

# ARTICLE

## STARE DECISIS IN MONTANA\*

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## INTRODUCTION

As the year 2000 approached we began to hear rumblings about the Montana Supreme Court. The court was "inconsistent." It was overruling cases at a high rate. It was "malpractice not to appeal." This perception pervaded the Montana bar. It pervades the bar today.<sup>1</sup> Were members of the bar simply complaining about their losses or was their per-

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1. See Montana Defense Trial Lawyers Association, *Supreme Court Questionnaire*, at <http://www.nvo.com/mdtl/bsupremecourtquestionnaire/> (accessed Oct. 21, 2003).

ception reality? My examination of the Montana Supreme Court's decisions answers this question. The court was overruling cases at a very high rate.

Why was this so? Was the court's high rate of overruling a result of forces beyond the court's control? Did it reflect a philosophy or lack of philosophy among the court's members? Some answers to these questions may be derived by examination and measurement. Therefore I looked closely at the Montana Supreme Court for the period of 1991-2000. My review of this period reveals that the court's high rate of overruling was not a result of external circumstances.

In Part I, I begin with a short review of the role that *stare decisis* plays in the American judicial system. Part II compares the interests fostered and frustrated by a rule of adherence to precedent. Because this is in part an empirical study, I have set forth my methodology in Part III. Part IV compares the frequency with which the Montana Supreme Court (1991-2000) overruled precedent with that of other state supreme courts during the same period. It also includes a decade by decade comparison of Montana Supreme Court panels, examining the frequency with which those courts overruled precedent. The court's defenders have articulated some explanations and justifications for its practice. In Part V, I treat each justification as a testable hypothesis. Some of these hypotheses could be tested empirically. Others required an analysis of the court's opinions. As the reader will see, each hypothesis failed under scrutiny. Part VI reviews the grounds articulated by the court when it overruled precedent and concludes that the court frequently ignored the values of *stare decisis*. Part VII examines the court's most common practice, that of overruling on grounds that a prior decision was manifestly wrong. I conclude that the court's reliance on this justification has lacked a principled foundation. Finally, in Part VIII, I offer a principled approach to *stare decisis*.

## I. THE "RULE" OF ADHERENCE TO PRECEDENT

Before we may engage in any discussion of a principled approach to *stare decisis*, we should consider that rule's history, its virtues, and its failings.

Montana inherited the rule of *stare decisis* along with the

rest of English common law,<sup>2</sup> with one modification: state jurisdictions did not adhere to or follow England's strict rule of adherence to precedent.<sup>3</sup> Professor Craig Klafter suggests that England's strict rule was a result of the aristocracy's reaction to the growing middle class.<sup>4</sup> A strict rule of stare decisis preserved the privileges and prerogatives the landed class had enjoyed.<sup>5</sup>

Klafter argues that the Revolution severed the connection between English and American law and that American courts, in their search to find a way to justify not following English precedent, adopted a modified version of stare decisis. Under this modified form, English precedent was persuasive but American precedent would be binding. American precedent was lacking, however, so American courts questioned and tested the English decisions in light of logic, morality, and utility. This practice came to characterize the American approach to stare decisis even with respect to local precedents.<sup>6</sup>

So, under the American system, an appellate court may depart from precedent, typically by distinguishing the precedent. Yet even in the United States, appellate courts rarely abolish the precedent, changing what all had thought was a familiar legal landscape, and adopt a new rule.

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2. See Mont. Code Ann. § 1-1-109 (2001).

For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.

I SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 69 (W.D.L. ed., 1900).

3. As of 1934, Professor A.L. Goodhart noted that in England when a prior case is directly on point, "[i]t is more than a model; it has become a fixed and binding rule." Arthur L. Goodhart, *Precedent in English and Continental Law*, 50 LAW Q. REV. 40, 41 (1934).

4. CRAIG E. KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 33 (1993).

5. *Id.*

6. *Id.* at 67-93.

## II. THE VIRTUES AND FAULTS OF STARE DECISIS

Stare decisis has its virtues and shortcomings. Several interests and policies justify adherence to precedent in a common law system. Nevertheless, each interest that may justify adherence to precedent generally has a countervailing shortcoming. Appellate courts must take note of these virtues and faults when deciding whether or not to overrule precedent.

I discuss the virtues and their corresponding shortcomings in the following sections.

### A. *The Equality Interest.*

Stare decisis ensures a degree of fairness. By virtue of the rule of stare decisis, similarly situated people can expect to be treated like those in the precedential case.

