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Samuel Beswick

Allard School of Law at the University of British Columbia, beswick@allard.ubc.ca

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Prospective Overruling Unravelling

SAMUEL BESWICK*

Judges have a dual role: they decide cases and they determine the law. These functions are conventionally understood to be intertwined: adjudication leads to case law, and disputes over judge-made laws lead to adjudication. Because judgments involve the resolution of past disputes, judge-made law is retrospective. The retrospective nature of judicial law-making can seem to work an injustice in hard cases. It appears unfair and inefficient for novel judicial decisions to apply to conduct occurring prior to the date judgment is handed down. A proposed solution is to separate the law-making and adjudicatory functions of courts. This is the technique of “prospective overruling”. Utilising this technique, courts seek to change the law prospectively for future cases, while continuing to decide past disputes under the “old” legal rule that was thought to apply at the time those disputes arose. This article challenges the claims that the exceptional juridical technique of prospective overruling is justified by values of stability, reliance, efficiency, dignity, and equality. These values, when properly understood, actually *support* rather than undermine the retrospectivity of judge-made law. Prospective overruling is an injudicious instrument.

Introduction

The spectre of retrospective law-making arises whenever a judgment overrules previous precedent, declares novel legal rules, or quashes governmental acts.¹ The

* Assistant Professor, Peter A. Allard School of Law, The University of British Columbia. For their generous feedback, I thank Liora Lazarus, Dan Priel, Lewis Sargentich, Robert Sharpe, Lionel Smith, Oren Tamir, Andy Yu, the anonymous reviewers, colleagues at an Allard Law Faculty Colloquium, and attendees of online workshops hosted by the Project on the Foundations of Private Law at Harvard Law School and the Canadian Workshop in Private Law Theory.

¹ J. Harris, “Retrospective Overruling and the Declaratory Theory in the United Kingdom: Three Recent Decisions” (2002) 26 *Revue de droit de l’ULB* 153, 154 (“Three Recent Decisions”). The terms “retrospective” and “retroactive” are interchangeable in the juridical context. This article uses “retrospective” when discussing the juridical context and “retroactive” for the legislative context. See C.J.G. Sampford, *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006), pp.21-23; A. Burrows, “Common Law Retrospectivity” in A. Burrows, D. Johnston and R. Zimmermann (eds), *Judge and Jurist* (Oxford: Oxford University Press, 2013), p.547; cf J. Waldron, “Retroactive Law: How Dodgy was *Duynhoven*?” (2001) 10 *Otago L. Rev.* 631, 632-638 (considering the legislative context).

consequences of applying new judge-made law to pending and past disputes can be stark. Such judicial law-making has been said to destabilise settled transactions, upset parties' ability to rely on prevailing law, treat people unequally, impose unanticipatable costs upon citizens and government, and drag the judicial institution into disrepute. These perceived problems find a solution in the technique of "prospective overruling". This supposedly "well-established US practice" provides that an overruling court "may announce in advance that it will change the relevant rule or interpretation of the rule but only for future cases".² A court can implement beneficial changes in the law for the future without disturbing the past. This technique has accrued both judicial³ as well as governmental support. The Autumn 2021 legislative agenda in England and Wales included enacting an unprecedented *presumption* of non-retrospective effect when a decision or statutory instrument under judicial review is quashed.⁴ It is said to be in the interests of legal certainty and the rule of law that an impugned act is deemed valid for the period prior to the date judgment is handed down.⁵

Given its American origins it is apt to ask how non-retrospective judicial law-making has fared in that country. The answer is: not well. In an article in the *Yale Law Journal*, I identify five distinct doctrinal frameworks that supposedly underpin this adjudicative technique, each of which have been deprecated and abandoned by the United States Supreme Court over the years.⁶ I offer in their place an alternative framework: embracing retrospective adjudication as tempered by orthodox limits on

² E. Steiner, "Judicial Rulings with Prospective Effect: From Comparison to Systematisation" in E. Steiner (ed), *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Cham: Springer, 2015), p.2; see M. Arden, "Prospective Overruling" (2004) 120 L.Q.R. 7.

³ See S. Beswick, "Retroactive Adjudication" (2020) 130 Yale L.J. 276, 304-306 (citing judicial recognition of the technique around the common law world); cf S. Beswick, "The Overpaid Tax Litigation: Roadblocked" (2021) 84 M.L.R. 1105, 1119-1120 ("Roadblocked") (considering how a recent judgment undermines the doctrine).

⁴ Judicial Review and Courts Bill 152-1, 2021-22 (E&W), cl.1(1)(29A)(9) (introduced on 21 July 2021).

⁵ Ministry of Justice, *The Government Response to the Independent Review of Administrative Law* (CP 408, 2021), pp.11, 28-31 (*IRAL Response*); Ministry of Justice, *Judicial Review Reform Consultation: The Government Response* (CP 477, 2021) pp.20-24.

⁶ Beswick, "Retroactive Adjudication" (fn.3 above), pp.293-298.

rights of action such as time-bars and procedural rules.

Commonwealth jurists have tended to ground support for judicial non-retrospectivity not in doctrinal frameworks as such, but rather on policy claims. Prospective-only legal change is said to advance the values of stability, reliance, efficiency, dignity, and equality. This article responds to these policy claims. Part I sets the stage by outlining the conventional conception of adjudication whereby retrospectivity is a characteristic of the dual judicial role of deciding cases and determining the law. This is the conception that proponents of the prospective overruling technique resist. Part II describes prospective overruling and how it purports to disentangle the judges' adjudicatory and law-making roles. Part III critiques the policy claims that supposedly justify the technique. The discussion focuses on judicial *overruling* (since it is here that arguments for non-retrospectivity are thought to be strongest), but the insights should help to shed light on arguments over non-retrospective judicial *developments* of the law as well as the *quashing* of governmental acts.⁷ The analysis concludes that, contrary to proponents' claims, in the adjudication of civil proceedings⁸ prospective overruling exacerbates instability in the law, undermines the reliance and expectation interests of successful parties to litigation, draws arbitrary and unequal distinctions among people subject to the jurisdiction of the courts, is inefficient and unnecessary, and facilitates judicial activism. There are no compelling policy grounds underlying the prospective overruling technique. It should, accordingly, be rejected.

⁷ Proponents of prospective overruling do not draw sharp distinctions between these three (often overlapping) categories of judicial law-making: see e.g. Steiner (fn.2 above), p.6.

⁸ This article addresses only the civil context. In the criminal context there are additional values in the balance: the liberty of imprisoned persons on the one hand, and public safety and the administrability of the criminal justice system on the other. See J. Stone, *Precedent and Law: Dynamics of Common Law Growth* (Sydney: Butterworths, 1985), pp.189-190; K.H. Lau, "On Mandatory Criminal Sentences, Legislative Interpretation, and the Prospective Application of the Law: A View from Singapore" (2020) 41 Statute L.R. 96, 101-103.

I. The Judge's Dual Role

Judges have a dual role: they decide cases and they determine the law.⁹ Deciding cases—reaching the just resolution of disputes according to law—is the first call of the judge. Elucidating the law is the second.¹⁰ This ordering follows from the nature of the judicial method. Unlike legislators (which have discretion to enact laws generally) or even administrators (which may be delegated power to make law within a prescribed remit), courts have no independent law-making power. The law-making power of courts is (predominantly)¹¹ dependent on the adjudication of disputes. Common law courts are not (foremost) advisory bodies. It is through deciding cases that judges develop the law.¹²

The dual role of judicial decision-making is conventionally understood to be intertwined. Judges resolve disputes brought before them by parties. They do so by assessing with hindsight the conditions that prevailed at the time of the parties' dispute. The resolution of disputes gives rise to *rationes decidendi*, which provide precedent for resolving other (materially similar) cases. This precedent is properly called judge-made law. It is a guide for future conduct and decisions. Gidon Gottlieb encapsulates how the judicial method entails both adjudication and law-making:

⁹ P. Weiler, "Legal Values and Judicial Decision-Making" (1970) 48 Can. B. Rev. 1, 30; G. Tedeschi, "Prospective Revision of Precedent" (1973) 8 Isr. L. Rev. 173, 178; A.G.L. Nicol, "Prospective Overruling: A New Device for English Courts?" (1976) 39 M.L.R. 542, 542; R.H.S. Tur, "Varieties of Overruling and Judicial Law-Making: Prospective Overruling in a Comparative Perspective" [1978] Jur. Rev. 33, 38 ("Varieties"); Stone, *Precedent* (fn.8 above), p.188.

¹⁰ H.K. Lücke, "Judicial Impartiality and Judge Made Law" (1982) 98 L.Q.R. 29, 36, 40, 62; R. Cross and J.W. Harris, *Precedent in English Law*, 4th edn (Oxford: Clarendon Press, 1991), p.232; J. Finnis, "Natural Law: The Classical Tradition" in J.L. Coleman, K.E. Himma and S.J. Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2004), pp.34-35; P. Jaffey, "Authority in the Common Law" (2011) 36 Austl. J. Leg. Phil. 1, 7; R. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2019) pp.78-80.

¹¹ Some jurisdictions recognise a procedure by which the executive may send a constitutional reference to be answered by the apex court. See e.g. Supreme Court Act (CA), s.5; Constitution of India Act (IN), art.143; Constitution of South Africa (SA), ss.80 and 84. Although not an adjudicatory process, such judicial pronouncements are still *dependent* upon the instigation of another.

¹² P.J. Fitzgerald (ed), *Salmond on Jurisprudence*, 12th edn (London: Sweet & Maxwell, 1966), p.177; M. McHugh "The Law-making Function of the Judicial Process—Part II" (1988) 62 Aust. L.J. 116, 121; P. Wargan, "Legal Sentience and the Problem of the Instant" (2013) 2 U.C.L. J.L. Juris. 278, 299.

