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Special Comment

On Legal Reform: Legal Stability and Legislative Questions

By Michael D. Bayles

INTRODUCTION

The respective roles of courts and legislatures in reform of the common law is of continuing interest and importance. Philosophers, especially rule utilitarians, frequently refer to the distinction between issues appropriate for judicial determination (judicial questions) and those more suitable for legislative resolution (legislative questions) as though it were clear, yet legal philosophers have not seriously examined the grounds for such a distinction. As used by philosophers and judges, the distinction frequently implies the discredited Blackstonian view that judges discover and apply law but do not make it. In his often cited statement of this distinction, even Justice Holmes, certainly no adherent to the Blackstonian view, employs the distinction:

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.

The question of the role of courts vis-à-vis legislatures in law reform has increased in practical importance during the last fifteen years. In the United States at least, there has been

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1 Rule utilitarians claim that acts are to be morally evaluated by their conformity to those rules which, if adopted, would produce more net utility (happiness) than the adoption of any other rules. For use of the distinction between judicial and legislative questions in this connection, see Rawls, Two Concepts of Rules, in Utilitarianism with Critical Essays 177 (S. Gorovitz ed. 1971).

a noticeable increase in judicial activism in both the Supreme Court and state courts of final review. Although it has abated somewhat in recent years, there has been an increased tendency for courts to overrule prior decisions. Yet, in many cases judges have insisted either that stare decisis prevents courts from making changes or that it is more appropriate for the legislature than the courts to make them. Judicial reluctance to depart from precedent is illustrated in Maki v. Frelk, a negligence action for personal injuries, in which the Supreme Court of Illinois had asked an appellate court to determine whether contributory negligence should continue to be recognized as a defense. The appellate court decided that it should not. Yet on rehearing, the Illinois Supreme Court reversed the judgment on the ground that abolition of the defense of contributory negligence should be left to the legislature.

The main thesis of this article is that there is less reason for distinguishing between the proper roles of courts and legislatures in reform of the common law than is generally recognized. The doctrine of stare decisis has caused much confusion on this point. In particular, its use in cases raising the issue of overruling previous decisions often confuses two distinct questions: (1) Whether the law should be changed; and (2) who should change the law. The first section of this article analyzes stare decisis in order to clarify its status and to show how distinct considerations relevant to answering these two questions are confused in it. The second section analyzes the reasons for a principle against changing the law—the principle of stability—and demonstrates that it applies equally to both legislative and judicial change of the common law. The third section analyzes functional differences between courts and legislatures as a basis for a standard of legislative questions indicating which issues of change of the common law courts should leave to legislatures.

3 With respect to tort law, see R. Keeton, Venturing to Do Justice 169-70 (1969).
4 239 N.E.2d 445 (Ill. 1968).
5 Because a majority of states now have comparative rather than contributory negligence and three states adopted it by judicial decision, this controversy makes a good case study. Indeed, the courts in Florida and California adopted comparative negligence despite statutes arguably requiring contributory negligence. Kaatz v. State, 540 P.2d 1037 (Alas. 1975); Li v. Yellow Cab Co., 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 ( Fla. 1973).
I. THE DOCTRINE OF STARE DECISIS

The doctrine of stare decisis or precedent (rarely are the two clearly distinguished) may be construed in several different ways. First, the doctrine may be understood either as a doctrine which specifies the kinds of reasons relevant to judicial decision-making, or as a specific reason in itself. As a doctrine pertaining to the relevancy of reasons, stare decisis is the claim that the only relevant reasons for judicial decisions are precedents or analogies to precedents. So construed, stare decisis is a meta-doctrine concerning the underlying reasons courts give for decisions and not itself a reason. More often, stare decisis is considered to be one among a number of reasons for judicial decisions. So interpreted, it states that courts ought to adhere to or follow precedents, but other reasons may be given for not following precedents. Thus, according to the first interpretation, wherein stare decisis is construed as a meta-doctrine, all arguments for decisions must be based on precedents, whether in accord with or contrary to them. The second interpretation of stare decisis, however, is that while good reasons exist for basing decisions on precedent, reasons other than precedent may also exist which justify deviation from precedent. It is this latter conception which is relevant here. Of course, it is a difficult and controversial task to determine the holding of a previous case. Herein it will be assumed that this task has been performed. One cannot sensibly ask whether a precedent ought to be followed until one has determined what it is.

Second, one may distinguish between the precedents stare decisis requires a court to follow. In one version, it only requires courts to follow the precedents of higher courts of the same jurisdiction. In another version, it requires courts to follow their own precedents as well. Since the present concern is with courts of final review, only the claim that courts ought to follow their own precedents is relevant to the present discussion, there being no higher courts in the jurisdiction. Moreover, the claim that courts ought to follow their own precedents may take two forms: strict or liberal. The strict or English doctrine of stare

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5 Id. at 50; see also Wise, The Doctrine of Stare Decisis, 21 Wayne L. Rev. 1043, 1045 (1975).
decisis requires that courts always adhere to their own precedents, whereas the liberal or American doctrine permits departure from precedent in some cases. Although it is unclear whether any court ever really applied the strict doctrine, it has substantially been put to rest by a recent Practice Statement of the House of Lords which declared that courts may depart from precedent “when it appears right to do so.” Consequently, only the liberal version of the doctrine will be considered.

Third, one may distinguish the doctrine’s application to different kinds of law. The justification for the doctrine of stare decisis and the strength of the reason it provides for adherence to precedent may vary depending upon the type of law involved. The most significant distinctions here are between (1) court-made rules (common law), (2) statutory interpretations, and (3) constitutional interpretations. The role of courts as concerns their ability to decide constitutional matters largely depends upon considerations peculiar to specific forms of government, e.g., whether there is a written constitution and judicial review. In statutory interpretation also, the respective roles of courts and legislatures are more clearly delineated than in common law. It is in the area of common law, the focus of this article, that the most difficult and general issues arise.