The equality value of stare decisis fails, however, if the application of stare decisis leaves the law tipped in favor of one party or one group. For example, prior to the 1960s, some states treated like litigants alike according to their race, and stare decisis preserved this doctrine of separate-but-equal until the mid-1950s. In that case, adherence to precedent was employed to maintain inequality.

### B. *The Interests of Predictability and Reliability.*

One of the better known values of stare decisis is the value of predictability or reliability. “[L]aw is essentially an expectation.”<sup>7</sup> People and institutions should be able to plan their financial and legal affairs with the expectation that the rules will not change significantly so as to frustrate those plans.<sup>8</sup> This fosters entrepreneurial behavior by reducing risk and uncertainty.<sup>9</sup>

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7. Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 211 (1933).

8. See Akhil Reed Amar & Vikram David Amar, *How Should the Supreme Court Weigh its Own Precedent*, at <http://writ.findlaw.com/amar/20021213.html> (Dec. 13, 2002); Akhil Reed Amar & Vikram David Amar, *Precedent on the High Court: More On & Part Two of a Three-Part Series on Stare Decisis*, at <http://writ.findlaw.com/amar/20021227.html> (Dec. 27, 2002); Akhil Reed Amar & Vikram David Amar, *Some Final Thoughts on the Affirmative Action Ruling, and Reliance in a Changing Legal World: Part Three of a Three-Part Series on Precedent*, at <http://writ.findlaw.com/amar/20030110.html> (Jan. 10, 2003) (discussing the reliance value of United States Supreme Court precedent).

9. The judicial branch differs from the legislative branch on the value of predictability. I would agree that the legislative branch is specifically empowered to

The predictability value does not extend equally to all areas of the law, however. It applies most strongly to interpretation of contracts, to interpretation of probate instruments, and to property relationships. These relationships are prospective, tend to be long-term, and tend to be memorialized in reliance upon existing law.

The value of predictability applies less strongly in other areas of the law. In torts cases, for example, we would argue that an actor should be free to act without the risk of incurring unforeseen liability. This argument, however, is really about insurance. Insurers should know what their likely exposure will be so they may set their premiums accordingly. Because insurers rely on a large pool of insureds, and because insurers reinsure, a court's failure to adhere to *stare decisis* has a more limited and indirect effect in torts cases. Insurers may adjust their actuarial tables following a change in the common law. They are less likely to be exposed to unforeseen liability.

Predictability has less value when a court changes a procedural rule, and has the least value when a court changes a rule prospectively. The Montana Supreme Court, after all, is free (under the Montana Constitution) to write and change its procedural rules almost at will, subject only to a legislative veto.<sup>10</sup> Nevertheless, in any given case the parties may have relied upon a prior interpretation of a procedural rule and a change in that interpretation will always work to one party's detriment. This, however, triggers the predictability value less and the fairness value more.

### *C. Interests in Efficiency and Standardization.*

*Stare decisis* increases decision making efficiency. A court does not have to spend as much time crafting, justifying, and explaining a decision when it makes the decision on the basis of precedent.

Standardization is a combination of predictability and

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make significant changes to the rules, changes that would wreck the plans of those who rely upon the preexisting rules. Unlike the judicial branch, which decides a single case at a time and may alter the rule in the context of that single case, the legislature is better equipped to consider arguments about the rule change's effect upon existing social relationships. Participants are free to go to the legislature to argue against the rule change or to argue for a mitigation of the rule change (delaying its implementation or exempting certain relationships, for example) on predictability and other grounds.

10. MONT. CONST. art. VII, § 2(3).

efficiency. Adherence to a preexisting rule tends to cement it. The rule becomes standardized as it is tested by new and different facts. As a result, we can more easily predict what and how strong the rule is in a later, slightly different context.

*D. Avoiding Arbitrary Decision Making and the Values of Institutional Legitimacy and Authority.*

From a positivist's standpoint, the validity of a rule depends in part upon the legitimacy of the institution that issues it.<sup>11</sup> If I declare that all amendments to the state constitution must have one subject, no one is likely to pay attention to my pronouncement. When a state supreme court says the same thing, this has binding effect, not only because we confer the judicial power upon the supreme court, but also because we accept and recognize the institution's authority to declare the rule. When the institution loses legitimacy, however, we are less likely to accept its pronouncements as authoritative. Its rule making may be viewed as the whim of its members, to be ignored when convenient, rather than as a rule to be honored.<sup>12</sup>

Resort to stare decisis avoids the de-legitimization of arbitrary rulemaking by appealing to preexisting principles. We may analogize arbitrary decision making by a court to the concept of "checkerboard" statutes. "Checkerboard" laws are a kind of distributive justice. That is, instead of resolving political disagreements by watering down or strengthening a controversial provision, the legislature resolves the disagreement by distributing the burden or the benefit arbitrarily,