The doctrine of precedent ... transmutes law-applying into law-making. Every inference made and every rule enunciated must be authorized or required by preexisting rules and principles, but precedent transforms that which is authorized or required into that which authorizes and requires. There is, therefore, no contradiction between the two propositions that courts always apply preexisting law and that courts create new law.¹³

The continuity between application and creation in judicial decision-making distinguishes judicial law-making from legislating. With case law there is no clean separation between the “old” and the “new”. Even a novel judgment is never wholly “new” because, in order to resolve a novel dispute, the judge must ground his or her decision in rules, principles, and reasons that can fairly be said to have already had a footing in the law at the time the dispute before the court arose. In this way retrospectivity can be seen as a characteristic of judge-made law.¹⁴

Under this conventional view, the adjudicatory context operates as both a source of and a substantive constraint on judicial law-making.¹⁵ It is constraining because, as the 1966 *Practice Statement* reminds, when judges are presented with an opportunity for law-making they must “bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into”.¹⁶ That danger is mitigated by the juridical practice of connecting judgments to the past. This practice accounts for the characterisation of the common law as developing “incrementally” or “modest[ly]”, even when in instant cases change may simultaneously seem to be “radical”.¹⁷

¹³ G. Gottlieb, *The Logic of Choice: An Investigation of the Concepts of Rule and Rationality* (London: Allen and Unwin, 1968), p.88.

¹⁴ See H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford: Oxford University Press, 1994), pp.274-276. Though Ronald Dworkin famously eschewed describing the judicial role in terms of (substantive) retrospective law-making, Peter Jaffey has compellingly argued that Dworkin’s account of adjudication is reconcilable with the idea of *justified* judicial retrospectivity: P. Jaffey, “Two Ways to Understand the Common Law” (2017) 8 *Juris*. 435, 454-457.

¹⁵ W. Lucy, *Understanding and Explaining Adjudication* (Oxford: Oxford University Press, 1999), pp.2-3, 138; Sharpe (fn.10 above), pp.92-97; P. Hodge, “The Scope of Judicial Law-Making in the Common Law Tradition” (2020) 84 *Rabels Zeitschrift* 211, 222-227.

¹⁶ *Practice Statement on Judicial Precedent* [1966] 1 W.L.R. 1234 (HL).

¹⁷ *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349 (HL) 378 *per* Lord Goff; *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 A.C. 680 [34] *per* Lord Nichols; *Samsoondar v Capital Insurance Company Ltd* [2020] UKPC 33, [13] *per* Lord Burrows.

That the context of retrospective adjudication constrains how judges decide cases can be seen in case law. Consider, for example, the landmark cases of *Spectrum Plus* and *Final Note*.¹⁸ *Spectrum Plus* concerned the correct interpretation of a bank's standard form debenture charge over a company's book debts. A seemingly clear rule was established by the judgment of the High Court of England and Wales in *Siebe Gorman & Co Ltd v Barclays Bank Ltd*,¹⁹ which interpreted such debentures as securing a fixed charge over book debts. Prima facie this precedent determined the status of such debentures in English law. The precedent subsequently came into conflict with a decision of the Privy Council, which interpreted a similar debenture in a case from New Zealand as securing only a floating charge.²⁰ This conflict in precedent cast a shadow over the legal status of debenture charges in English law. It destabilised the fixed/floating charge distinction. As a result, upon the company *Spectrum Plus Ltd* falling into liquidation, conflict arose between the bank and the company's preferential creditors regarding who had priority over the company's book debts. The claimants in *Spectrum Plus* sought to overturn *Siebe Gorman* to bring the rule in England into line with the Privy Council's decision. The House of Lords assessed the conflicting principles and reasoned that the claimants had the better argument. The seemingly clear rule in *Siebe Gorman* could not be justified. The House overruled the prior precedent. Their decision vindicated the understanding of the law held by preferential creditors over the understanding held by banks. How one perceives the House's intervention may turn on one's jurisprudential perspective on adjudication. Some understand the judgment to have changed the law retrospectively in order to settle pre-existing uncertainty regarding the authoritative force of *Siebe Gorman*.²¹ Others understand the judgment to have

¹⁸ *Spectrum Plus* (fn.17 above); *Friedmann Equity Developments Inc v Final Note Ltd* [2000] 1 S.C.R. 842 (SCC) ("*Final Note*").

¹⁹ [1979] 2 Lloyd's Rep. 142 (Ch).

²⁰ *Agnew v Comr of Inland Revenue* [2001] 2 A.C. 710 (PC).

²¹ See J. Lewis, "Retrospective Effect: Is Article 5 any Different?" (2006) 122 L.Q.R. 370, 373-374.

corrected a pre-existing error expressed in *Siebe Gorman*.²² Both perspectives can explain and justify the House's novel judgment applying (retrospectively) to the parties before it.

Contrast *Final Note*, which concerned the continued legitimacy of the sealed contract rule in Canadian common law. Like in *Spectrum Plus*, the Supreme Court of Canada was invited to overturn seemingly settled precedent.²³ The claimants criticised the sealed contract rule as anachronistic and out of step with societal practice. Unlike *Spectrum Plus*, however, there was “no conflicting appellate authority as to the application of the sealed contract rule in Canada”.²⁴ Nor was the rule found to be “out of step with the developments in the common law in other jurisdictions”, or inconsistent with commercial reality.²⁵ Reflecting both on the rule's place in the wider case law and the fabric of society, the Court regarded itself as constrained to uphold the sealed contract rule as valid law.²⁶ In these circumstances, abolishing the rule would have been unjustified retrospective law-making.²⁷

Spectrum Plus illustrates how courts must sometimes make law to resolve disagreement as to what the law actually requires. *Final Note* illustrates how courts do not have a free hand to legislate change. In both cases the scope and manner of law-making was constrained by the adjudicatory context. To the extent the House of Lords in *Spectrum Plus* engaged in retrospective law-making, it was presented in their Lordships' opinions as a justified intervention.

²² See D. Sheehan and T.T. Arvind, “Prospective Overruling and the Fixed-Floating Charge Debate” (2006) 122 L.Q.R. 20, 20-23.

²³ As established in *Porter v Pelton* (1903) 33 S.C.R. 449 (SCC).

²⁴ *Final Note* (fn.18 above), [44].

²⁵ *Final Note* (fn.18 above), [44].

²⁶ *Final Note* (fn.18 above), [51]; cf *Teva Canada Ltd v TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317, [83].

²⁷ cf G.R. Hall, “Preserving the Clavicle in the Cat: Stunted Reform of Common Law Rules in the Supreme Court of Canada” (2002) 36 Can. Bus. L.J. 89, 90-91 (contending that the Court should have abolished the rule with prospective-only effect); but see A.J. Duggan and K. Roach, “A Further Note on *Final Note*: The Scope and Limits of Judicial Law Making” (2002) 36 Can. Bus. L.J. 115, 135-138 (expressing pessimism about Hall's contention).

II. The Dual Role Disentangled

The dual role of judicial decision-making is intertwined on the conventional account: adjudication leads to constrained judicial law-making, and disputes over judge-made laws lead to adjudication. A competing account, which has its roots in American Legal Realism, seeks to disentangle this dual role. It proposes that we can “accept the obvious enough distinction between the judge as policymaker and the judge as adjudicator”.²⁸ Utilising this distinction, some legal realists²⁹ claim that the two functions of law-making and adjudication can be separated by affording them different temporal ambits.³⁰ Not only that, the courts’ functions *should* be separated in some cases. According to this account, some judicial changes in the law should operate for the future but not for the past. Courts have the power to change the law prospectively for future cases, while continuing to decide past disputes under the “old” legal rule that was thought to apply at the time those disputes arose. This is the technique of “prospective overruling”.³¹ This Part describes this technique as well as some of the reasons jurists are divided over its form. Part III critiques it.

A. What is Prospective Overruling?

The term “prospective overruling” is a misnomer.³² First, there is nothing

²⁸ B.H. Levy, “Realist Jurisprudence and Prospective Overruling” (1960) 109 U. Pa. L. Rev. 1, 28.

²⁹ This is not to suggest that anyone who identifies as a legal realist must hold this view. My contention is only that arguments that the dual role can be disentangled, and that courts can overrule with prospective-only effect, are legal realist arguments. See P.J. Mishkin and C. Morris, *On Law in Courts* (Brooklyn: Foundation Press, 1965), pp.302-303 (noting that one of the fathers of American Legal Realism, Karl Llewellyn, did not go so far as to endorse the “polarizing” technique of prospective overruling).

³⁰ A.R. Blackshield, “‘Fundamental Rights’ and the Economic Viability of the Indian Nation: Part Three: Prospective Overruling” (1968) 10 J. Indian L. Inst. 183, 215-228; Tur, “Varieties” (fn.9 above), pp.39-41; Stone, *Precedent* (fn.8 above), p.188; Harris, “Three Recent Decisions” (fn.1 above), pp.177-181; Steiner (fn.2 above), pp.14-16.

³¹ It is sometimes characterised as related to the precarious public law voidability doctrine. Voidable acts are “flawed but valid and effective except to the extent that a competent tribunal annuls them”. D. Feldman, “Error of Law and Flawed Administrative Acts” (2014) 73 C.L.J. 275, 312; cf P.A. Joseph, “False Dichotomies in Administrative Law: From There to Here” (2016) N.Z. L. Rev. 127, 137-140. The prospective overruling doctrine treats impugned acts as void for *some* (otherwise timely) cases and valid for *others*, based simply upon the date judgment is handed down.

³² Blackshield (fn.30 above), p.201; *Department of Corrections v Gardiner* [2017] NZCA 608, [2018] 2

distinctive about the *prospectivity* of overruling: new judgments always presumptively serve as precedent for future cases. What is distinctive about this juridical technique is that it limits the *retrospective* effect of judge-made law. Secondly, the term does not only capture *overruling*: it is employed in relation to cases of “new” judge-made law generally, such as when a court declares a novel legal rule in the absence of prior precedent or quashes a statutory or regulatory provision. A more accurate label is “non-retroactive judicial law-making”.³³ This article nevertheless uses the prevailing nomenclature.

Among scholars and judges who favour prospective overruling as a juridical device, there is division as to what form it should take.