Thus far, stare decisis has been referred to as a doctrine. In this context, the term “doctrine” has no clear meaning. It is thus useful to introduce the more precise terminology of standards, principles, and rules. Standards such as good faith, due care, and fair rate provide a basis for evaluations which admit degrees and may be used to establish rankings. Such evaluations are frequently stated in terms of good, better, best, bad, worse, and worst. Principles, on the other hand, present the criteria (good- and bad-making characteristics) used in applying standards and may themselves refer to char-

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9 Moreover, within the common law, the weight of the reason provided against change by the doctrine of stare decisis may vary depending upon whether tort, contract, property, or criminal law is involved.
acteristics which admit degrees, e.g., the ripeness of an apple in grading it. Rules are used in making evaluations which do not admit degrees; they are either complied with or not. Such evaluations are usually expressed in terms of right or wrong, correct or incorrect. Thus, rules apply in an all or none fashion, whereas principles do not, since the various principles constituting a standard may be weighed against one another. For example, it is a rule that one who is contributorily negligent cannot recover for damages. The requirement that liability ought to be based on fault, on the other hand, is a principle because it may be balanced against other considerations.

Determining whether the law should be changed requires consideration of the factor of the stability of the law. In particular, a decision to change the law cannot be made solely on the basis of the merits of the existing and the proposed rules but must also include consideration of the disadvantages or costs of legal change. In this context, the liberal doctrine of stare decisis cannot be treated as a rule. This conclusion is predicated upon the theory that to be construed as a rule against change, it would be necessary for the liberal doctrine to consist of one of the following forms: (a) Precedents ought to be followed unless . . . ; or (b) precedents ought usually or generally to be followed.

When given form (a), however, the doctrine often reduces to a tautology as in the House of Lords formulation that one ought to adhere to precedent unless it appears right to depart from it. If, on the other hand, the “unless” clause is formulated so as not to reduce to a tautology, then the rule provides no reason at all against change whenever a case falls within the excepting “unless” clause. Yet, stare decisis always provides a reason for adhering to precedent, notwithstanding the fact that other factors may outweigh the factor of adherence to precedent. Consequently, stare decisis cannot be a rule of type (a).

Nor can stare decisis be treated as a rule of type (b). As such, stare decisis is a mere summarization of the results of

\[1\] R. WASSERSTROM, supra note 6, at 173; see also W. SHAEFER, PRECEDENT AND POLICY 9 (1956).

\[2\] Contra, R. WASSERSTROM, supra note 6, at 53-54. On the basis of quite different considerations, Wise also claims stare decisis is not a rule. Wise, supra note 7, at 1043.

\[3\] [1966] 1 W.L.R. 1234, 3 All E.R. 77 (H.L.)
considering the advantages and disadvantages of legal change in particular cases. Without explicitly so stating, Wasserstrom, in his utilitarian theory of judicial decision, treats stare decisis as a rule of this type.\(^\text{14}\) He requires that to justify a judicial decision “the rule upon which its justification depends must be shown to be desirable, and its introduction into the legal system itself desirable.”\(^\text{15}\) This view considers only the disadvantages of change of the particular law in question.\(^\text{16}\) Hence, whenever in a particular case the advantages of change outweigh the disadvantages, a new rule should be introduced. Yet in focusing upon the disadvantages of change of a particular rule, Wasserstrom has omitted consideration of the disadvantages of a practice of frequent change. However, as D. H. Hodgson has argued at length, Wasserstrom’s view would make the law quite uncertain.\(^\text{17}\) Lawyers would not be able to predict when a court might decide that it would be useful to change a rule. Yet certainty in the law (as discussed more fully in the next section) is one of the main reasons for stare decisis or stability. Thus, because it is essential to have one settled rule, a reason is provided for adhering to a previously settled rule although it is no better than another one.

As it concerns the stability of law, stare decisis is a legal principle, the principle of stability. It is one of the principles constituting the standard of the appropriate rule to apply in a case and may be weighed against other relevant principles. As a principle, stability provides a reason in and of itself for applying an extant rather than a proposed rule. Basing the choice of a rule solely on a straightforward utilitarian calculation of the merits of the extant and proposed rules (a calculation which may include the disadvantages of change of the particular rule) is thereby foreclosed because of the failure to consider the principle of stability.\(^\text{18}\)

\(^\text{14}\) R. Wasserstrom, supra note 6.
\(^\text{15}\) Id. at 173.
\(^\text{16}\) In essence, this is an act utilitarianism view.
\(^\text{17}\) D. Hodgson, Consequences of Utilitarianism 104-08 (1967).
\(^\text{18}\) However, consequentialist or utilitarian considerations may be relevant to the justification of principles. This view adds another level to rule utilitarianism. Instead of directly evaluating rules by their utility, rules are evaluated by principles which, in turn, may be justified by utility or other considerations.
As applied to the issue of whether courts should introduce legal change, stare decisis involves a standard. The standard is that of legislative questions, those which courts should leave to legislatures. The various principles which constitute this standard must be weighed against one another in particular cases to determine whether it is appropriate for a court to decide a question.

Thus, the doctrine of stare decisis consists of two elements: (1) A principle of stability; and (2) a standard of legislative questions. With respect to the proper role of courts in reform of the common law, two issues are presented: First, does the principle of stability apply more strongly with respect to judicial than to legislative reform? Second, what are the principles or criteria of the standard of legislative questions?