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11. H.L.A. Hart refers to the rules that establish legitimacy as "rules of recognition." H.L.A. HART, *THE CONCEPT OF LAW* 97-107 (1961). Under Hart's construct, the Montana Supreme Court has authority to say what the law is because a rule of recognition, the Montana Constitution, recognizes its power to do so. A rule of recognition notwithstanding, Hart recognizes, using a scoring official as an analogy, that at some point an official who is consistently incorrect will lose legitimacy with the players and fans. Then the game "is no longer cricket or baseball but 'scorer's discretion.'" *Id.* at 141. Henry Monaghan takes a slightly different, pragmatic view when writing about the role of stare decisis in the United States Supreme Court. In his view, there are some principles that are so well established that, if they were overruled, massive destabilization would follow that would threaten the functioning of government and the constitutional order. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 749-752 (1988).

12. The public's reaction to *Marshall v. State ex rel. Cooney*, 1999 MT 33, 293 Mont. 274, 975 P.2d 325, which I discuss in Section VI, and the Montana Bar's sense that the court lacks predictability because it overrules too many cases, are symptoms of lost legitimacy.

for example, making some activity illegal on odd-numbered days and legal on even-numbered days. Such laws "treat similar accidents or occasions . . . differently on arbitrary grounds."<sup>13</sup>

Checkerboard laws suffer from a lack of coherence or integrity. They are checkerboard because their checkeredness lacks an element of utility or function. Alternate-side-of-the-street parking rules, for example, would seem arbitrary and checkerboard, but for the fact that they have utility. Stated another way, checkerboard laws bear no rational relationship to the object they seek to achieve by their checkeredness (except for the object of trying to please both sides of an issue).

Using this analogy, we see that *stare decisis* reduces arbitrariness. A court avoids checkeredness when it treats accidents or occasions in the same manner as did the precedent that it follows.

Nevertheless, resort to lack of arbitrariness may be arbitrary when we preserve a precedent solely for the sake of *stare decisis*. In a case in which the precedent lacks utility and adherence to it denies justice, following the precedent simply because it is precedent grants *stare decisis* its own value independent of other utilitarian or justice values. We might call this "blind" adherence to precedent.

### *E. Separation of Powers.*

Finally, *stare decisis* is branch-respecting.<sup>14</sup> When a state appellate court interprets a statute and the legislature declines the opportunity to revise the statute in order to "reverse" the judiciary's interpretation, the court's interpretation should become part of the statute. When a later court overrules the earlier interpretation it acts more legislatively than judicially. If the judicial power is the power to decide disputes and to make binding orders,<sup>15</sup> then we must ask, what dispute is to be resolved by re-interpreting a statute that has previously received an authoritative interpretation? What, other than an appeal to policy, would warrant overruling the prior construction? *Stare decisis* counsels that the power to revise or

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13. RONALD DWORKIN, *LAW'S EMPIRE* 178-184 (1986).

14. It is a fundamental constitutional rule that the legislature, not the courts, makes policy. *Duck Inn, Inc. v. Mont. State Univ.-N.*, 285 Mont. 519, 523-24, 949 P.2d 1179, 1182 (1997).

15. *See State ex rel. Bennett v. Bonner*, 123 Mont. 414, 425, 214 P.2d 747, 753 (1950).

overrule a statute's construction ought to be left to the legislature, not to a second-guessing appellate court. This is particularly true when arguments for overruling are made on the same policy grounds raised or available in the earlier cases.

*F. Stare Decisis, the Value of Justice, and Their Relationship to Abstract, Personal Judgments.*

Before we leave this discussion of the virtues and failings of stare decisis, we should consider a question that is often raised: Should we adhere to stare decisis when precedent perpetuates injustice? Conversely, should we not readily overrule precedent to ensure justice? When a court overrules precedent only on the basis of its view of justice, has it acted in a principled manner or does its decision reflect a personalized judgment?

These questions are commonly raised by reference to *Plessy v. Ferguson*,<sup>16</sup> and *Brown v. Board of Education*.<sup>17</sup> *Plessy* held that separate railway car accommodations based on race were lawful, so long as the accommodations were equal.<sup>18</sup> *Brown* rejected *Plessy*'s separate but equal doctrine.<sup>19</sup>

It is very easy for us, living in the Twenty-First Century, to say that we "know" *Plessy* was unjust. If we know that *Plessy*'s rule was unjust, then we should conclude not only that it was proper to overrule *Plessy* in 1954, but also that the United States Supreme Court should have overruled *Plessy* before 1954. For our superior knowledge also means we know that *Plessy* was always unjust. Therefore, our conclusion that *Plessy* should have been overturned earlier than it was eventually reaches the year 1896, when *Plessy* was decided. We may conclude, then, that Justice Harlan's dissent should have been the majority opinion.<sup>20</sup>

But Harlan's was not the majority opinion, and we see therefore that any statements in the abstract about *Plessy*'s injustice fail to tell us why *Plessy* was properly overruled.