Pure Prospective Overruling

A seemingly simple way to avoid retrospectivity of novel precedent is for a court to announce a new rule that is to be applied only to future events.³⁴ This attempts a clean split between the court’s adjudicatory and law-making functions. Adjudication of the dispute is resolved according to the “old” rule, because the dispute necessarily arose before the court delivered its judgment changing the rule. The novel precedent governs only those disputes arising after the date it is handed down. This is the “critical date” that separates the “old” law from the “new”.³⁵ For example, when the House of Lords abandoned the doctrine of advocates’ immunity in *Arthur JS Hall & Son v Simons*—a doctrine that for centuries had shielded barristers from the law of negligence—Lord Hope opined that the change in the law should affect only future cases.³⁶ In his minority view, it would not have been just to hold the parties in *Simons*

N.Z.L.R. 712, [16] *per* Miller J.

³³ B. Juratowitch, *Retroactivity and the Common Law* (Oxford: Hart Publishing, 2008), p.199 (“*Retroactivity*”); see Steiner (fn.2 above), pp.6-8.

³⁴ This approach is favoured by Nicol (fn.9 above), p.547, and J. Wall, “Prospective Overruling—It’s about Time” (2009) 12 Otago L. Rev. 131, 147, and defended by Blackshield (fn.30 above), pp.196-199.

³⁵ Nicol (fn.9 above), p.543.

³⁶ [2002] 1 A.C. 615, 726 (“*Simons*”).

to the new rule of no-immunity given that the claimants' grievances arose at a time when advocates' immunity was still recognised in English law.³⁷

This "pure" form of prospective overruling can be a double-edged sword for claimants who seek a rule-change but will not benefit from it in their case. Claimants can become saddled with the costs of litigating forward-looking considerations that may be held to have no relevance to their dispute (the new rule essentially being *obiter dicta* from their perspective).³⁸ Prospective overruling also seems to deny successful claimants the fruits of their victory, which raises questions of fairness and incentives. It would seem to be unfair that the successful party does not benefit from the rule-change they have brought about, while the losing party gets the benefit of an old rule that the court has impugned.³⁹ And the technique seems to gut parties' incentives to seek positive changes in the law: why pursue costly litigation when success will not result in reward?⁴⁰ Some answers have been posed. Institutional or repeat players have an incentive to pursue favourable rules for future transactions.⁴¹ If prospective overruling is an exceptional recourse then parties cannot assume *ex ante* that they will be denied the benefit of the rule change, so their incentives to seek change should remain largely intact.⁴² Perhaps a state fund could be set up to reimburse successful claimants' legal costs in lieu of the fruits of litigation.⁴³ These responses only partially, and in the latter instance hypothetically, address the concerns, however.

³⁷ See *Spectrum Plus* (fn.17 above), [73] *per* Lord Hope.

³⁸ Nicol (fn.9 above), pp.543, 550.

³⁹ S. Freedman, "Continuity and Change—A Task of Reconciliation" (1973) 8 U.B.C. L. Rev. 209, 214.

⁴⁰ L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press, rev ed, 1969), p.57; R. Dworkin, *Law's Empire* (Cambridge MA: Harvard University Press, 1986), pp.155-157.

⁴¹ Nicol (fn.9 above), pp.548-550.

⁴² W. Zhuang, "Prospective Judicial Pronouncements and Limits to Judicial Law-Making" (2016) 28 S.Ac.L.J. 611, 618. Although this is not so for parties who perceive their case to be exceptional and anticipate it being treated as such by a court, or where legislation creates a presumption of non-retrospective effect of certain judgments (e.g. Judicial Review and Courts Bill 152-1, 2020-21 (E&W), cl.1(1)(29A)(9)).

⁴³ Nicol (fn.9 above), p.547; see *IRAL Response* (fn.5 above), p.28.

Selective Prospective Overruling

These objections to pure prospective overruling have led some jurists to favour diluting the technique.⁴⁴ In order to avoid the fairness and incentive problems perceived by claimants, a court might selectively apply the “new” rule to the immediate parties’ dispute while holding that other similarly placed parties remain subject to the “old” rule. For example, when the Supreme Court of New Zealand abandoned the doctrine of advocates’ immunity in *Chamberlains v Lai*, Tipping J endorsed “[a]n intermediate position between a fully prospective and a fully retrospective approach”.⁴⁵ Justice Tipping’s minority view favoured exempting the immediate parties to the law-changing case from non-retrospectivity, so that claimants who advance ground-breaking litigation receive the fruits of victory.

This approach implies a problematic concession that the law really ought to have been recognised as the claimants asserted it (hence the carve-out in their favour), and that other similarly placed parties are being prevented from relying on the “correct” legal position for mere administrability reasons. The selective approach also trades the fairness and incentive problems for equality and arbitrariness problems. It applies different rules to similarly placed parties. The successful claimants to the law-changing case are treated more favourably (and the losing respondents less favourably) compared to other parties with equivalent grievances.⁴⁶ This unequal treatment depends solely on whose dispute happens to reach an appellate court first—regardless of whether it is the most deserving case for special treatment.

To mitigate these equality and arbitrariness problems, a court could expand the scope of retrospectivity by applying the new rule to all materially similar claims *pending* before the courts. This was the approach the Supreme Court of Ireland took

⁴⁴ See e.g. A.P. Lester, “English Judges as Law Makers” (1993) Public L. 269, 287; P.A. Joseph, “Constitutional Law: Prospective Overruling” (2006) N.Z. L. Rev. 138, 142.

⁴⁵ [2006] NZSC 70, [2007] 2 N.Z.L.R. 7, [134] (“*Chamberlains*”); see similarly *Re Remuneration of Judges of the Provincial Court (P.E.I.)* [1998] 1 S.C.R. 3 (SCC) [20].

⁴⁶ Nicol (fn.9 above), pp.543, 547; *Spectrum Plus* (fn.17 above), [27] *per* Lord Nicholls.

in *Murphy v Attorney-General*.⁴⁷ The Court held certain taxation provisions unconstitutional, but restricted rights to restitution to those taxpayers who had already filed tax recovery claims at the time of its decision. Under this approach, inequality as between litigants is avoided, but it remains as between litigants and would-be litigants. It incentivises precautionary claims. To the extent that claimants will bring themselves “within the judicial system” as a precautionary measure pending the outcome of a lead case, the efficacy of the entire technique becomes questionable.⁴⁸ The more parties that are exempted from non-retrospectivity, the more the rule begins to resemble conventional retrospectivity.⁴⁹

B. What isn't Prospective Overruling?

Several adjudicative techniques are erroneously painted as “prospective overruling in disguise”.⁵⁰ Distinguishing or not-following a precedent is not equivalent to prospective overruling.⁵¹ The effects may look similar, in that the court’s decision will not impact those cases or circumstances falling under the distinguished or not-followed precedent. But the decision to distinguish or not to follow bears the normal temporal ambit. Its backward-looking effects are not curbed. It is a determination of the law that can apply to accrued disputes. Unlike prospective overruling, distinguishing or not-following a precedent comports with the dual role of judicial decision-making.

Obiter dicta within a judgment that questions the soundness of a rule is not equivalent to prospective law-making, either. It is, though, an important juridical signal. It signals that reliance on the rule may be imprudent and thereby lays the

⁴⁷ [1982] I.R. 241, discussed in Arden (fn.2 above).

⁴⁸ Joseph, “Prospective Overruling” (fn.44 above), p.142.

⁴⁹ B. Juratowitch, “The Temporal Effect of Judgments in the United Kingdom” in P. Popelier and others (eds), *The Effects of Judicial Decisions in Time* (Cambridge: Intersentia, 2014), p.175 (“Temporal Effect”).

⁵⁰ Nicol (fn.9 above), p.551.

⁵¹ R.H.S. Tur, “Time and Law” (2002) 22 O.J.L.S. 463, 477.

ground for incremental change.⁵² The advocates' immunity jurisprudence illustrates this approach well. Though the immunity was longstanding, its rationale was questioned and revised many times over before it was ultimately abandoned. The House of Lords in *Rondel v Worsley* affirmed the immunity on the basis of public policy considerations,⁵³ which were queried in *Saif Ali v Sydney Mitchell & Co*⁵⁴ and narrowed in *Ridehalgh v Horsefield*.⁵⁵ Bolstered by academic critique, when the issue returned to the respective apex courts of the United Kingdom and New Zealand it had become sufficiently dubious such that all of the judges, Lord Hope aside, were content to abolish the immunity with retrospective effect.⁵⁶

Announcing a new rule in a case that does not meet the conditions of the rule is not judicially legislating with prospective-only effect. It would mischaracterise *Hedley Byrne v Heller* to say that the judgment operated in substance as prospective overruling given the novel precedent was not applied on the facts of the case.⁵⁷ *Hedley Byrne* was still dispositive of cases within its scope.⁵⁸

Finally, prospective overruling is distinct from the suspended declaration doctrine. A court does not prospectively overrule when it announces a new rule but suspends its implementation, allowing the legislature time to respond.⁵⁹ In such cases, the judgment states the law as it ought to have been understood at the time of dispute, while suspending the remedial implications for a time. If the legislature takes

⁵² J. Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), pp.198, 214; M. Coper, "Concern about Judicial Method" (2006) 30 *Melb. U.L. Rev.* 554, 567-568 ("Concern").

⁵³ [1969] 1 A.C. 191 ("*Rondel*").

⁵⁴ [1980] A.C. 198 (HL); see Dworkin (fn.40 above), pp.220, 401.

⁵⁵ [1994] Ch. 205 (CA).

⁵⁶ See *Chamberlains* (fn.45 above), [95] *per* Elias CJ, [154] *per* Tipping J, [205] *per* Thomas J; *Awoyomi v Radford* [2007] EWHC 1671, [2008] Q.B. 793, [19] *per* Lloyd Jones J.

⁵⁷ *cf* W. Friedmann, "Limits of Judicial Lawmaking and Prospective Overruling" (1966) 29 *M.L.R.* 593, 605; A. Rodger, "A Time for Everything under the Law: Some Reflections on Retrospectivity" (2005) 121 *L.Q.R.* 57, 78.

⁵⁸ M.D.A. Freeman, "Standards of Adjudication, Judicial Law-Making and Prospective Overruling" [1973] *C.L.P.* 166, 202 ("Standards"); M.L. Friedland, "Prospective and Retrospective Judicial Lawmaking" (1974) 24 *U. Toronto L.J.* 170, 181-182.