II. THE PRINCIPLE OF STABILITY

One must examine the considerations which justify the principle of stability before determining whether it provides a reason against judicial change of common law rules. Five important considerations support the principle of stability: The need for certainty; fairness to those who have relied upon the extant rule; the efficiency of following precedent; the need for continuity in the law; and equality in treating similar cases similarly. Each of these considerations needs to be more fully elucidated.19

Certainty of the law is obviously a significant consideration. Essentially, it may be equated with the ability to predict the legal consequences of one's conduct. One must recognize the limits of this consideration. The argument for certainty may be pressed too far as in the following dissent of Chief Justice Bell of Pennsylvania:

Unless the Courts establish and maintain certainty and stability in the law, businessmen cannot safely and wisely make contracts with their employees or with each other; the meaning of wills, bonds, contracts, deeds and leases will fluctuate and change with each change in the personnel or in the changing views of a Court; property interests will be jeopardized and frequently lost or changed; Government cannot ade-

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19 See generally R. Wasserstrom, supra note 6, at 60-74.
Were there no predictability at all, the dire results Chief Justice Bell depicts would ensue. However, the fact that a complete lack of predictability would be disastrous does not justify the conclusion that some unpredictability would be so. One must balance the advantages of being able to change outmoded rules and predictability. The principle of stability occupies a middle ground between Bell's argument against all change and Wasserstrom's allowance of change whenever the advantages of change in a particular case outweigh the disadvantages.

Reliance is closely related to certainty. Although reliance is based upon predictability, the interest involved is somewhat different. Predictability refers to the ability to predict what the legal consequences of conduct will be, while reliance pertains to the effect a change of the law will have upon people who have acted on the basis of predictions. A subsequent change in the law involves unfairness to those who have relied upon a previously well-established rule even though the new rule may be a more just one. The concern is not, as Hodgson suggests, how long a rule has been relied upon, but the extent to which it has been relied upon, i.e., how many people, how often. Moreover, the injustice or unfairness occasioned by changes in the law to those who have acted in reliance upon the law depends upon whether that reliance was justifiable. To the extent that the existing rule is clearly contrary to community standards or where there are dicta and dissenting opinions indicating a desire to change it, reliance is less justified; that is, it is less

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20 Reitmeyer v. Sprecher, 243 A.2d 395, 399 (Pa. 1968). This point is similar to Lon Fuller's argument that too rapid a change in laws would result in the absence of a legal system. L. Fuller, The Morality of Law 39, 79-81 (rev. ed. 1969).

21 "The longer a rule has been relied upon by the profession and the public, the less willing a court will be to reject or qualify it." D. Hodgson, supra note 17, at 136 (emphasis added). Of course, the longer a rule has existed, the more people there are likely to be who have relied upon it, but the time is not the crucial point.

22 Alferitz v. Borgwardt, 58 P. 460, 462 (Cal. 1899); R. Keeton, supra note 3, at 41-43; Mishkin, The Supreme Court 1964 Term, Foreward: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 70 (1965).
justifiable to expect the rule to remain unchanged. This consideration, therefore, goes more to the pace of change than to the existence of change itself.

Considerations of efficiency relate to the allocation of judicial resources. A heavy burden would be placed upon courts if each case were to be treated as one of first impression. In the complete absence of the principle, each case could presumably be taken all the way to the court of final review—at least there would be no clear reason not to do so. Moreover, in each case courts would have to raise anew all the arguments for and against each rule, even though they would continually arrive at the same conclusion when one rule is clearly preferable over another. When cases at the trial level clearly fall within the boundaries of a precedent, it saves time and money for all involved to follow precedent. Settlement rather than litigation is encouraged. As Mill recognized, even in ethics most situations need not be considered anew because rules have been worked out on the basis of previous experience. Courts of final review can consider only a few of all the cases in their jurisdictions. Utilization of the principle of stability insures that few previously settled issues will be appealed to them, thereby enabling courts to devote their time and energy to issues of first impression and those involving rules which create serious injustice or disutility.

Continuity deals with the coherence or consistency of a body of rules. A change in one rule may significantly affect a number of other rules which were made upon the assumption of the effectiveness of the extant rule. For example, change from a rule of contributory negligence to one of comparative negligence would cast doubt upon the status of a last clear chance rule. A system of rules can be worked out by case law only on the assumption that previous rules are still valid.

Furthermore, rarely can an issue even be formulated without use of the principle of stability. For example, the issue of whether a restrictive covenant in a lease is enforceable presupposes a host of rules with respect to the nature and existence of various property rights. All of these various presuppositions involve rules based on precedents to which both parties agree. Were there no effect to precedent, all of these presuppositions would be open to question and there would be no formulable issue or issues short of justifying the bulk of property law.

J.S. Mill, Utilitarianism with Critical Essays 29 (S. Gorovitz ed. 1971). See D. Hodgson, supra note 17, at 134-36. There is a difference between the rules which must be presupposed to formulate
Moreover, although a new rule may not directly affect other rules, it may rest upon a different principle than do the other rules and thus produce incoherence or discontinuity at the level of principles.27

The final consideration is equality. If courts were to decide each case afresh without regard to precedent, they might reach opposite conclusions in relevantly similar cases. When the justification for a rule is clear and it obviously applies to a case, the chances of disparate decisions may be relatively small. However, a decision as to which of two or more rules is the better is often a close one about which reasonable judges may disagree. In these cases, considerations of equality require that the same rule be applied to similarly situated litigants.