*Plessy* was decided by judges who had been, with the exception of the recently appointed Justice White, born before

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16. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

17. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

18. *Plessy*, 163 U.S. at 551-552.

19. *Brown*, 347 U.S. at 495.

20. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

1840. All would have been exposed to the physical anthropological findings of Dr. Samuel Morton and the neo-Darwinist theory of Harvard's Louis Agassiz. Morton's and Bean's studies on skull size and their conclusions that Africans had cranial capacities significantly smaller than Caucasians influenced educated people of the time. Agassiz, America's leading naturalist in the mid-Nineteenth Century, contended that Blacks and Whites were separate species.

The *Plessy* justices would not have known that Morton had manipulated his data. Agassiz had yet to be wrecked on Darwin's shore.<sup>21</sup> It should be no surprise then that *Plessy* tastes of the flavor of protection of the inferior being, all the while disclaiming equality of the races.<sup>22</sup>

We are able to say today that *Plessy* was unjust because "separate but equal" failed as a social experiment. Lacking Justice Harlan's foresight and lacking experience with the doctrine, we might not have said that in 1896. Had we been a member of the *Plessy* majority, we might well have believed that we were doing good. Operating on these conceptions, later we would have considered it an injustice to overrule *Plessy*. We would have laid down the "White Man's Burden" had we forced a so-called "less gifted" group to compete with white children in public schools, much less to expose them to the harm of sitting with white passengers on Louisiana's railroad trains.

By 1954, however, Nineteenth Century biological determinism had long been debunked and the era's theory of eugenics had been extinguished in the ovens of Central Europe. The data upon which these theories rested had been shown to have been manipulated.<sup>23</sup> Blacks were seen to have performed so well in the Second World War that military units had been desegregated—without the terrible results that would have been predicted in 1896.<sup>24</sup>

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21. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 74-104 (rev. ed. 1996).

22. *Plessy*, 163 U.S. at 544-545 (comparing establishment of special schools for Black children with the establishment of special schools for the poor or for girls).

23. Franklin P. Mall, *On Several Anatomical Characters of the Human Brain Said to Vary According to Race and Sex, with Especial Reference to the Weight of the Frontal Lobe*, 9 AM. J. OF ANATOMY 1, 7-12, 32 (1909) (concluding that Robert Bean's data on brain tissue had been affected by Bean's knowledge of the sources of each brain he measured).

24. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); see also Brief of Amicus Curiae Am. Veterans Comm. at 1-2, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Thurgood Marshall brilliantly saw the role of social science in this debate and employed it for his purposes.<sup>25</sup> Changes in circumstances and demonstrations by historical fact that separate was not equal led to the overruling of *Plessy*.<sup>26</sup> Thus we see that *Brown* overruled *Plessy* not because “separate but equal” was unjust, but because experience with the rule proved it to be unjust. This is the difference between the overturning of precedent for principled reasons and the overturning of precedent on the basis of abstract, personal judgment.

Judicial decision making that is premised on abstract or personal notions of justice or injustice departs from the rule of law. When personal notions of justice govern a dispute, the rule of law becomes the rule of judges. While applying personal notions of justice and injustice might have shortened *Plessy*'s harm, in the long run applying personal notions of justice and injustice result in personalized, not democratic, rules of law. Reasonable adherence to precedent preserves the rule of law by limiting the freedom of judges to decide cases. The rule of law and reasonable adherence to the precedents that interpret and elaborate on that law, over the long run, preserve liberty and foster justice.

### G. Conclusion.

All of these things said, it is proper for a court to depart from precedent on occasion, whether by distinguishing the new case or overruling the old case. Principles that arise from prior decisions occasionally need repair. This is true not because the later court thinks the earlier decision poorly reasoned (that is mere second-guessing), but because experience or change shows that the principle is either incomplete or flawed. This experience can be in the practical application of a rule. Change, by which I mean changes in society (including evolution of the law), may also show that a rule, once valid and practical, has lost its utility. As we shall see, although the Montana Supreme Court paid lip-service to the idea that earlier rules needed repair, the court rarely applied this idea in a principled way during the 1991-2000 decade.