⁵⁹ *cf* Hall (fn.27 above), p.109; *Spectrum Plus* (fn.17 above), [11] and [22] *per* Lord Nicholls.

no action before the suspension expires, the judgment will apply to justiciable disputes in the usual way: i.e. retrospectively.⁶⁰ If the legislature acts to reverse or resolve the juridical rule, it will only fully override the court's precedent when the statute itself is enacted with retroactive effect.⁶¹

C. *Is it an Exceptional Doctrine?*

Most jurists characterise prospective overruling as an exceptional doctrine. Philip Joseph, by contrast, suggests that it should be the norm of judicial law-making. Joseph maintains that there is no qualitative difference between legal change brought about by statute and change brought about by adjudication: new law is made either way. He takes the Austinian view that judicial law-making is essentially delegated legislating. Retroactive legislation presumptively violates the rule of law. For judges as much as parliamentarians, then, “[a]s a general prescription, legal change should be prospective”.⁶² The weight of judicial⁶³ and scholarly⁶⁴ opinion, however, is that prospective overruling—if it applies at all—is, and should be, an exception to the normal course of retrospective adjudication. The rationale is grounded in *stare decisis*. It is a basic presumption of the common law method that judgments of higher

⁶⁰ Duggan and Roach (fn.27 above), p.130; Juratowitch, “Temporal Effect” (fn.49 above), pp.170, 177; L. Smith, “Canada: The Rise of Judgments with Suspended Effect” in E. Steiner (ed), *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Cham: Springer, 2015), p.254; see Judicial Review and Courts Bill 152-1, 2020-21 (E&W), cl.1(1)(29A)(6).

⁶¹ S. Choudhry and K.W. Roach, “Putting the Past behind Us? Prospective Judicial and Legislative Constitutional Remedies” (2003) 21 S.C.L.R. (2d) 205, 233; A. Mason, “The Common Law” in S.N.M. Young and Y. Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge: Cambridge University Press, 2013), p.343.

⁶² Joseph, “Prospective Overruling” (fn.44 above), p.148; see similarly *IRAL Response* (fn.5 above), p.31. This idea has roots in Jeremy Bentham's furious critique of judicial law-making: Lücke (fn.10 above), p.44; cf Weiler (fn.9 above), p.30.

⁶³ See *Spectrum Plus* (fn.17 above), [41] per Lord Nicholls, [74] per Lord Hope; *Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, [99] per LeBel and Rothstein JJ, [140] per Bastarache J (“*Hislop*”); *Ramdeen v The State (Trinidad and Tobago)* [2014] UKPC 7, [2014] 3 W.L.R. 1523, [90] per Lord Mance; *B.A. Linga Reddy v Karnataka State Transport Authority* [2014] INSC 920, [37] per Arun Mishra J; *FII Test Claimants v HMRC (No.2)* [2020] UKSC 47, [2020] S.T.C. 2387 [99] per Lord Reed and Lord Hodge, [293] per Lord Briggs and Lord Sales (“*FII Test Claimants No.2*”).

⁶⁴ See Blackshield (fn.30 above), pp.190-191; Friedland (fn.58 above), p.171; Friedmann (fn.57 above), p.605; Stone, *Precedent* (fn.8 above), pp.191-192; Choudhry and Roach (fn.61 above), p.214.

courts operate as precedent for all other cases unless and until they are overruled. A general rule of prospectivity of judge-made law would be infeasible. Parties would forever disagree about the novelty and temporal ambit of competing precedents. Instead of bringing clarity to the law, each new appellate judgment would compound uncertainty as to which precedent governs comparable cases. Scholars who favour prospective overruling therefore typically reserve the technique for those cases where the change in law is surprising or unexpected, where compelling reliance interests are at stake, and where the balance of justice favours non-retrospectivity.⁶⁵ These values warrant robust consideration.

III. Temporal Justice

Six primary instrumental justifications have been advanced in favour of the technique of prospective overruling. They are the social interest in (a) a stable legal order; (b) protection of reliance and expectation interests; (c) the efficiency of judicial institutions; (d) the dignity and good repute of judicial institutions; (e) the efficiency of administrative or legislative action; and (f) the equality of treatment for like cases.⁶⁶ This Part argues that these six values, when properly understood, actually support (rather than undermine) the retrospectivity of judge-made law. Prospective overruling does not achieve its intended aims.

A. *Stable Legal Order*

The rule of law requires that laws should generally be stable. They should not be changed frequently. A stable legal order enables people to identify their rights and

⁶⁵ Nicol (fn.9 above), p.552.

⁶⁶ These values are summarised in J. Stone, *Social Dimensions of Law and Justice* (Stanford: Stanford University Press, 1966), p.661 and Stone, *Precedent* (fn.8 above), p.189. Stone's list builds upon T.S. Currier, "Time and Change: Prospective Overruling in Judge-Made Law" (1965) 51 Va. L. Rev. 201, 234; see Friedmann (fn.57 above), p.604. Stone did not think that all six values would necessarily weigh *in favour* of prospective overruling. He thought they would have to be balanced against each other. Nevertheless, scholarly arguments have been made for each value in support of prospective overruling. See also Judicial Review and Courts Bill 152-1, 2020-21 (E&W), cl.1(1)(29A)(8).

duties under law, to act in compliance with the law, and to plan and interact with certainty.⁶⁷ Stability is the premise of *stare decisis*. At its height the doctrine of precedent implies that the law being settled is more important than that it being settled right.⁶⁸ Following precedent ensures consistency and predictability of adjudication. Disputes can be avoided when their judicial resolution is readily anticipatable. But *stare decisis* cannot alone deliver a stable legal order. There must also be mechanisms for juridical innovation. For doctrine to serve society it must keep pace with societal developments. This will sometimes require judges to depart from old rules. As Michael Freeman notes:

Whilst restraint in exercising the judicial power to overrule precedents makes for stability, abstention can defeat this very stability, for a practice of rigid adherence to precedent will eventually produce an accumulation of outmoded rules which are likely to be blurred by artificial distinctions.⁶⁹

The orthodox way in which the anchor of *stare decisis* yields to the winds of innovation is incremental development of the law by judges.⁷⁰ The common law is revised and refined like the planks of the Ship of Theseus. Gradual development of the law maintains the substance of established rights while signalling changes to which people should adjust their expectations. Conservative change preserves stability.

Radical legal change, by contrast, is destabilising. When courts overrule settled precedent or determine rules of law that controvert established social practice they expose disjunction between the law *then* and *now*. Particularly stark illustrations arise when a court announces a binary change in a rule. For example, revising the

⁶⁷ Fuller (fn.40 above), p.39; Raz (fn.52 above), pp.214-215; S. Lewis, "Precedent and the Rule of Law" (2021) 41 O.J.L.S. __, *9.*12.

⁶⁸ *London Street Tramways Co Ltd v London County Council* [1898] A.C. 375 (HL) 380 *per* Lord Halsbury; *Burnet v Coronado Oil & Gas Co*, 285 U.S. 393 (1932) 406 *per* Brandeis J.

⁶⁹ M.D.A. Freeman (ed), *Lloyd's Introduction to Jurisprudence*, 8th edn (London: Sweet & Maxwell, 2008), pp.1536-1537 ("*Jurisprudence*").

⁷⁰ Freeman, "Standards" (fn.58 above), p.179; Coper (fn.52 above), pp.560-564.

interpretation of a debenture from a fixed charge over debts to a floating charge,⁷¹ interpreting completed government contracts to be *ultra vires*,⁷² or abolishing the common law bar on recovery for mistakes of law,⁷³ the immunity of advocates,⁷⁴ or the sealed contract rule.⁷⁵ Retrospective application of a binary rule-change can be destabilising when it undermines the basis on which people planned, acted, and interacted. Such changes seem to contravene the rationale underpinning *stare decisis*. It is said that this dilemma can be mitigated by non-retrospectivity. In instances of radical legal change, prospective overruling actually “defers to the *stare decisis* principle by insisting that the old decision now overruled should continue to stand up to the time at which it was overruled”.⁷⁶ The new rule then takes over from that point. Non-retrospectivity thus eases the transition to the new rule.

Proponents of the prospective overruling technique tout transitional stability as a key virtue.⁷⁷ “So far from endangering legal certainty”, Anthony Lester contends, “prospective overruling respects legal certainty”.⁷⁸ The Supreme Court of India embraced this rationale when it became the first apex court in the Commonwealth to endorse the technique. Chief Justice Subba Rao considered that prospective-only judicial law-making “enables the court to bring about a smooth transition by *correcting its errors* without disturbing the impact of those errors on the past transactions”.⁷⁹ It avoids the injustice of interfering with arrangements *ex post facto* and facilitates “a less traumatic change”.⁸⁰ Some go further and suggest that non-

⁷¹ *Spectrum Plus* (fn.17 above).

⁷² *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1 (HL).

⁷³ *Kleinwort Benson* (fn.17 above); see Harris, “Three Recent Decisions” (fn.1 above), pp.157-166.

⁷⁴ *Simons* (fn.36 above); *Chamberlains* (fn.45 above); see Harris, “Three Recent Decisions” (fn.1 above), pp.171-177.

⁷⁵ As advocated (unsuccessfully) by the claimants in *Final Note* (fn.18 above).

⁷⁶ Stone, *Precedent* (fn.8 above), p.188.

⁷⁷ Nicol (fn.9 above), p.553; K. Mason, “Prospective Overruling” (1989) 63 Aust. L.J. 526, 530; Choudhry and Roach (fn.61 above), p.218; see *IRAL Response* (fn.5 above), p.28.

⁷⁸ Lester (fn.44 above), p.286.

⁷⁹ *Golak Nath v State of Punjab* [1967] 2 S.C.R. (India) 762, A.I.R. 1967 S.C. 1643, 1668 (emphasis added); see Blackshield (fn.30 above), pp.229-230, 238.