The considerations of certainty, reliance, efficiency, continuity, and equality provide adequate justification for a court's adherence to the principle of stability. These same factors are also relevant to legislative decisions to change the law. Too frequent legislative changes can have as serious an impact on certainty of the law as too frequent judicial changes. Considerations of reliance are also involved in legislative decision-making. Indeed, reliance is the primary factor in the general principle against retroactive legislation. However, since most legislation is prospective while most judicial decisions are retrospective, reliance is a more important check on judicial than on legislative change.28 Continuity is also a legislative consideration. Legislators as well as judges ought to have regard for the orderly development of law, especially as it concerns consistency between laws. Considerations of equality and efficiency are involved in the principle that legislation should be general; that is, legislation should concern classes of persons and events rather than particular ones.

Thus, the only difference between the considerations supporting the principle of stability as it affects judicial as opposed

\[\text{an issue and the rules presupposed in considerations of coherence between laws. The latter presuppose the existence of the rule in question, but the rule in question does not necessarily presuppose the existence of the rules which compose the other laws.}\]

\[\text{27 Discontinuity at the level of principles is a result of the rapid change of direction which overruling decisions may have. Such rapid change may additionally affect the considerations of certainty and reliance.}\]

\[\text{28 Moreover, there is usually more warning of impending legislative change than of judicial change.}\]
to legislative change of the common law is reliance and the retrospective character of judicial decisions. Overruling decisions are usually retroactive. For example, a decision invalidating a divorce obtained by a private legislative bill would ordinarily invalidate all previous such divorces as well as that in the instant case. In *Bingham v. Miller* the technique of prospective overruling was, however, used to avoid such a result; that is, the court held that past legislative divorces were valid, but that no valid divorces could be obtained by that method in the future.29 The definitive feature of prospective overruling is, therefore, that the court limits the effect of the decision so that is does not apply to all previous cases. Since prospective overruling of precedents avoids the retrospective effect of judicial reform, the one difference in the relevance of the principle of stability as it applies to judicial and legislative change of the common law is eliminated.

Before prospective overruling may be justified, one must carefully consider the reliance factor upon which it is based, for in the absence of justifiable reliance on the existing state of the law, retroactive overruling is defensible. For example, reliance may not have been justified because of previous judicial warnings in dicta or dissents that the extant rule was in doubt. Moreover, ordinary citizens are often not aware of judicial opinions and may not have relied on them. Also, the impact of a retroactive decision may not be very great on any individual. For example, a change in tort liability may not have a serious impact upon the losing party because the damages he owes may be distributed amongst others via liability insurance rates.30 Finally, the aspect of reliance may apply almost as strongly when courts do not utilize the device of prospective overruling, but, rather, distinguish an instant case from a previous one.31 Of course, to the extent the instant case differed from previous ones, reliance upon the prior decisions was less

30 R. Keeton, supra note 3, at 42-43.
31 W. Shaefer, supra note 11, at 15. Distinguishing an instant case from precedents may also decrease certainty and predictability. Wise, supra note 7, at 1056.
justifiable. But to avoid the dead hand of precedent, courts have frequently distinguished cases on unpredictable grounds.

The major argument against prospective overruling is based upon equality. To see the force of this argument, one must consider the possible and actual variations in prospective overruling. In effect, courts set the date at which a new rule is to become effective. Very rarely do courts set a definite date in the future, such as forty days from the date of decision. Courts more frequently use what has been called prospective-prospective overruling, i.e., saying that the precedent will be overruled in the next case. The variety of dates of effectiveness which are possible in overruling is made apparent by the decisions of the United States Supreme Court respecting the retroactive application of constitutional rules of criminal procedure. The Court has allowed retroactive application to (1) all cases; (2) all those in which direct review has not been completed; (3) all those which have not proceeded beyond a certain point in the trial; (4) all those in which trials have not yet commenced; and (5) the instant case and future cases in which the proscribed conduct has not occurred as of the date of the decision. Cases of type (1) are the ordinary form of retroactive judicial decision, while those of types (2) through (5) involve limits on the retroactive effect of the decision and are thus versions of prospective overruling. Moreover, pure prospective overruling is that in which the new rule applies only to cases arising after the date of decision.

Whatever date or point is used, some litigants may complain of inequality because their relative similar cases were decided differently. However, such inequality is always involved when the law is changed. Similar cases are decided differently before as well as after the change. The relevant consideration is the number of temporal inequalities involved when the law is altered. For example, if a court first changes

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32 Holytz v. City of Milwaukee, 115 N.W.2d 618 (Wis. 1962).
34 Ostrager, Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations, 19 N.Y.L. Forum 289, 294-95 (1973).
35 The Supreme Court has rejected its use. Stoval v. Denno, 388 U.S. 293, 301 (1967).
from contributory negligence to limited comparative negligence, and then, two years later, changes to pure comparative negligence, within three years similar cases will have been treated in different ways more frequently than would have been the case had pure comparative negligence been adopted in the first instance. There will have been two temporal inequalities rather than one. This consideration applies equally to courts and legislatures.

The United States Supreme Court has justified temporal inequality by the impetus prospective overruling provides "for implementation of long overdue reforms, which otherwise could not be practicably effected." The Court's language is unfortunate in that it suggests that reforms are completely justified, the only problems being those of administration. While the Court has taken problems of administration into account as one factor among others justifying prospective overruling, they are not the central reason for its use. Rather, the reason is more general in that unless a decision is prospective, the consideration of reliance, which is obviated by prospective overruling, would be sufficient to make the overruling unjustified. That is, unless some of the disadvantages of changing the law are avoided, the change is not justifiable.

With the availability of prospective overruling, therefore, the principle of stability provides no stronger reason against judicial than against legislative change of the common law.

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Ronald Dworkin, however, suggests another reason for applying the principle of stability more strongly to courts than to legislatures. He distinguishes between principles involving distributive values (rights or claims of individuals) and policies involving collective values (goals or claims of the community). His essential claim, the "rights" thesis, is that judicial arguments are and ought to be based on principles (rights of the parties), while legislative arguments are and may be based on policies as well as on principles. Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057 (1975). The rights thesis thus has a descriptive version (how decisions are made) and a normative version (how decisions ought to be made).