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25. See *Brown*, 347 U.S. at 495 n.11 (noting social science studies of the effects of segregation on the development of Black children).

26. *Id.* at 492-493.

### III. METHODOLOGY

I employed two Westlaw search strings<sup>27</sup> that produced a citation list of over 170 Montana Supreme Court decisions, among which were nearly all, if not all, cases in which the court had overruled precedent during 1991-2000. This search string also produced cases in which the court did not overrule its precedents. A quick reading of the cases eliminated those. I conducted similar searches for 1891-1991.<sup>28</sup>

I repeated the same searches for eleven other states for the 1991-2000 period. I examined decisions from Delaware, Maine, New Hampshire, North Dakota, South Dakota, Rhode Island, Nevada, Vermont, and Wyoming. These states, like Montana, lack intermediate appellate courts. Out of curiosity, I ran the same searches for the Idaho and Washington Supreme Courts, as two other illustrative states in the region.

Once I had identified the Montana "overruling" decisions, I read each one. I sought and found patterns among the court's declarations that a precedent ought to be overruled. I discuss those patterns in Part VI of this article.

### IV. HISTORICAL AND STATE-BY-STATE COMPARISONS

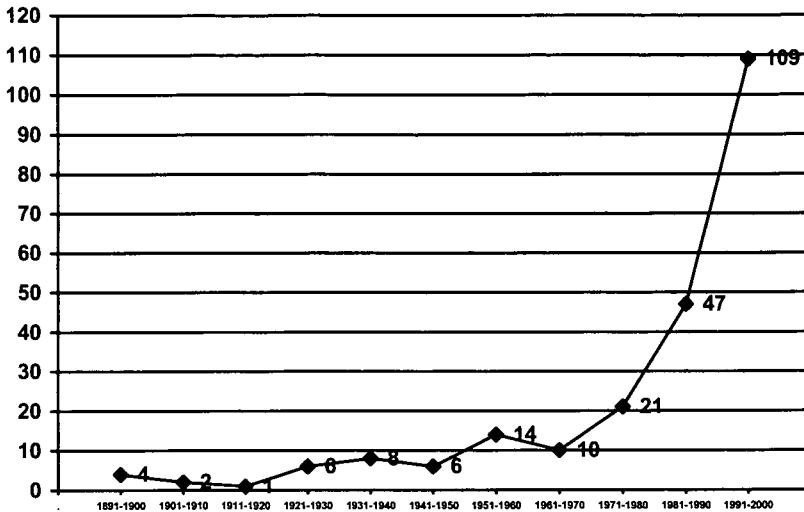
#### *A. Historical Comparison.*

The rate at which the Montana Supreme Court has overruled precedent increased substantially in recent decades. Figure 1 describes the change in the rate of overruling from 1891 to date:

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27. "IS OVERRULED" "WE OVERRULE" "ARE OVERRULED" OVERRULING ("TO THE EXTENT" +P (OVERRUL! REVERSI!)) & DA(AFT 12-31-1990). "WE EXPRESSLY OVERRULE" "ARE EXPRESSLY OVERRULED" "IS EXPRESSLY OVERRULED."

28. Because the court, in the demurrer and exception days, tended to declare that it or a lower court had overruled or reversed a demurrer, I added the limiter "% ((OVERRUL! REVERSI!) +4 (OBJECTION\* DEMURRER)) (MOTION +3 OVERRUL!)," to the first search string in order to reduce the volume of unrelated cases. To determine the effect of the limiter, I added it to the 1991-2000 search string and discovered that it eliminated only one case in which the court had overruled precedent.



**Figure 1. No. of cases overruling, by decade (Montana Supreme Court).**

Beginning in 1970, the court's rate of overruling precedent increased geometrically as it doubled, redoubled, and redoubled again during each succeeding decade.

The results give rise to one conclusion: the current court<sup>29</sup> has been the most active in Montana's history. It has been rewriting law at an unprecedented rate. The rate is reflected not only in the number of decisions that overruled precedent, but also in the number of past cases that were overturned. The 109 "overruling" decisions<sup>30</sup> invalidated 249 cases.<sup>31</sup>