⁸⁰ Freeman, “Standards” (fn.58 above), p.201; see Lord Mackay, “Can Judges Change the Law?” (1988) 73

retrospectivity of judge-made law is essential to the maintenance of the rule of law. Philip Joseph and Jesse Wall both claim that retrospective overruling offends the first principle of the rule of law identified by Joseph Raz.⁸¹ Namely, that: “All laws should be prospective, open, and clear.”⁸² No one can be guided today by what judges might say in the future. So, Joseph and Wall contend, when judges say something new they should not impose their novel rulings on past events. Judicial law-making is, on their account, essentially a legislative endeavour.⁸³ Accordingly, when judges make law they should be bound by the same constraints as legislatures: their changes in the law should apply only to the future.

This reasoning employs a simplistic view of legal stability and the judge’s role. Non-retrospectivity proponents paint a binary picture: that a legal rule was X until a judgment changes the rule to \neg X. Prospective overruling operates simply to transition the rule from one stable equilibrium to another. This picture understates the conditions of instability that invariably precipitate any law-change. Parties litigate disputes because they cannot agree on what law applies to their case. A seemingly clear rule may be shown to conflict with some other relevant rule or standard, or to have been impugned in prior case law or scholarship. Even before it reaches the courtroom such a rule may come to be considered of questionable authority. Overruling may be justified when a rule can no longer be counted on as providing an answer, but has instead itself become a question. It is for this reason that Lord Devlin thought that concerns over the retrospectivity of judicial overruling were exaggerated:

A judge-made change in the law rarely comes out of a blue sky. Rumbblings from Olympus in the form of *obiter dicta* will give warning of unsettled

Proc. Brit. Acad. 285, 305.

⁸¹ Joseph, “Prospective Overruling” (fn.44 above), p.138; Wall (fn.34 above), pp.131-132, 140; see *IRAL Response* (fn.5 above), p.31; cf Sampford (fn.1 above), p.225; S. Beswick, “Prospective Overruling Offends the Rule of Law” [2021] N.Z.L.J. 274, 274-276.

⁸² Raz (fn.52 above), p.214.

⁸³ Joseph, “Prospective Overruling” (fn.44 above), pp.140, 148; Wall (fn.34 above), p.143; cf Weiler (fn.9 above), p.30.

weather. Unsettled weather is itself of course bound to cause uncertainty, but inevitably it precedes the solution of every difficult question of law.⁸⁴

Judicial change in the law occurs *because* a rule of law has become incapable of clearly guiding conduct.⁸⁵ A novel precedent is both a *response* to legal instability, *as well as* a vehicle of legal change.

As an illustration, consider a prominent series of cases awarding against government restitution of monies “mistakenly” paid under void contracts or taxation provisions. In 1998 in *Kleinwort Benson Ltd v Lincoln CC*,⁸⁶ the House of Lords reversed longstanding common law precedent that had barred restitutionary claims brought on the ground of mistake of law. A majority further held that such claims were subject to an extended limitation period that commenced once the mistake was discoverable. In 2006 in *Deutsche Morgan Grenfell Group Plc v IRC*,⁸⁷ the House of Lords ruled for the first time that taxes could be recovered as restitution for mistake of law. A majority further held that for limitation purposes such claims were not “discoverable” until an appellate court authoritatively settled the point of law in dispute. In 2007 in *Sempra Metals Ltd v IRC*,⁸⁸ the House of Lords departed from centuries of authority and ruled for the first time that interest at a compounding rate was recoverable as unjust enrichment in cases such as these. In 2018 in *Prudential Assurance Co Ltd v HMRC*,⁸⁹ the Supreme Court unanimously overturned *Sempra Metals* and ruled that unjust enrichment claimants were limited to statutory simple interest. And in 2020 in *FII Test Claimants v HMRC (No.2)*,⁹⁰ the Supreme Court unanimously overturned the limitation rule foreshadowed in *Kleinwort Benson* and announced in *Deutsche Morgan*. In each of these cases the parties advanced

⁸⁴ Lord Devlin, “Judges and Lawmakers” (1976) 39 M.L.R. 1, 10.

⁸⁵ Raz (fn.52 above), pp.198, 214; S. Lewis (fn.67 above), pp.*13-14.

⁸⁶ *Kleinwort Benson* (fn.17 above).

⁸⁷ [2006] UKHL 49, [2007] 1 A.C. 558 (“*Deutsche Morgan*”).

⁸⁸ [2007] UKHL 34, [2008] 1 A.C. 561.

⁸⁹ [2018] UKSC 39, [2018] S.T.C. 1657; see also *FII Test Claimants v HMRC (No.3)* [2021] UKSC 31, [8], [85]-[118].

⁹⁰ *FII Test Claimants No.2* (fn.63 above).

competing theories of how the law governed their (novel) disputes. The judgments resolving their disputes were novel. They “changed” the law in response to the disputed (and unstable) legal doctrines being litigated. Yet, if each judgment had been applied only prospectively,⁹¹ the claimants to these cases would have been denied the relief they sought every time they succeeded on the merits. Or, if prospectivity were applied only to explicit instances of overruling (such as the judgments of *FII Test Claimants No.2* and *Prudential Assurance*), the claimants would have been entitled to vast restitutionary sums relying on interpretations of law that the Supreme Court has explicitly overturned for being erroneous. These judgments reveal how judge-made law (here, the common law of restitution of overpaid tax) can be unstable and in development *even when* there is recent high-level precedent on point. Such precedent is not in itself sufficient to make for a stable legal order.

The claim that prospective overruling preserves stability is not only too simplistic; it flouts a key premise of its own underpinning legal theory. Prospective overruling is an unorthodox juridical technique—an exception to the norm of retrospective adjudication—which emerged from American legal realist jurisprudence. Rule scepticism is a hallmark of legal realism. Realism does not see law as inherently stable. Law is “in flux”.⁹² The sources of law (case law and statute) are not determinative of disputes between people. Doctrine can always be corralled to support either side in litigation. Accordingly, the realist view is that in every dispute judges have choice to say what the law is. This is not to say that judges act as unconstrained legislators. The social practice of law and the expectations of acceptable judicial decision-making give law “a significant measure of stability”.⁹³

⁹¹ Say, on the basis that “[t]ax had been collected and spent without challenge ... and it would be inequitable if those taxes had to be repaid”: Arden (fn.2 above), p.7.

⁹² K.N. Llewellyn, “Some Realism about Realism—Responding to Dean Pound” (1931) 44 Harv. L. Rev. 1222, 1236; see Levy (fn.28 above), p.25.

⁹³ H. Dagan, “The Real Legacy of American Legal Realism” (2018) 38 O.J.L.S. 123, 134.

But it is a contingent stability. Law's dynamism means "it can change even when the pedigreed sources themselves remain intact".⁹⁴ From this perspective, the realists who tout prospective overruling err in assuming that a statement of doctrine remains good law up until the point it is overruled. Realism tells us that all doctrine is to some degree unstable.

In this light, Joseph and Wall's reliance on Raz is curious. Raz does say that retroactive statutes prima facie contravene the rule of law. But he does not conflate retrospective overruling with retroactive legislating. Like Lord Devlin, Raz notes that courts invariably only entertain overruling when the stability of a legal rule has already been put in question by *obiter dicta* or off-the-Bench pronouncements. In such circumstances, Raz states, "[t]he law is still formally settled but people are put on notice not to rely on it. The "vice" of retroactivity is here avoided. Instead we have the disadvantages of uncertainty which apply to all unregulated disputes".⁹⁵ The "vice" of retroactivity is avoided because by the time it comes to be abandoned an impugned rule can already be seen to be unstable. In hard cases the law is unstable: there is a genuine question as to how parties' disputes are to be resolved. Retrospectivity serves to stabilise the law by answering that question. In this way judicial retrospectivity can be seen (counterintuitively to some) *to vindicate* the rule of law.⁹⁶

Returning to Lord Devlin's meteorological metaphor, "unsettled weather" precipitated the landmark cases in which the retrospectivity of overruling has been critiqued. The debenture interpretation in *Spectrum Plus*;⁹⁷ the *vires* of local council

⁹⁴ Dagan (fn.93 above), p.128.

⁹⁵ Raz (fn.52 above), p.198 fn.18; see J. Raz, "Facing Up: A Reply" (1989) 62 S. Cal. L. Rev. 1153, 1209-1212; see also Hart (fn.14 above), p.276.

⁹⁶ T.A.O. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000), pp.192-193; T. Endicott, "Adjudication and the Law" (2007) 27 O.J.L.S. 311, 317-320, 326; M. Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007), pp.119-122; Beswick, "Rule of Law" (fn.81 above) pp.274-275.

⁹⁷ *Spectrum Plus* (fn.17 above).

swaps contracts;⁹⁸ the mistake-of-law bar;⁹⁹ the immunity of advocates;¹⁰⁰ the sealed contract rule¹⁰¹—each were decried in the law reports, the law reviews, and at the bar prior to the courts’ formal intervention. The judgments in these cases were responding to already-existing disagreements as to the applicable law—not simply to disagreements as to what the law *should be* for future cases. These landmark judgments were a response to legal instability and uncertainty. Prospective overruling could not, therefore, facilitate transitional stability. It is an illusion that the technique promotes stability by preserving existing rights and avoiding “sudden discontinuities from previously established rules and practices”.¹⁰² To the contrary, the technique amplifies discontinuity by preserving an impugned rule up until the date when a judgment brings clarity to the law. Prospective overruling offers stability for the future by obfuscating the instability of the past.

B. Reliance and Expectation

The “core argument” for curbing judicial law-making is the protection of reliance and expectation interests.¹⁰³ People must act and interact in reliance on the law of the day. They tend to expect “that the laws that will be applied to their actions (and transactions) by courts will be the same as the laws that applied at the time they acted or transacted”.¹⁰⁴ These values are particularly salient in the realm of commerce. Legal certainty is crucial to the smooth performance of contracts, property settlement, taxation, and payments.¹⁰⁵

⁹⁸ *Hazell* (fn.72 above).

⁹⁹ *Kleinwort Benson* (fn.17 above).

¹⁰⁰ *Simons* (fn.36 above); *Chamberlains* (fn.45 above).

¹⁰¹ *Final Note* (fn.18 above).

¹⁰² *cf* *Mackay* (fn.80 above), p.305.

¹⁰³ A. Palmer and C. Sampford, “Judicial Retrospectivity in Australia” (1995) 4 Griffith L. Rev. 170, 171.

