makes such considerations unnecessary. The only problem with this approach is that the loser has relied on the system as best he could at the time, while the victor did not; rather, he got his victory by changing the system. It is difficult to prefer one over the other. Here, reasonable reliance is matched against giving a reward to a person who has earned it.

In general, the preference should be for the winner. The presence or absence of institutional litigants, as indicated above, would be a possible criterion for differentiating between cases in which the victor is given his fruits and those in which he is not. The appeal incentive would not be diminished for litigants who can later benefit from their rule, and the person who relied on the previous system is protected. But this form of discrimination is rather difficult for a court to explain. When all considerations are weighed, therefore, the blanket rule of giving the victor the benefit of the new rule seems best.

There is some force in the argument that prospective overruling removes needed restraint on the judiciary, but this argument cuts both ways. If courts are too restrained, they do not serve their function of changing rules that no longer have meaning. A court cannot always say "Leave it to the legislature." Instead, courts must be free to correct that which is erroneous, especially when that error is court made. If a court is to act like a court, it cannot be too restrained. Faced with this necessity, it would seem to be worth the

---

151 See note 150 supra and accompanying text.


Forcing courts to overrule retroactively or not at all tends to minimize objectionable judicial legislation — that is, judicial legislation that is in some way disruptive of the harmonious functioning of a multipartite government — by rendering it difficult for a court to overrule a prior decision because of the injury that will result from retroactive application of the newly announced rule to interests that have been created in reliance upon the old rule. Ibid.

153 Mishkin & Morris, op. cit. supra note 103, at 306: "In situations of this kind, then, if courts had no alternative but to operate with retroactive effect, judicial change of some existing rules of law — no matter how bad they might now appear to be — would be totally unavailable."
chance that the judiciary will have sufficient self-restraint to use this judicial tool in a proper manner.

The final argument arises when a court announces a new rule and then says that it will be prospective only. This argument does not aim at prospective overruling itself but rather at announcing a new rule and then giving it prospective effect in the same case. "A court's use of deliberate silence about the retroactive effect of a judicial decision should be regarded as another technique of declining jurisdiction in the case of institutional competence; in short, a passive virtue."154 This is what the Supreme Court did with *Mapp v. Ohio*,155 *Griffin v. California*,156 and *Escobedo v. Illinois*.157 The conclusion is that the proper approach was taken in the follow-up cases of *Linkletter v. Walker*,158 *Teban v. United States ex rel. Shott*,159 and *Johnson v. New Jersey*.160 The preferable view, however, is that the decision as to prospective application should be made at the time that the new rule is announced. This clarifies the situation. By doing this the court will have considered the effect of the new rule in such cases and will have said that it should be applied only prospectively. It will have heard a case or controversy. Further, a decision will then save the court's time and the time and expense of individuals bringing later actions to determine whether the rule will be applied retrospectively. The strongest arguments for using the *Mapp-Linkletter* approach are in the constitutional area where there is merit to allowing a cooling-off period for adjustment to the new rule and also for thought.

The argument of courts deciding issues after they arise greatly overlaps with constitutional arguments, arguments which it is time to examine.

C. Constitutional Problems

With respect to legislative action, there are many restrictions on

---

154 Note, 71 Yale L.J. 907, 935-36 (1962). This article is critical of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), in which the new rule of insanity was announced and given prospective effect only. The reasons for objection were: (1) the question was not before the court; (2) the court did not know the effect of the number of petitions for writs of habeas corpus; (3) the issue had not been raised and briefed in trial court; and (4) it is more equitable to apply the rule on a case-by-case basis. Note, *supra* at 936-37.
158 381 U.S. 618 (1965).
the retroactive application of statutes: (1) due process; (2) bills of attainder; (3) ex post facto laws; and (4) laws impairing the obligation of contracts. Courts do not have these restrictions, nor do they have the benefits that flow from them. If the restrictions did apply, the prospective method would be a requirement and not just a happy alternative. The Constitution cuts the other way so far as prospective application by courts is concerned. Here, the courts have to answer constitutional arguments instead of being able to rely on constitutional provisions. The Supreme Court has taken care of the constitutional arguments against prospective overruling.

The first constitutional argument raised was that of due process under the fourteenth amendment. As stated above, the Sunburst decision put an end to this argument. There is also a due process provision under the fifth amendment. This, of course, does not apply to the states but only to the federal government. Apparently, the due process clause of the fifth has never been raised to question the validity of prospective overruling. If it were, there is no reason to assume that due process here would mean something different for the federal government from that which it means for the states under the fourteenth amendment. In other words, the Sunburst reasoning should apply under the fifth amendment also.

The other constitutional argument has already been touched upon in this section. It is the article III, or cases and controversies, argument. Mr. Justice Black raised this for the first time in James v. United States. The Court considered and answered it in Linkletter: prospective overruling does not violate article III of the Constitution.