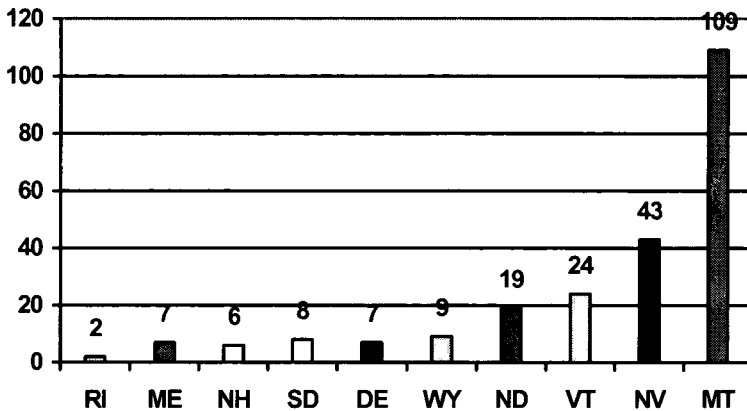
29. It is fair to call this the current court. Four members of the current court sat in 2000. A fifth member, Justice Cotter, elected in 2001, defended the court's overruling practice at public meetings during the election.

30. The decisions, and the cases that they overruled, are collected in the Appendix.

31. The total may exceed 249. In 1997, the court began including catch-all phrases when it overruled precedent. In *State v. Lawrence*, 285 Mont. 140, 161, 948 P.2d 186, 199 (1997) (overruling *State v. McSloy*, 127 Mont. 265, 261 P.2d 663 (1953)), for example, the court stated: "Our research does not reveal any cases citing *McSloy* for the particular position here advanced by Appellant, but if any exist, they too are overruled to the extent they are inconsistent with Rule 613(b)." See *Dobrocke v. City of Columbia Falls*, 2000 MT 179, ¶ 47, 300 Mont. 348, ¶ 47, 8 P.3d 71, ¶ 47 (overruling two cases "and any other cases" that hold that notice of a defect is required before a landowner has a duty of care), overruled by *Roberts v. Nickey*, 2002 MT 37, 308 Mont. 335, 43 P.3d 263; *State v. Lane*, 1998 MT 76, ¶ 41, 288 Mont. 286, ¶ 41, 957 P.2d 9, ¶ 41 (overruling four reported decisions "and any other Montana case that has held that the written judgment and

*B. State-by-State Comparison.*

Viewing the historical rate in isolation does not tell us much about its relevance. Perhaps a high rate of overruling was normal for late-Twentieth Century appellate courts. Accordingly I measured the frequency with which supreme courts overruled precedent in states that, like Montana, lack intermediate appellate courts. Figure 2 displays the frequency of overruling for the period 1991-2000 in ten states (including Montana) that lack intermediate appellate courts.



**Figure 2. No. of cases overruling, by state (1991-2000).**

As Figure 2 illustrates, the rate of overruling in Montana exceeded the rates of these other states, not by a few cases, but by multiples of up to seventeen (if we overlook Rhode Island). To place these findings in a different perspective, the rate at which Vermont was overruling its precedent generated a *Vermont Bar Journal* article criticizing the practice.<sup>32</sup> Yet the Vermont Supreme Court had overruled only thirty-nine cases over the course of sixteen years.

These data give rise to a second observation: the Montana Supreme Court has been the most active among similar state supreme courts.

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commitment is the valid, final judgment.”). We cannot fault the court for lack of thoroughness.

32. Paul S. Gillies, *Overruling*, 23 VT. B.J. & L. DIG. 12 (1997). Gillies criticized the Vermont Supreme Court for overruling its prior decisions in 39 cases since 1980.

These two observations tell us only that the Montana Supreme Court overrules precedent more frequently than it once did, and that it overrules precedent more frequently than similar state supreme courts. This may, however, be the result of circumstances unique to Montana and beyond the control of the court. I now examine that question.

## V. FIVE HYPOTHESES

During the 1999-2000 election cycle, the court's frequency of overruling was a topic of discussion.<sup>33</sup> Some criticized the court's practice; others defended or justified it. Each justification suggested that some circumstance, beyond the court's control, explained the frequency with which it overruled precedent. Those who explained the court's practice offered five arguments: (1) the court is overruling more cases because its case load has increased; (2) the court is overruling more cases because there is a greater body of case law today than there has been in the past (I call this the "so many cases, so little time" justification); (3) the court is not overruling any more cases than have past courts—instead the court is simply being honest in doing expressly what past courts did impliedly or *sub rosa*;<sup>34</sup> (4) the court is doing nothing more than correcting conflicts between cases;<sup>35</sup> (5) the court's actions are a result of the 1972 Constitution.<sup>36</sup> We may treat each explanation as a testable hypothesis. In the following sections, I test each hypothesis to determine if it explains the results we observed above.<sup>37</sup>

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33. See Jeff Renz, *The Quiet Revolution in the Montana Supreme Court*, GREAT FALLS TRIBUNE, February 13, 2000, at 8A.