The principle of stability would thus be less stringent upon legislatures than upon courts because the equality consideration is less strong for rules based upon policies.
Reliance is the only consideration underlying the principle of stability which may operate more strongly against judicial than against legislative legal change. Prospective overruling, however, eliminates any difference between courts and legislatures with respect to reliance. Consequently, if a court considers the possibility of prospective overruling, but correctly decides that the principle of stability militates against change, the law should not be changed by either a court or a legislature. Conversely, so far as the principle of stability is concerned, if it is appropriate for a legislature to change a common law rule, then it is also appropriate for a court to do so, at least by prospective overruling.40

However, the rights thesis does not have this implication for common law rules which were originally adopted by courts. If the descriptive version of the rights thesis is correct, then the rules were adopted on the basis of arguments from principle. Consequently, the equality consideration for the principle of stability fully applies to the common law rules, and legislators would be as constrained by the principle as are judges. Moreover, cases of prospective overruling are prima facie counter-examples to the rights thesis. If courts are not willing to apply rights retrospectively, they seem either to be asserting that there is no right which the party had until the announcement of the new rule or to be allowing policy considerations to affect the application of the rule. Dworkin’s only comment upon cases of prospective overruling adopts the former alternative. He considers the criminal case, Linkletter v. Walker, 381 U.S. 618 (1965), and claims that the rights thesis does not fully apply to criminal cases because the prosecution does not have a right to a conviction if the defendant is guilty, although the defendant does have a right to acquittal if innocent. In ordinary civil cases, he claims, one or the other of the parties does have a right to win. Dworkin, supra at 1077-78. Yet, the use of prospective overruling in tort cases appears to falsify the descriptive version of the rights thesis.

40 Thus far, the principle of stability has been treated as a principle presenting a reason against change which forecloses a straight-forward utilitarian calculation of the advantages and disadvantages of change in a particular case. No account has been given as to when this reason may be outweighed and overruling decisions justified. Such an account is not central to the point of this article; it suffices to show that the principle of stability provides no more reason against judicial than against legislative change. The best such an account could do would be to present other principles calling for change and to weigh them against the principle of stability. It should be noted that the merits of the proposed rule over the extant one is such a principle. In making this determination, the way in which a court construes the holding of the case relied upon as precedent may be of prime importance and open to consideration. See Stone, The Lords at the Crossroads—When to “Depart” and How!, 46 AUSTRALIAN L.J. 483, 488 (1972).

The principle of stability, however, prevents adoption of a proposed rule whenever
III. THE STANDARD OF LEGISLATIVE QUESTIONS

If the principle of stability does not provide a reason to prefer legislative to judicial reform of the common law, then the standard of legislative questions must bear that burden of preference. The principles which constitute the criteria used in the determination of legislative questions are based upon a combination of functional differences between courts and legislatures and also upon the considerations underlying the principle of stability. 41

A. Functional Differences Between Courts and Legislatures

The most significant functional difference between courts and legislatures is that courts, unlike legislatures, are limited to deciding actual cases. The United States Constitution limits article III courts to deciding cases and controversies. 42 Although not necessarily constitutionally so limited, most common law courts are also restricted to deciding actual cases. 43 Such a limitation involves several elements. First, there must be a definite, concrete issue involving particular parties; courts do not decide general policy except in the context of a particular case. Second, the issue must be an actual one; courts do not generally decide hypothetical or moot cases. 44 Third, courts cannot decide an issue just because they think it an important one deserving resolution. The issue must be brought to them. However, this point must be qualified in two respects. Courts

it is preferable to the extant one, just as the obligation to keep promises prevents one from breaking a promise whenever doing so would have better consequences than keeping it. Yet, just as one may be justified in breaking a promise when the results of so doing are much better than those of keeping it, one may also be justified in introducing a new rule when it is clearly better than the extant one.

41 The various principles specifying criteria for legislative questions developed in this section rest on general functional differences between courts and legislatures, not on those limited to particular legal systems. See generally S. Mermin, supra note 29, at 102-13.


43 S. Mermin, supra note 29, at 175.

44 Sometimes they do. For example, M’Naghten’s Case, which set forth the famous tests of insanity, was not before the House of Lords in an actual case. [1843] 8 Eng. Rep. 718 (H.L.). The defendant had died before the United States Supreme Court’s decision declaring unconstitutional those laws making the status of being a narcotic addict a crime. Robinson v. California, 370 U.S. 660 (1962).
of final review frequently exercise much control over the issues they will decide. Moreover, they may sometimes decide a case on an issue other than that on which it is argued. For example, when the United States Supreme Court applied to the states the rule excluding material obtained in unconstitutional searches and seizures from evidence at trial, the case had been granted certiorari and argued on an issue of obscenity.\footnote{Mapp v. Ohio, 367 U.S. 643 (1961).} Fourth, the plaintiff must state a cause of action or claim upon which relief may be granted. There must be a legal basis for the dispute before courts can take it up. But this limit is not absolute. At least in common law, courts do have the power to recognize new causes of action,\footnote{The procedure is not to recognize an entirely new cause of action, but to recognize new claims for relief within a broad category such as negligence. See e.g., Dillon v. Legg, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960). Eventually such decisions may lead to whole new bodies of law, such as that of products liability.} and so, theoretically, new issues can be recognized.