¹⁰⁴ Palmer and Sampford (fn.103 above), p.171; *cf* *Lymington Marina Ltd v MacNamara* [2007] EWCA Civ 151, [2007] 2 All ER (Comm) 825, [33] *per* Arden LJ.

¹⁰⁵ Lord Lloyd, *Introduction to Jurisprudence*, 4th edn (London: Stevens & Sons, 1979), p.857; Stone, *Precedent* (fn.8 above), p.190; Tur, “Varieties” (fn.9 above), p.44.

It is because people rely on rules and precedent that courts hesitate to change the law at all. Judicial law-making creates “the danger of disturbing retrospectively the basis” of past transactions.¹⁰⁶ It is thought that courts require “special justification” before “upsetting legitimate expectations” through retrospective changes.¹⁰⁷ If only they could effect beneficial changes in the law *without* disturbing reliance and expectation interests. That is the promise of prospective overruling. The purpose of curbing the retrospective effects of novel precedent is to ensure that actions taken on the basis of an “old” law stay governed by that old law, while future actions are governed by the “new” law. Reliance is a necessary condition for invoking the technique. For, as Julius Stone opines, “[u]nless there was reliance, how could there be injustice arising therefrom?”¹⁰⁸

The protection of reliance and expectation interests is a facially persuasive justification for limiting retrospectivity, which unravels under scrutiny.¹⁰⁹ Tensions within these concepts are too readily overlooked. First, proponents of prospective overruling are at odds as to whether actual reliance or constructive reliance is needed. On the one hand, if the purpose is to protect parties’ reliance and expectation interests, then the parties ought to show they actually had such interests. An impugned rule should not linger for the benefit of parties who never placed any stock in it. Prospective overruling is necessary only to protect parties who had “actual justified reliance”.¹¹⁰ Such claims should be supported by evidence.¹¹¹ This may well be possible in leading cases, such as *Spectrum Plus* or *Final Note*, where respondents oppose a binary rule-change because of their reliance on the old rule. But not everyone who stands to be affected by a rule-change will necessarily have *relied* on

¹⁰⁶ *Practice Statement* (fn.16 above).

¹⁰⁷ *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] 1 A.C. 1016, [61] *per* Lord Mance; see *Final Note* (fn.18 above), [46].

¹⁰⁸ Stone, *Precedent* (fn.8 above), p.192.

¹⁰⁹ See further Beswick, “Retroactive Adjudication” (fn.3 above), pp.312-324.

¹¹⁰ Stone, *Precedent* (fn.8 above), p.192; see Tur, “Varieties” (fn.9 above), p.44; Juratowitch, *Retroactivity* (fn.33 above), pp.44-47.

¹¹¹ Duggan and Roach (fn.27 above), pp.135, 138, citing Friedland (fn.58 above).

the old rule. To the contrary, it may be “pure romanticism to pretend” that the content of the law carries weight in most parties’ deliberations.¹¹² Nor can proof be required of all affected parties. Courts cannot feasibly delineate the temporal boundaries of laws according to who placed reliance upon them. There is no certainty if law is one thing for some people at one point in time, and the opposite for others at the very same point in time. It would be contrary to the principles of generality and equal justice to hold that non-retrospectivity “protects those who know and rely on the law but is inapplicable to those who do not”.¹¹³

So perhaps the better approach is, on the other hand, a constructive standard of reliance. That is, that the presumption against retrospectivity protects peoples’ *reasonable ability* to rely on the old rule. Andrew Nicol seems to endorse this approach: that a case precedent should be overruled with only prospective effect “if a reasonable man would have relied on the case in question”.¹¹⁴ This leaves it to judges to infer reliance and expectation interests generally. That is no small task. Epistemically, we cannot know the extent to which everyone’s expectations are frustrated by judicial decisions. Generalisations can be perilous.¹¹⁵ Moreover, the premise that people expect laws upon which they act to remain static is itself dubious. People may well expect the contrary. As Lady Justice Arden observed in *Lymington Marina Ltd v MacNamara*, informed parties understand “that both statute law and the common law develop over time”.¹¹⁶ Since the law is always in “a process of structured development”, no precedent is ultimately immutable.¹¹⁷ People who are properly advised can be expected to account in their dealings for the risk of

¹¹² Tur, “Varieties” (fn.9 above), p.44; see L. Smith, “The Rationality of Tradition” in T. Endicott, J. Getzler and E. Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford: Oxford University Press, 2006), p.311.

¹¹³ Juratowitch (fn.33 above), p.47.

¹¹⁴ Nicol (fn.9 above), p.544; see Juratowitch (fn.33 above), pp.47-49; *IRAL Response* (fn.5 above), pp.29-30.

¹¹⁵ Freeman, “Standards” (fn.58 above), p.186.

¹¹⁶ *MacNamara* (fn.104 above), [33].

¹¹⁷ Weiler (fn.9 above), p.32.

developments or departures in precedent. Reliance and expectation interests may not, ultimately, be sufficiently generalisable to warrant non-retrospectivity.

A second problem concerns whether non-retrospectivity is reserved to protect the reliance interests of *parties*, or only of affected *defendants*, or of society or societal institutions generally. The argument for prospective overruling seems most compelling when all of the parties to the dispute had relied on a rule. Non-retrospectivity of an overruling would seem to respect their autonomy. That was the position in *Spectrum Plus*: the parties to the debenture agreement thought that it had secured a fixed charge over book debts.¹¹⁸ It was third party preferential creditors who contested this view. Those creditors' ultimate success suggests that the interests of third parties can outweigh contracting parties' own mutual reliance interests. In the advocates' immunity litigation, on the other hand, the reliance interests of the parties were at odds:¹¹⁹ the defendant lawyers relied on the advocates' immunity rule,¹²⁰ while the claimant clients relied on the common law principle that those engaged for their professional skill owe a duty of care.¹²¹ Reliance interests were said to weigh in favour of the defendants, though the claimants were held to have the better argument. Yet, when the parties' reliance interests are at odds, why should the reliance interests of the losing party prevail over the "better rule" relied upon by the other party?¹²² Where a (losing) side's reliance interests were not sufficiently compelling to keep a court from "changing the law" in the first place, the other (winning) side's reliance interests will tend to provide the court a compelling reason to apply the judgment in the ordinary retrospective way. Further complicating the question of whose reliance is relevant, it has been suggested that institutional reliance carries weight: that prospective overruling may be necessary to help judicial,

¹¹⁸ *Spectrum Plus* (fn.17 above).

¹¹⁹ *Simons* (fn.36 above); *Chamberlains* (fn.45 above).

¹²⁰ As established in *Rondel* (fn.53 above).

¹²¹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465 (HL) 502-503.

¹²² See Palmer and Sampford (fn.103 above), pp.175-183.

administrative, or governmental institutions to transition from the old to the new rule.¹²³ This argument, though, opens the door to non-retrospectivity being employed in spite of, rather than because of, the parties' own reliance and expectation interests.

Finally, at what point in time is reliance to be assessed? Are we concerned with reliance at the time of the parties' transaction, at the time of dispute and litigation, or at the time of judicial decision? The natural inclination is to assess reliance at the transaction-time. The law that the parties reasonably expected to apply at the time they transacted should prevail. This means that when it can be anticipated at the time from the weight of *obiter dicta* or commentary that some rule, such as the mistake-of-law bar,¹²⁴ is likely to be overruled, the parties should not benefit from reliance on it. For "a party could hardly make a plausible case for reliance on the basis of an already dubious precedent".¹²⁵ Similarly, in cases where a rule was challenged by one party from the outset, prospective overruling would seem unsuitable. Where, for instance, a taxpayer paid the Revenue pursuant to a taxing provision while simultaneously challenging the *vires* of that provision in court, we would probably not infer mutual reliance on that law so as to warrant non-retrospectivity of any ultimate finding that the provision was, indeed, *ultra vires*.¹²⁶ But then, should it make a difference if the taxpayer only decided to challenge the tax provision at some future point in time still within the limitation period? Surely not.¹²⁷ Assent to payment at the time of a transaction does not normally undermine one's right to bring a timely challenge or claim over it in the future. Peoples' reliance and expectation interests can evolve over time, often for varied and complex reasons. One of the advantages of adversarial litigation is its tendency to hone the issues and competing

¹²³ See sections C and E below.

¹²⁴ See *Kleinwort Benson* (fn.17 above).

¹²⁵ R.J. Traynor, "Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility" (1976) 28 *Hastings L.J.* 533, 565.

¹²⁶ See *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] A.C. 70 (HL); *Kingstreet Investments Ltd v New Brunswick* 2007 SCC 1, [2007] 1 S.C.R. 3.

¹²⁷ See *FII Test Claimants No.2* (fn.63 above), overruling *Deutsche Morgan* (fn.87 above).

arguments before the court. It does not serve the adjudicative process to ignore subsequent developments and legal arguments merely because they were not envisaged or raised by the parties at the time of the transaction in dispute.

These three tensions—between actual versus constructive reliance, the contestable nature of claims to reliance, and the tendency of reliance interests to shift over time—reveal the malleability of the reliance value. While reliance may be a “core” reason for courts to refrain from overruling, it offers no firm foundation on which to construct novel temporal limits on the effects of such overruling.

C. Efficiency of Judicial Institutions

Prospective overruling can expand flexibility in the judicial role. It seemingly avoids several costs of judicial law-making. By protecting entitlements in the past from change, law-changing courts shield parties from retrospective windfalls and wipeouts in regard to their past conduct.¹²⁸ Courts can focus on setting rules that optimally deter undesirable conduct without repercussions for those past actions over which it is too late to intervene.¹²⁹ They can set aside the cost of retrospectivity when assessing the value of innovation for the future.¹³⁰ By unshackling the retrospective consequences, prospective overruling frees judges to engage in more ambitious and creative decision-making. In sum, “the major benefit or detriment of the doctrine (depending on one’s point of view) is its capacity to encourage judicial activism”.¹³¹

This description alone may cause many to recoil from the technique.¹³² But even if we embrace judicial activism there are reasons to be sceptical of non-retrospective judicial law-making. Freeman identifies problems of representation in the use of the

¹²⁸ Blackshield (fn.30 above), pp.204, 227; Joseph, “Prospective Overruling” (fn.44 above), pp.144-145.