34. This hypothesis was offered by former Associate Justice Trieweiler, while a candidate for Chief Justice.

35. This defense was offered by Associate Justice Cotter and Associate Justice Leaphart, who were candidates for Associate Justice during the 2000 and 2002 elections, respectively. See Bob Anez, *Primary Will Cut Court Race from Four to Two*, HELENA INDEPENDENT RECORD, May 24, 2000, available at <http://www.helenair.com/articles/2000/05/24/stories/helena/c1a.txt>.

36. This claim has been made by several justices. SeeCarolynn Bright, *Candidate Face-off*, HELENA INDEPENDENT RECORD, Oct. 29, 2002, available at <http://www.helenair.com/articles/2002/10/29/stories/montana/1a5.txt> (Justice William Leaphart).

37. No defender of the court's practice has argued that a high rate of overruling was necessary to correct older biases of a "pro-Anaconda Copper Company Court," for example, or that the high rate of overruling was explained by other valid reasons for overruling precedent.

*Hypothesis 1: "The Court's Case Load is Much Larger."*

This hypothesis assumes that a higher rate of overruling correlates to a higher case load. Put simply, if a court that issues 100 decisions per year overrules precedent in two of those decisions, then a court that issues 200 decisions is likely to overrule precedent in four of its decisions. This theory sounds reasonable. Statistical analysis, however, does not support this explanation for the Montana Supreme Court's practice.

The National Center for State Courts maintains statistics on new case filings for all state supreme courts.<sup>38</sup> The new case filings for Montana and nine other states are set forth in Table 1.

MONTANA .....	6124
NORTH DAKOTA .....	3818
DELAWARE .....	5414
RHODE ISLAND.....	4319
MAINE.....	7689
SOUTH DAKOTA.....	3829
NEVADA.....	15339
VERMONT.....	5896
NEW HAMPSHIRE.....	8271
WYOMING.....	3426

**Table 1. New Case Filings During 1991-2000.<sup>39</sup>**

During 1991-2000, two states had case loads similar to Montana's. Montana had 6124 new filings, Vermont had 5896 new filings, and New Hampshire had 8271. The Vermont Supreme Court overruled precedent in twenty-four decisions during 1991-2000. The New Hampshire Supreme Court issued eight decisions that overturned past precedent during the same decade. In contrast, Montana overruled precedent in 109 cases. Similar case loads in these states did not lead to a similar high frequency of overruling.

When we reduce each state's frequency of overruling to a rate of overruling per 1000 new filings, we generate this set of results:

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38. NATIONAL COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS: THE STATE OF THE ART 176-178, tbl.13 (2001).

39. *Id.*

MONTANA .....	17.8
NORTH DAKOTA .....	4.98
DELAWARE .....	1.29
RHODE ISLAND.....	0.46
MAINE .....	0.91
SOUTH DAKOTA.....	2.09
NEVADA.....	2.8
VERMONT.....	4.07
NEW HAMPSHIRE.....	0.73
WYOMING.....	2.63

**Table 2. Number of cases overruling precedent, per 1000 new filings (1991-2000).**

These two comparisons demonstrate that case load does not explain the frequency of overruling in Montana.<sup>40</sup> Case load correlates to frequency of overruling in nine state supreme courts. When Montana's data are included, however, this statistical relationship disappears.

Although Montana's data dampens the statistical inference that there is a relationship between case load and frequency of overruling among state courts, this observation merely compares the Montana Supreme Court with nine other state supreme courts. It is possible that the Montana Supreme Court has historically overruled more frequently than other state courts and that growth in the case load is the sole or primary

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40. The frequency of overruling should vary among states. It is therefore possible that normal variation explains Montana's data. We can test this with the correlation coefficient (Pearson's *r*) between caseload and overruling decisions, omitting and including Montana's totals. The correlation coefficient measures the consistency with which one set of data changes as a second set of data changes. A correlation coefficient of +1 would show perfect correlation. A coefficient of 0 shows no correlation. A correlation coefficient of -1 demonstrates an inverse correlation (as A goes up, B goes down). In this case, we want to measure the strength of the correlation between case filings and rates of overruling. When Montana's data are omitted, the correlation coefficient between case filing and number of overruling cases is .73 ( $R^2 = .54$ ). This demonstrates high correlation between caseload and the rate at which the supreme courts in these nine states overruled precedent. That is, as case filings increased, the number of cases overruling precedent tended to increase. When we add Montana's data to those of the other nine states, however, the correlation coefficient drops to .25 ( $R^2 = .06$ ). This demonstrates little relationship between caseload and number of cases overruling precedent. More important, Montana's numbers are so skewed, they demonstrably reduce the strength of the relationship that we observed when Montana's numbers were omitted.

explanation for the rate at which it overruled cases in the 1990s.