The functional limitation of courts to actual cases, therefore, significantly restricts their power as compared to that of a legislature. Courts are not as free as legislatures to choose the issues they wish to decide, and they must determine the specific legal situation of at least one legal person or entity. Legislatures, however, usually decide general issues without reference to the legal situation of any specific person.\footnote{S. Mermin, supra note 29, at 104.}

Another set of functional differences involves what may be called power over resources. Courts do not have a general taxing and spending power. So, for example, they could not institute a social security system. The federal courts have generally avoided issues of spending by determining that individual taxpayers do not have standing to sue with respect to Congressional spending decisions. Only when courts have the power to constitutionally review legislation may they restrict spending by legislatures, and even then they cannot say how money is to be spent, only how it is not to be spent. This sort of limitation does not imply that courts do not exercise functions similar to legislatures, but merely that they exercise fewer of them. A related and more significant aspect of courts' limited power
over resources concerns the gathering of information. Unlike legislatures, courts generally cannot establish investigative bodies to obtain information relevant to issues. They must generally rely upon the information presented by the parties to the case.

A further functional difference between courts and legislatures relates to the acceptability of compromise. Legislatures are expected to compromise competing interests. Thus, the interests of charitable institutions and of victims of negligence may be compromised by a rule holding charitable institutions liable for negligent injuries, but only to the amount of $10,000. Courts do not compromise interests in this way; rather, judges are to determine the justice of a particular issue. Of course, in determining the just solution they are expected to weigh competing interests. However, it would be improper for a court to announce that since half the justices favor tort immunity for charitable institutions while half do not, the difference has been settled by determining that charitable institutions are liable for one half of the damages caused by their employees' negligence. Instead, when courts have evenly split decisions, the extant rule governs.

B. Principles Constitutive of the Standard of Legislative Questions

The combination of the functional differences between courts and legislatures, when taken in conjunction with the considerations underlying the principle of stability, provides certain principles constitutive of the standard of legislative questions. These principles concern: (1) The interrelation of the extant rule with other rules; (2) the complexity of the proposed rule; (3) the scope of the proposed rule; (4) the availability of information relevant to the relative desirability of the extant and proposed rules; and (5) the need for a bright line in a gray area.48 Another consideration, alternative means of change, is relevant to differences in judicial activity in reform of constitutional, statutory, and common law. The ultimate basis of each of these principles is a functional limit on courts.

48 See generally R. Keeton, supra note 3, at 40-41; W. Shaefer, supra note 11, at 10-13.
The interrelation between the extant rule and others is relevant to whether judges or legislators should change the existing rule. The greater a rule's relations and connections with other rules, the stronger the reason for leaving its change to the legislature. The reason for this principle is that since courts are limited to deciding actual cases, court decisions are binding only insofar as is necessary to decide the instant case. Since the relationship of a new rule to extant ones will not usually be at issue in a case, judges' comments upon related extant rules would be mere obiter dicta. The new rule would be a discontinuity in the law casting doubts upon many previously settled rules, and these doubts could not be resolved until many other cases had arisen and been decided. A legislature could settle many of these doubts at the same time it changed the existing rule in question because a statute need not be limited to as narrow an issue as a judicial decision.

The principle of interrelation should not be confused with that of complexity. Complexity refers to whether or not all elements of a proposed rule may be settled in one decision. For example, when the Supreme Court recognized an independent tort action for violation of fourth amendment constitutional rights, many issues, such as the elements of the damages, were left unsettled; yet the decision did not disturb or affect prior rules. While a complex new rule cannot be completely fleshed out in a single court decision (due to the restriction on courts to deciding actual cases), the rule may be fully developed in a statute, thereby avoiding uncertainty. It should be observed, however, that complexity is not always a strong reason for leaving a question to a legislature. Arguably, it is preferable to leave many details to be worked out in light of practical experi-

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"Our decision in this case is to be viewed as a first step in what we deem to be a proper and just direction, not as a compendium containing the answers to all questions that may be expected to arise." Li v. Yellow Cab Co., 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975).

Our adoption of this new principle does not, of course, end our judicial tasks in this area. Subsidiary questions and problems concerning the relationship of the new rule to other doctrines of tort law must necessarily be adjudicated in the future. We must, for the most part, await future cases for the further development of law in this field.

Kaatz v. State, 540 P.2d 1037, 1049-50 (Alas. 1975). The court did, however, abolish the last clear chance rule.
ence as cases arise rather than trying to foresee them in a legislative enactment.\textsuperscript{51} Furthermore, when legislatures have acted, they have generally adopted a simple general rule and left the details to the courts to develop.\textsuperscript{52} Whether courts or legislatures should work out the details depends primarily upon the foreseeability of the problems which may arise. To the extent the problems are not adequately foreseeable, they should be left to the courts to work out.\textsuperscript{53} However, it should generally be left to legislators to initially determine whether they can foresee problems sufficiently to provide for them by statute.

The third principle, the scope of the proposed rule, is closely related to its complexity. Scope and complexity are, however, distinguishable in that complexity, as previously mentioned, refers to whether or not all elements of a proposed rule may be stated in one decision; scope relates to a court's power to make a change regardless of whether all elements of the change may be stated in the same decision. Simply stated, the principle of scope rests upon the limits on courts' personal jurisdiction and power over resources. An illustration of scope considerations is found in the dissent of Chief Justice Burger in \textit{Bivens v. Six Unknown Agents of Federal Bureau of Narcotics} in which it was suggested that a special court be instituted to handle tort claims for violation of constitutional rights.\textsuperscript{54} No court, however, has the power to establish another court. Also, due to the considerations of scope, courts should not undertake to develop a workmen's compensation type system for automobile accidents.\textsuperscript{55} Moreover, no court has adopted a no fault insurance system by decision. Part of the reason for such a limitation rests upon the power of courts. They do not

\textsuperscript{51} "We feel the trial judges of this State are capable of applying this comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical level at the appellate level." Hoffman v. Jones, 280 So. 2d 431, 439-40 (Fla. 1973); \textit{accord}, Li v. Yellow Cab Co., 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975).