¹²⁹ K. Mason (fn.77 above), p.530.

¹³⁰ L.L. Jaffe, *English and American Judges as Lawmakers* (Oxford: Clarendon Press, 1969), p.56.

¹³¹ K. Mason (fn.77 above), p.531; see Friedland (fn.58 above), p.171; Tur, “Varieties” (fn.9 above), pp.37, 47; Zhuang (fn.42 above), p.621.

¹³² But see *IRAL Response* (fn.5 above), pp.11, 28-30 (embracing the technique).

technique arising from the separation of the courts' adjudicatory and law-making roles.¹³³ If counsel orient their arguments and evidence toward the resolution of their clients' dispute, the judge may be under-informed as to the implications of changing the law only for the future. Alternatively, if prospective law-making becomes the focus, counsel will have to give submissions on matters that may have nothing to do with their clients' circumstances. Further, those whose rights and duties are actually impacted by the law-change will typically not be represented in the litigation. Under such conditions a court may overlook important considerations in forming its decision. Nicol concedes that that this "danger does exist", but not in all cases.¹³⁴ It will usually be in defendants' interests to argue both against a rule-change and against any change applying retrospectively. Institutional or representative litigants will also typically argue cases with an eye to the future. Further, third party interveners can weigh in on polycentric cases—although group litigation is itself a fraught and controversial practice.¹³⁵ What is clear is that use of the technique will tend to exacerbate divisions between the interests of plaintiff and defendant, third parties, and non-parties. Courts inclined toward non-retrospectivity should bear in mind the invariably complex and expansive implications of their prospective law-making.

A second worry is that courts may more readily overrule if unshackled from retrospective repercussions. More overruling would, in turn, fuel more petitions for judicial law-making. The volume of litigation would go up. A cycle of judicial activism would lead to more uncertainty and inefficiency, not less.¹³⁶ Nicol dismisses this concern: recognition of prospective overruling would not cause judges to

¹³³ Freeman, "Standards" (fn.58 above), pp.186, 206; Freeman, *Jurisprudence* (fn.69 above), p.1536; see Mackay (fn.80 above), pp.306-307.

¹³⁴ Nicol (fn.9 above), p.548.

¹³⁵ C. Harlow, "Public Law and Popular Justice" (2002) 65 M.L.R. 1, 8-18.

¹³⁶ cf R.A. Posner, *The Problems of Jurisprudence* (Cambridge MA: Harvard University Press, 1990), pp.358-362.

“indulge in a legislative field day”.¹³⁷ The evidence so far seems to agree. Since Lord Simon first expressed curiosity of the technique in 1972,¹³⁸ the senior judges of the UK have not found any occasion to utilise prospective overruling outright.¹³⁹ This is despite the House of Lords in *Spectrum Plus* preserving the possibility of doing so and despite express statutory provision of a judicial discretion to remove or limit the retrospective effects of judgments concerning devolved powers.¹⁴⁰

This jurisprudential prudence raises the question of what the technique is being reserved for. Lord Scott in *Spectrum Plus* conjectured that it would never be proper to apply the technique to the interpretation of statutes.¹⁴¹ A court that has ascertained the correct construction of a statute should apply that interpretation to all cases that come before it. It takes only a small step to conclude that courts should act similarly in construing and applying common law rules.¹⁴² Yet, it is said to be a wise judicial precept to “never say never”, and so prospective overruling remains reserved for exceptional future cases.¹⁴³ This reservation is not as prudent as it appears.¹⁴⁴ Never-say-never can create false hope and uncertainty. False hope may foster petitions for exceptional relief that are doomed to fail. Uncertainty may cause needless litigation and excessive argumentation over the temporality of rules and remedies that could otherwise be settled. Uncertainty is especially troublesome given the context of non-retrospectivity: it generates uncertainty about the very nature of the judicial method. The efficiency of judicial institutions generally is sacrificed by preserving a

¹³⁷ Nicol (fn.9 above), p.555.

¹³⁸ *Jones v Secretary of State for Social Services* [1972] A.C. 944 (HL) 1026.

¹³⁹ See *Germany v Hughes* [2009] EWHC 279 (Admin) [10]. It is a misconception that Green J applied the doctrine in *R (British Academy of Songwriters, Composers and Authors Musicians' Union) v Secretary of State* [2015] EWHC 2041 (Admin). He did not: *ibid* at [19]-[21].

¹⁴⁰ See Rodger (fn.57 above), pp.77-78; *Spectrum Plus* (fn.17 above), [17] *per* Lord Nicholls.

¹⁴¹ *Spectrum Plus* (fn.17 above), [127]; see *Samsoondar* (fn.17 above), [13]; *cf IRAL Response* (fn.5 above), pp.11, 28-30.

¹⁴² P.S. Atiyah, “Judges and Policy” (1980) 15 *Isr. L. Rev.* 346, 356; *cf* J. Grant, “Unconstitutional Interpretation” (2018) 134 *L.Q.R.* 627, 646-649.

¹⁴³ *Spectrum Plus* (fn.17 above), [41] *per* Lord Nicholls.

¹⁴⁴ *cf* Burrows (fn.1 above), pp.550-551.

technique that only facially delivers efficient resolution of individual cases.

D. Dignity and Good Repute of Judicial Institutions

A fourth value that influences the temporality of novel precedent concerns the public perception of the judicial role: the “image of justice”.¹⁴⁵ A well-rehearsed, but weak, argument for retrospectivity is that judges are not thought by the public to be, and should not be seen to be, law-makers. It is important that the public see the judge as an “objective, impartial, erudite and experienced declarer of the law that is”.¹⁴⁶ The disguise of the declaratory theory of adjudication helps to preserve the image of the judiciary as above the fray.¹⁴⁷ Overt judicial law-making, which prospective overruling entails, might engender suspicion of judicial power within democratic society.¹⁴⁸ This argument is easily attacked by proponents of prospective overruling on the grounds that judicial obfuscation is unfeasible,¹⁴⁹ dishonest,¹⁵⁰ and stifles reform initiatives.¹⁵¹ In their estimation, “honesty is the best policy”.¹⁵²

Certainly, honesty is a virtue here. But it does not obviously support this unorthodox technique. To the contrary, like the notion that judges merely “find” law but do not “make” it, the arguments that judges should legislate openly seem to rest on “surprisingly simplistic ideas” about the judicial role.¹⁵³ Patrick Atiyah criticised the tendency of judges “to conceal or to minimize the extent of” their creative function.¹⁵⁴ He warned it smacked of elitism. But Atiyah also criticised the depiction

¹⁴⁵ Stone, *Precedent* (fn.8 above), p.189.

¹⁴⁶ Lord Radcliffe, “The Lawyer and his Times” in *Not in Feather Beds* (London: Hamish Hamilton, 1968), p.271; see Freeman, “Standards” (fn.58 above), p.204; Mackay (fn.80 above), p.306.

¹⁴⁷ Devlin (fn.84 above), p.11.

¹⁴⁸ Mackay (fn.80 above), p.307; Coper (fn.52 above), pp.567, 572-573.

¹⁴⁹ Stone, *Precedent* (fn.8 above), p.188; Atiyah (fn.142 above), p.357; Nicol (fn.9 above), p.551.

¹⁵⁰ K. Mason (fn.77 above), p.530; Lloyd (fn.105 above), p.857.

¹⁵¹ Tur, “Varieties” (fn.9 above), p.37; Traynor (fn.125 above), p.542.

¹⁵² J.J. Doyle, “Judicial Law Making—Is Honesty the Best Policy?” (1995) 17 *Adel. L. Rev.* 161.

¹⁵³ Atiyah (fn.142 above), p.367; see e.g. *Chamberlains* (fn.45 above), [136]; *Hislop* (fn.63 above), [93].

¹⁵⁴ Atiyah (fn.142 above), p.365.

of the judicial law-maker as one who can “cast off all fetters and do what he thinks is right”.¹⁵⁵ The law-making function of judges is far more nuanced: “[t]o recognise that the judge has a creative role does not imply that he can create exactly what he pleases”.¹⁵⁶ Judges should be honest about their role. But honesty entails being forthright about the complex considerations that fetter judicial discretion and that constrain judicial law-making. When judges overrule precedent they must disavow the simplistic notion that their judgment merely replaces one stable rule with another. They should explain the law that governs the parties’ dispute and show that it is being applied even-handedly.¹⁵⁷ Otherwise, the parties and the public may suspect that the judicial method is arbitrary. That would certainly undermine the dignity and good repute of the judiciary.¹⁵⁸

E. Efficiency of Administrative or Legislative Action

Administrability and floodgates arguments are advanced in favour of curbing the retrospective effects of judge-made law. Non-retrospectivity is said to be necessary to protect the interests both of government and the public generally who can only follow the law as it is understood at the time they act.¹⁵⁹ It allows time for officials and individuals to adjust to new rules.¹⁶⁰ Consider, for instance, the judicial quashing of a taxing provision or practice. This can be exceptionally disruptive. The loss of a source of fiscal support can impact government accounts and forecasts, budgets and spending plans, Revenue officer training and conduct, and the legislative agenda. If the Crown is additionally held liable in restitution for taxes paid under the invalid

¹⁵⁵ Atiyah (fn.142 above), p.367; see Lloyd (fn.105 above), p.859.

¹⁵⁶ Atiyah (fn.142 above), p.368.

¹⁵⁷ Mackay (fn.80 above), p.306; Hodge (fn.15 above), pp.214, 221.

¹⁵⁸ Jaffey, “Two Ways” (fn.14 above), p.459.

¹⁵⁹ Stone, *Precedent* (fn.8 above), p.189; Joseph, “Prospective Overruling” (fn.44 above), pp.144-145; see *IRAL Response* (fn.5 above), pp.28-29; cf E. Campbell, “The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts” (2003) 29 *Monash U. L. Rev.* 49, 74-84.