D. The Solution

Now that it has been shown that technical problems can be handled, that the arguments against prospective overruling are not too forceful, and that constitutional problems have been solved, it

---

161 HART & SACHS, op. cit. supra note 150, at 640-43.
162 See text accompanying notes 64-66 supra.
163 Note, Retroactive Effect of an Overruling Decision, 42 YALE L.J. 779, 781 (1935): "In reaching this conclusion, the Court entertained the view that no distinction is to be drawn between the position of the litigant who seeks to have an overruling declaration operate only prospectively and the position of the one who desires its retroactive application."
164 See text accompanying notes 135-43 supra.
168 381 U.S. at 629.
is time to consider what type of prospective overruling is generally the best. As was mentioned above, it is the "untrue" form of prospective overruling — the victor gets his victory — that was advocated by the dissenting opinion in Rosenstiel. The new rule would generally not be applied to cases which were final before its promulgation. Further, the decision's prospective effect would be made in the case in which the new rule was announced. This is the type of prospective overruling that seems best. Again, it should be urged strongly that this is not an inflexible rule. With something like prospective overruling, there can be no inflexible rules. That is really what prospective overruling is all about; it is a judicial tool for judicial housecleaning. Courts should not be restricted by arbitrary rules when the whole purpose of this method is to free them to innovate where innovation is badly needed. The question now becomes when is it needed?

VI. FACTORS TO BE CONSIDERED IN THE USE OF PROSPECTIVE OVERRULING

This section is a summary of what has been scattered through previous sections. To summarize, the factors are: (1) whether there has been reliance upon previous decisions; (2) whether the purpose of the new rule will be best served; (3) whether administration of the courts will be facilitated; (4) whether the courts feel inhibited when a new and better rule is needed; and (5) whether it is a fit area for judicial "legislation." Of these, the reliance factor is by far the most important.

No one seems to feel that prospective overruling is improper where there has been reliance and someone will be hurt by a retroactive application of the new rule. The controversy is over what

---

167 See text accompanying notes 81-82 supra.

168 Professor Currier expressly disagrees with this method. Currier, supra note 152, at 215.


170 The author in Note, supra note 139, at 440 called this the only blanket test, but added that there is always a question of what it is. Professor Mishkin considered reliance as a valid factor calling for prospective overruling. Mishkin, supra note 145, at 71 n.47. Professor Currier had this to say: "Interests may have been created in reliance on the old precedent that are deserving of protection; and society may have a predominant interest in stability in the affected area, if a rule of property, or similar institutional rule demanding stability, is involved." Currier, supra note 152, at 225. See also id., at 242. Snyder agrees. Snyder, Retrospective Operation of Overruling Decisions, 35 Ill. L. Rev. 121, 146-53 (1940).
is justified reliance. Further, once a good argument has been made against an existing rule, a good argument has also been made against prospective overruling because the more an old rule is criticized and limited, the less justifiable reliance upon it becomes. There is the further question of whether reliance is justified even if it did exist. Although this objection is strongest in the tort and criminal cases, it has little merit in the property and contract areas where honest men have acted reasonably in attempting to structure their affairs.

The second factor is the purpose of the rule that is newly announced. If it is to correct what is now a socially improper rule, then the argument for prospective overruling is strong. When a change in social conditions requires a change in the law, there is reason to let the old rule apply to the old situations and the new one to future situations. A rule that is future-oriented should apply only in the future.

Third, is the factor of administration in the courts. Prospective overruling may be validly invoked when a court is seriously concerned about flooding itself with other cases of a similar nature. This concern is especially great where thousands of convicts may petition for release or thousands of land titles may be overturned. While it should not be the sole basis for making a rule prospective, it is a factor to be considered. A court is on weak ground when it denies justice because it is worried about its work load. Yet, when no injustice will result, judicial administration is a legitimate concern. Since Mapp was based on what was a change in social conditions and outlook, making that prospective and saving the courts from a flood was the reasonable thing to do.

---

171 Cardozo felt that real reliance was much rarer than was commonly supposed. 55 REPORT OF N.Y.S.B.A. 262, 295 (1932). And Gray agreed. GRAY, THE NATURE AND SOURCES OF THE LAW 100 (2d ed. 1921).

172 Mr. Justice Miller in Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 219 (1863) (dissenting opinion), pointed out how the old rule had been weakened and, with it, reliance: "[A]fter a struggle of seven or eight years, in which this question has always been before the court, and never considered closed, this case may now be considered as finally settling the law on that subject in the courts of Iowa." In the Mapp situation, it has been pointed out that the states had little reason to rely on Wolf, because of the constant encroachment on the rule of that case. Mishkin, supra note 145, at 75.

173 "In this century many courts have limited the retroactive effect in situations where there has been reliance on the prior law or where stability was particularly valued." Note, Prospective-Prospecive Overruling, 51 MINN. L. REV. 79, 80 (1966).

174 Note, supra note 154, at 950.

175 Professor Currier feels that this is really a problem only in the criminal area. Currier, supra note 152, at 240, 257-58.
The last two factors are really alternative methods of combining the first three. In prospective overruling the court has a tool to reduce its inhibitions, but weighed against this is the question of whether this is a fit area for judicial lawmaking. Both are important factors, and a court should consider them when deciding whether or not to use the prospective method.