\textsuperscript{53} K. Diplock, \textit{The Courts as Legislators} 13 (1965).

\textsuperscript{54} 403 U.S. 388, 422-23 (1971).

\textsuperscript{55} R. Keeton, \textit{supra} note 3, at 43.
have the power to require people generally to obtain insurance or to set the limits of such insurance. On the other hand, the setting of schedules and the like is not an issue of the scope of a law but of its complexity, the availability of information, and the need for a bright line.

A court's lack of information on which to evaluate the merits of rules is yet an additional reason for leaving questions to legislatures. For example, one reason courts should not set schedules of damages is their lack of information about the general costs of accidents. A court's inability to obtain adequate information pertaining to a particular subject is ultimately founded on the court's lack of power over resources. Courts cannot instigate or conduct detailed social scientific investigations into problems, nor can the litigants in a case usually afford to do so. Legislatures, on the other hand, do possess power over resources. If, therefore, a court lacks the information needed for making a reasonable judgment, the issues under consideration should be deferred to the legislature, provided it is better able to obtain the needed information.

The fifth principle is that issues requiring the drawing of a bright line through a gray area are best left to legislatures. Any issue which, in justice, requires a rule setting a maximum

54 Gray, Judicial Legislation: Judicial Constructs and Societal Facts, 31 U. Toronto Faculty L. Rev. 75, 84-87 (1973); Hall, Law Reform and the Judiciary's Role, 10 Osgoode Hall L.J. 399, 409 (1972). Note the inappropriateness of the adversary procedure for determining legislative facts, i.e., those needed for evaluating rules as opposed to those needed for deciding cases under rules.

57 One must be careful not to confuse the availability of information with the kind of information involved. Hodgson contends that courts work reasonably well without hearing sociological information or evidence and that it is not desirable for them to receive it since judges are not specially trained to evaluate it. D. Hodgson, supra note 17, at 137, 149. However, he tends to confuse the valid point that courts are not empowered to conduct investigations with the invalid one concerning the ability of judges to make policy decisions on the basis of sociological evidence. The judges would not primarily be assessing the reliability and accuracy of such evidence, but making policy decisions on the basis of it. Legislators are no more qualified than are judges to evaluate the scientific validity of sociological evidence. Moreover, as others correctly argue, at least in cases of first impression, if judges are to make reasonable decisions they must consider empirical evidence bearing upon the desirability of alternative rules. R. Wasserstrom, supra note 6, at 156-57; Gray, supra note 56, at 82, 87; Hall, supra note 56, at 405. In cases which are not of first impression, judges do not have to decide which of two rules is the more desirable. If they lack information needed for making a reasonable judgment on the matter, they should defer it to the legislature provided it is better able to obtain the needed information.
dollar amount of damages would be such. Likewise, statutes of limitations set bright temporal lines. To some extent, the drawing of such lines is arbitrary. There is a range in which a line appropriately belongs, but no particular point can be justified vis-à-vis others nearby. Consequently, the drawing of such lines involves a process of compromise between conflicting interests and no justification by means of neutral principles may be given for drawing it through one part of the gray area rather than through another. Since these bright line issues are the sort open to compromise, they are apt to be surrounded with political activity. So the rather arbitrary drawing of a bright line by the judiciary may provoke attacks upon the court. For example, the Supreme Court decision establishing a constitutional right to abortions during the first two trimesters of pregnancy essentially permitted state prohibition of abortion after the fetus is viable. But Justice Blackmun's suggestion that the time of viability is twenty-four to twenty-eight weeks has provoked criticism from opponents of abortion. It would undoubtedly have been better to allow state legislatures to define the time of viability, subject to judicial review for reasonableness.

Yet another frequently suggested principle for determining a legislative question is the availability of alternative means for changing the extant rule. For example, Shaefer suggests that one reason courts are more likely to overrule previous constitutional interpretations than they are to overrule statutory ones is the difficulty involved in otherwise changing a constitution. Although this consideration is not as significant when directed to the subject of change of common law rules, such a principle might be relevant in two respects. First, if a court is uncertain that it wants to fully reconsider a rule, the likelihood of soon having another chance to do so might be taken into account. However, if a court does want to reconsider a rule, it usually

58 Roe v. Wade, 410 U.S. 113 (1973). During the first trimester of pregnancy, abortion decisions are left to the medical judgment of the attending physician; after the first trimester, the state may regulate the abortion procedure in ways reasonably related to maternal health.


60 W. Shaefer, supra note 11, at 11; see also S. Mermin, supra note 29, at 262.
will have no difficulty in finding a case in which to do so. Second, this principle may also be relevant when the legislature is actively engaged in considering the issue. If the legislature is soon likely to make a change, it may be appropriate for a court to defer it.

This raises a consideration much discussed in the cases, namely, the significance to be attached to legislative inaction. Sometimes legislative inaction is taken to indicate satisfaction with the law. However, it can also be interpreted as indicative of a legislative desire for courts to assume the responsibility of making any needed changes. If a legislature has voted on a bill proposing a change, then it may seem more reasonable to construe its failure to change the law as indicating satisfaction with it. However, there are extreme difficulties in knowing why a legislature has not passed a bill. Moreover, the pressure upon legislatures to act in various areas has increased during this century, making it extremely difficult for legislators to devote time to law reform, especially when there are no pressure groups pushing for change in certain areas of private law.

Rupert Cross suggests that the system of case law is workable only on the assumption that when it breaks down under the dead weight of precedent, amending legislation will be available. Assuming this to be true, courts will have to overrule more decisions than previously to keep the legal system viable when legislatures are unable to act. Consequently, courts must decide on the basis of a realistic appraisal of the situation when to make changes themselves and when to leave them to legislatures.