¹⁶⁰ K. Mason (fn.77 above), p.530; Choudhry and Roach (fn.61 above), p.219.

law, the “disruptive potential becomes severe”.¹⁶¹ Similar concerns may be raised by private parties when a judicial overruling seems to interfere with the basis of completed commercial transactions. Prospective overruling, it is said, is needed to avoid “administrative chaos”.¹⁶²

One implication of this argument seems to be that claims against government warrant unique judicial treatment. That is dubious. The bending of judicial method to administrability concerns is *prima facie* an affront to constitutional norms. A.V. Dicey famously proclaimed that in England (and her Commonwealth), all classes and every official—“from the Prime Minister down to a constable or a collector of taxes”—are to be equally subject to the ordinary law of the land.¹⁶³ Prospective overruling violates this ideal by exempting the Crown from ordinary liability in the name of efficiency and administrability. It essentially turns the doctrine of legitimate expectations on its head by privileging the interests of government above individual claimants.¹⁶⁴

The administrability and floodgates concerns over judicial retrospectivity are not compelling. When a regulatory provision is held to be *ultra vires* and quashed, why should the affected individuals bear the burden of the drafter’s error as opposed to taxpayers as a whole?¹⁶⁵ If selective prospective overruling comes to be endorsed, will floodgates concerns not be exacerbated by the resultant incentives to file precautionary claims whenever someone challenges a rule before the courts? Cries of fiscal chaos seem overwrought. We know from experience that tax laws have been disapplied by courts while upholding “colossal” claims for restitution of past paid

¹⁶¹ J. Lovell, “From Now On: Temporal Issues in Constitutional Adjudication (2005) 18 Nat. J. Const. L. 17, 41.

¹⁶² M. Zander, *The Law-making Process*, 7th edn (Oxford: Hart Publishing, 2015), pp.379; see Blackshield (fn.30 above), p.228; Hall (fn.27 above), p.104.

¹⁶³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 3rd edn (London: MacMillan & Co, 1889), p.181; see Beswick, “Rule of Law” (fn.81 above), p.275.

¹⁶⁴ *cf* G. Weeks, “What Can We Legitimately Expect from the State?” in M. Groves and G. Weeks (eds), *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017), pp.147-164.

¹⁶⁵ *Kingstreet Investments* (fn.126 above), [28] *per* Bastarache J.

taxes without resort to non-retrospectivity.¹⁶⁶ The sky has not fallen. In practice, the extensive scope of some novel liability can be curbed through procedural-bars, time-bars, and other defences.

In a democracy functioning with checks and balances it is inapposite, and unnecessary, for courts to be swayed by speculative policy implications when adjudicating rights of action.¹⁶⁷ Courts typically are not well equipped to cost projected administrative and fiscal chaos. The other branches of government, on the other hand, are. Legislatures can, and do, intervene when the repercussions of judicial law-making are considered to be too burdensome.¹⁶⁸ The directly democratically accountable branches of government are best placed to weigh the public policy considerations for and against limiting judicially determined rights. It is not implausible to expect legislatures to intervene in this way.¹⁶⁹ An example from New Zealand illustrates the point. In 2014, the Social Security Appeal Authority of New Zealand identified an error in how the Government had been interpreting legislation concerning from when benefit entitlements should be paid.¹⁷⁰ It had gone unnoticed for 17 years that beneficiaries were being underpaid by one day's benefit. The cost of retrospective redress was estimated at around \$6 million per year. Should the Appeal Authority's decision not have operated retrospectively? The courts certainly would have been criticised if they had afforded the decision prospective-only effect. Instead, the issue was taken out of their hands. Parliament intervened by passing legislation amending the Social Security Act retroactively to instate the previously understood interpretation of the Act, leaving past affected beneficiaries without a

¹⁶⁶ *FII Test Claimants No.2* (fn.63 above), [9]; see Beswick, "Roadblocked" (fn.3 above), pp.1119-1120.

¹⁶⁷ Mackay (fn.80 above), p.306.

¹⁶⁸ A. Mason, "Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?" (2003) 24 *Adel. L. Rev.* 15, 33-34; Campbell (fn.159 above), pp.82-83. Constitutional rules may curb the scope of retroactive legislation in some cases: see C. Mitchell, "End of the Road for the Overpaid Tax Litigation?" (2017-18) 9 *U.K.S.C. Yrbk* 1, 8-9. There should, however, be no absolute bar on retroactive legislation, especially in the context of hard cases: Fuller (fn.40 above), pp.44, 53-54; Himsworth (fn.31 above), pp.169-170.

¹⁶⁹ *cf* Tur, "Varieties" (fn.9 above), p.36, and Hall (fn.27 above), p.104.

¹⁷⁰ *Re Benefits Review Committee* [2014] NZSSAA 39.

remedy.¹⁷¹ For many, that was an unsavoury result. But that is the point. It is better that the legislature weathers the reputational fallout of curbing judicial-recognised rights than do the courts.¹⁷²

F. Equality of Treatment for Like Cases

It is a well-established requirement of formal justice “that we treat like cases alike, and different cases differently, and give to everyone his due”.¹⁷³ The expectation of equality is that the same rules should apply to materially similar incidents. So new judicial rules should govern all cases justiciable before the courts, regardless of when those cases arose. Proponents of prospective overruling argue, contrariwise, that the technique allows courts to treat *truly* like cases alike. Nicol contends that when two materially similar incidents are divided in time by the issuance of a novel precedent courts may be justified in treating the two cases differently. That is because the court’s new rule is a significant event for the parties. Before the judgment was handed down “reliance on the old decision was justified; afterwards, it was not”.¹⁷⁴ On this account, equality does not compel the application of “new” rules to “old” disputes litigated before the courts.

The equality value can be invoked, at most, in support of the pure understanding of the technique. Clearly, equality is violated by selective prospective overruling.¹⁷⁵ But even in its pure form the value of equality is not decisive as to the temporal scope of “new” rules. Ordinarily, justiciable cases (i.e. cases that are not procedurally

¹⁷¹ Social Security (Commencement of Benefits) Amendment Act 2015, No.113 (NZ) (repealed with prospective-only effect by Social Security Act 2018, No.32, ss.66 and 455(1)).

¹⁷² C. Forsyth, “The Rock and the Sand: Jurisdiction and Remedial Discretion” (2013) 18 *Jud. Rev.* 360, 374; see *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 A.C. 86, [93] *per* Lord Mance, [121] and [132] *per* Lord Reed.

¹⁷³ N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1994), p.73; Sharpe (fn.10 above), p.78.

¹⁷⁴ Nicol (fn.9 above), p.547; *cf* Part III(B)’s argument that reliance on a rule of law is not justified as a matter of course until overruled. Rather, overruling occurs *because* reliance on some rule has become unjustified.

¹⁷⁵ See Part II(A) above.

barred or time-barred) are decided according to the court's best understanding of the governing law. Proponents of prospective overruling would have it that a claimant injured *one day before* a relevant novel precedent is handed down should be subject to different rules than an otherwise identical claimant who suffers the same kind of injury *one day after* the precedent is handed down. The claimants may have had no awareness of the state of the law when they were injured. Though *prima facie* both would have timely claims over their injuries—injuries separated by only two days—only the latter claimant's case would be subject to the new precedent. Far from respecting the principle of equality, courts violate the principle when they treat otherwise-comparable hard cases differently on the basis of the “entirely fortuitous” timing at which some novel judgment is handed down.¹⁷⁶ The principle of equality is best understood to weigh against drawing “invidious and unjust distinctions” within justiciable claims.¹⁷⁷

Conclusion

I have argued that the instrumental values that are commonly corralled in support of the prospective overruling technique—stability, reliance, efficiency, dignity, and equality—unravel under scrutiny. Properly understood, these values affirm the retrospectivity of judge-made law. That judges can be seen to make law retrospectively is no cause for alarm. When we recognise that judicial law-making is inextricably bound up with the resolution of past disputes we can see how the adjudicatory context constrains judicial law-making. Novel judgments represent the court's considered understanding of the law that governed the parties' dispute at the time it arose. Because a judgment provides precedent for resolving disputes future, present, and past, judicial creativity is tempered by “the danger of disturbing

¹⁷⁶ Mackay (fn.80 above), p.305; see B. Juratowitch, “Questioning Prospective Overruling” [2007] N.Z. L. Rev. 393, 409.

¹⁷⁷ *cf* K. Mason (fn.77 above), pp.530-531.

retrospectively the basis” of past transactions.¹⁷⁸ By contrast, prospective overruling purports to untether judicial law-making from the past so as to free judges to engage in untrammelled legislating. It is the ultimate instrument of judicial activism. It is for this reason that the High Court of Australia rejected the doctrine as inimical to the judicial method, holding:

A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations. If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law.¹⁷⁹

As to the disruptive effects of novel precedent, there is often a tendency toward exaggeration. Retrospective judicial law-making does not disrupt transactions for all time in the past. The law already draws a principled line between justiciable cases and those closed off by time-bars, defences, and procedural limits.¹⁸⁰ Such doctrines implement a requirement of the rule of law “that the past be settled”.¹⁸¹ Prospective overruling is simply superfluous. Moreover, whether disruptive consequences are too onerous is ultimately a policy question that courts are not well-placed to assess. To the extent that the ordinary retrospective effect of a judicial decision must be curtailed, the answer is tailored retroactive legislation. The politically accountable arm of the state is better placed to weather the public fallout of naked policy-making than is the independent judiciary.

¹⁷⁸ *Practice Statement* (fn.16 above).

¹⁷⁹ *Ha v New South Wales* [1997] HCA 34, (1997) 189 C.L.R. 465, 504 (internal citations omitted), aff’d *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, [55], [94]-[98].

¹⁸⁰ *Blackshield* (fn.30 above), pp.186-187; *Campbell* (fn.159 above), pp.51, 65; *Lovell* (fn.161 above), p.34; *Beswick*, “Retroactive Adjudication” (fn.3 above), pp.345-363.

¹⁸¹ A. Ripstein, “The Rule of Law and Time’s Arrow” in L.M. Austin and D. Klimchuk (eds), *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014), p.306.

If judges and policymakers are minded to dabble in unorthodox juridical crafts, they must at least present a plausible rationale. On the issue examined in this article the rationale is found wanting. Prospective overruling is an injudicious instrument.