VII. Where Prospective Overruling Would Work Well in the Property Area

A few suggestions will be made about areas in which prospective overruling could be used to bring about some needed improvement. For example, it could be used in the perpetuities area. One specific place would be to allow medical testimony to be admitted to prove that a man or woman is incapable of having children. Yet, generally, perpetuities is not a good place for application of the prospective method. Perpetuities problems are something that people try to avoid. As a result, the reliance factor is eliminated. However, courts may wish to use prospective overruling as a form of housecleaning when some troublesome rule is involved there.

Possibilities of reverter and rights of entry, where they have not been limited by statute, are excellent subjects for the prospective approach. Here, the method could be used to reduce the lives of these harsh rules. The element of reliance is very strong, and a method for protecting this reliance will encourage judicial innovation.

In the tax sale area, the element of reliance is weak for both the buyer and the person who will reclaim, because the buyer is warned that there is a right of redemption and the reclaimer has let the property go. Neither of these parties stands in a very good position to make a claim of justified reliance. However, when courts are worried about overturning many tax titles, the prospective method is available.

Two very common and harmful rules exist with respect to wills. In this country, a child may be disinherited and a widow may be

---

176 Note, supra note 154, at 910-11, mentions the inhibiting factor of disappointing reasonable expectations.

177 This last section is nothing more than a suggestion of situations in which the prospective method could have been, or should be, used as well as the general areas of application. The specific examples are only some rather obvious places for the prospective method. They should not be thought of as the only examples possible.

It should be remembered that the purpose of this article is to advocate a specific form of innovation, not to propose specific innovations that should be made.
deprived of her statutory share by the use of a revocable trust.\textsuperscript{178} The use of the trust to prevent the widow's getting her forced share is especially offensive in that it may be used although it is not accepted in the state in which the testator was domiciled at his death. A trust may be set up in another state, may provide that the laws of that state govern, and therefore be good to defeat the claim of the widow. A New York resident can set up a revocable trust in Massachusetts and put all of his assets in it to defeat the claim of his widow. There has been reliance in disinheriting the children and preventing the widow's getting her statutory share. If a court feels that this is the type of reliance that should not be encouraged in the future, it could use the prospective method to advantage and not upset the plans of those who had relied upon past decisions.

To get down to specific cases, prospective overruling could be used to correct the Kentucky rule that a man can adopt his wife. In Bedinger v. Graybill's Ex'\textsuperscript{r},\textsuperscript{179} the Court of Appeals of Kentucky reached this interesting but rather foolish result. It could never have been in the mind of the legislators to create such a possibility. Since people have relied, and are relying, on this case to draft wills, the court could correct its own error with the least possible harm by the prospective method. As was pointed out above,\textsuperscript{180} Kentucky has a certain liking for the prospective method, and such a ruling should be very possible.

The above are all suggested instances in which the prospective method could be applied in the future. It is interesting to mention some of the famous cases in the past where it could have been used but was not. It could have been used in Doctor v. Hughes\textsuperscript{181} to knock out the ancient doctrine of worthier title. It could have been used for in rem judgments in Pennoyer v. Neff.\textsuperscript{182} It could have been used in the legacy area in Fox v. Snow.\textsuperscript{183} It could have been used to improve the effect of residuary clauses in In re Proestler's Will.\textsuperscript{184} It could have been used to abolish what had become a

\textsuperscript{178} Lecture by Professor W. Barton Leach, Harvard Law School, March 21, 1966. This has been done with Totten trusts. In re Jeruzal, 269 Minn. 185, 130 N.W.2d 473 (1964).

\textsuperscript{179} 302 S.W.2d 594 (Ky. 1957).

\textsuperscript{180} See text accompanying notes 88-111 supra.

\textsuperscript{181} 225 N.Y. 305, 122 N.E. 221 (1919).

\textsuperscript{182} 95 U.S. 714 (1877).

\textsuperscript{183} 6 N.J. 12, 76 A.2d 877 (1950).

\textsuperscript{184} 232 Iowa 640, 5 N.W.2d 922 (1942). "Where the common law is changed by statute, the change operates prospectively ..." Id. at 647, 5 N.W.2d at 926.
senseless rule regarding the use of a legal seal in *Crowley v. Lewis.*

The list of "could haves" is long; however, it does no good to go on with them because they are only "could haves." The courts in these cases could have been innovators in the best common law tradition, but they were not. Instead, they helped to preserve doctrines and rules that should have been extinguished.

Where a court has to change ancient rules to keep up with a changing society, and where a court wants to look at policies without being hampered by justified reliance, these are the cases in which the prospective method should be employed. Most of all, the court must realize that prospective overruling is not only perfectly acceptable as a judicial tool but also is one of the best tools for legal innovation. "We must work with the system; Pasteur could go aside to develop his new truths and demonstrate their usefulness; but we cannot get legal change except by persuading those in authority to make it.""186

---

185 239 N.Y. 264, 146 N.E. 374 (1925).

186 Snyder, *supra* note 170, at 127.