The issue of legislative inaction is frequently thought to be most perplexing when in earlier decisions a court has expressed a preference for a new rule, but has declined to overrule precedents. The issue in this context, however, is spurious. If the court considered prospective overruling and declined to overrule precedent because of the principle of stability, then it should not prefer, everything considered, a change in the rule. If it failed

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41 See Berry v. Branner, 421 P.2d 996, 998 (Ore. 1966).
43 R. Cross, Precedent in English Law 218 (2d ed. 1968).
to consider prospective overruling, then it should do so in the next appropriate case. If the court declined to overrule precedent because, when considered in light of the appropriate principles, the issue was determined to be a legislative question, then the issue should still be left to the legislature. In short, legislative inaction should not be a special bar to judicial change: Either the principle of stability militates against the change and only the legislature should make it; or the court was wrong not to have made the change previously.

Thus far, five principles have been considered as constituting a standard to be utilized in a determination as to which types of issues are more appropriately resolved by legislatures than by courts. However, there is a general argument that since the common law rules were originally promulgated by courts, not legislatures, courts are the only bodies competent to consider the proposed changes. Change of the common law, therefore, could never be a legislative question. This argument, however, overlooks the probability of changed circumstances. A rule's interrelations with other rules may have developed over time, so that a current change in it may have much wider ramifications in the legal system than did its original adoption. Similar considerations apply when the principle of complexity is regarded. Moreover, the availability of information may be much more crucial now than it was at the time of the rule's initial adoption. The development of sociology and economics has made it possible to obtain information not obtainable in the nineteenth century. Also, the proposed rule may require such information for an evaluation of its merits, while alternative rules considered when the existing rule was originally promulgated did not. Hence, the fact that an extant rule is a court-

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4 One might contend that Dworkin's distinction between arguments based on principles and those based on policies should be a sixth principle, since only legislatures should make decisions involving policy considerations. See Dworkin, supra note 39. However, even if one accepts the distinction of the rights thesis between principle and policy, it has little relevance to common law rules. Since, if the descriptive version of Dworkin's rights thesis is correct, that rules were adopted on the basis of rights, it is likely that such considerations, rather than policies, would be the ground for changing them. For example, the standard argument in favor of a comparative rather than a contributory negligence system is based upon a more just application of the principle of fault. A legislative question would be involved only if policy considerations had arisen for changing a rule; for example, limiting damages in medical malpractice suits.
made one is not dispositive in a determination of whether its change is a legislative question. At best, a basis is provided for skepticism of the claim that courts should not alter common law rules. Thus, the basic principles which constitute the standard of a legislative question should be applied in each case.

CONCLUSION

The proper role of courts in reform of the common law has been neglected by legal philosophers. The confusions inherent in the doctrine of stare decisis have generally prevented courts from developing a clearly articulated rationale for their action or inaction in reform of the common law. In particular, the doctrine of stare decisis confuses the principle of stability with the standard of legislative questions. Such a confusion is natural, for if courts decide that the law should not be changed (principle of stability), change must emanate from the legislature (legislative question). However, if courts may engage in prospective overruling, then the principle of stability provides no stronger a reason against judicial than against legislative change.  

At this point it should be noted that there is a general argument that courts should not overrule precedents or at least should be very cautious in so doing because courts, as compared to legislatures, are undemocratic institutions. Legislators must frequently stand for reelection, whereas some judges are not elected and those who are generally have long terms of office. Consequently, it is claimed that courts do not reflect the will of the people as well as legislatures and should not be involved in lawmaking.

Since a complete consideration of this argument would require a complex analysis of political theory, only a few brief points may be made here. First, historically, the law developed primarily by judicial decision rather than by legislative enactment. The discussion herein has been explicitly restricted to judicially created common law. If judges were historically competent to make law, then they may be presumed to be competent to do so now absent a showing that changed social circumstances render the matter a legislative question. Second, the value of public representation is greatest when various competing interests need to be compromised. The principle of a need for a bright line covers many of these situations. Such compromise is also important in decisions about governmental spending, but courts do not make such decisions. Third, and most significantly, the argument that courts, as undemocratic institutions, should not overrule precedents is not directly relevant either to the principle of stability or to the standard of legislative questions. The principle of stability provides a reason against change of the law which is applicable to both courts and legislatures. Furthermore, even if the general argument provides a good but not conclusive reason against judicial change of the law, it does not help in distinguishing between those questions which courts should handle and those which are legislative questions. Consequently,
basis for distinguishing rules which courts ought not undertake to change from those which they may. If the change of a rule is a legislative question, then courts are not qualified to determine the relative merits of proposed and extant rules. Consequently, it is inappropriate for courts to declare that although a particular common law rule should be changed, it is a legislative question.

The proper role of courts of final review in reform of the common law is greater than most of them seem to realize. If the standard of legislative questions is applied realistically, few issues of change of the common law will be found to be legislative questions. If the common law is arcane and inadequate for social conditions, the blame will frequently be placed upon the nonfeasance or malfeasance of contemporary judges. The blame can rarely be passed to legislatures under the guise of the issue being a legislative question.

Legal philosophers cannot reform the law, but they may help by sorting out the distinct considerations involved in deciding to overrule precedent. The courts must still apply these considerations to actual cases. There is considerable evidence that judges on courts of final review in the United States are becoming aware of their responsibilities in reform of the common law. A well considered judicial activism in common law reform will benefit the public at large.

unless the argument proves that courts should never overrule precedents, it at best provides a principle against judicial change which is distinct from the principle of stability and the standard of legislative questions.