We test this hypothesis by looking at the rate at which the court overruled prior decisions, compared to its historic case load.<sup>41</sup> This is the result:

Decade	Rate per 1000 case load
1891-1900	3.5
1901-1910	1.3
1911-1920	0.7
1921-1930	2.7
1931-1940	6.0
1941-1950	7.0
1951-1960	13.1
1961-1970	7.3
1971-1980	8.6
1981-1990	13.1
1991-2000	23.5 <sup>42</sup>

**Table 3. Rate of overruling per 1000 cases, by decade (Montana Supreme Court, 1891-2000).**

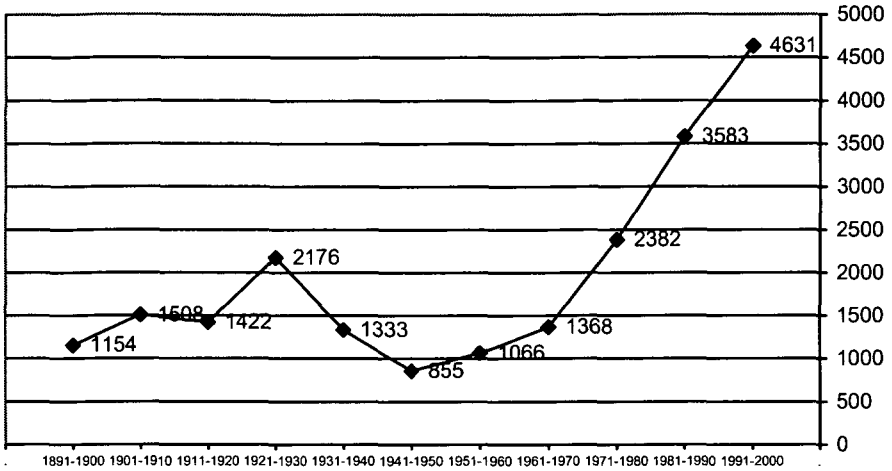
The mean rate for 1891-2000 is 7.9 cases per 1000. The mean rate for 1891-1990 is 6.4 cases per 1000. Employing the mean rate during 1891-1990, we would predict that the court would have overruled decisions in thirty cases (which is still quite high when compared to the other nine states), not 109 cases, during the 1991-2000 decade.<sup>43</sup> This result tells us that

41. Note that the rate for 1991-2000 differs from that shown in Table 2. Because statistics for new case filings were not readily available for earlier decades, I have employed a measure of caseload that is different from the measure that I used to compare state courts. Here I have estimated the caseload by employing the total number of opinions issued by the Montana Supreme Court and reported on Westlaw during each decade.

42. During the 1990s, the Montana Supreme Court issued more unreported orders and "non-cite" opinions than it had in the past. I have not included these in the total caseload for any decade because the court deliberately treated them as non-precedential.

43. If we base the expected value on a regression analysis—that is, if we extrapolate the past rate of growth, the expected value for 1991-2000 is 53.3 cases, half of what we observed during this period.

case load does not explain the 1991-2000 rate.<sup>44</sup>



**Figure 3. Total reported decisions, by decade (Montana Supreme Court, 1891-2000).**

Consider one more obvious measure. The court's case load increased roughly linearly since 1941.<sup>45</sup> No decade saw a case load increase greater than seventy-four percent over the preceding decade. The mean rate of increase was forty-one percent during this period. The 1991-2000 case load increased by twenty-nine percent over the preceding decade, marking a return to 1941-1970 case load growth rates.

The rate of overruling, in comparison, has more than doubled each decade since 1970.<sup>46</sup> This is one more indicator that case load does not explain the court's work during 1991-

44. One final statistical tool tests the historical caseload hypothesis. The *Spearman Rank Correlation Coefficient* (Spearman's *r*) compares the rankings of two sets of scores. The 1991-2000 data point lies more than two standard deviations from the mean. Because the 1991-2000 data-point is an outlier, a rank correlation is more appropriate than Pearson's *r*. See LOTHAR SACHS, *APPLIED STATISTICS: A HANDBOOK OF TECHNIQUES* 395 (2d ed. 1984); MICHAEL O. FINKELSTEIN, *STATISTICS FOR LAWYERS* 348 (2d ed. 2001). Spearman's *r* ignores the actual number of cases, except to rank them. We may think of this test in this way: If the rank of the total case load for every decade was the same as the rank for the total cases overruling for the same decade, then we would have a perfect correlation. In that instance Spearman's *r* would be 1.0. Spearman's *r* for 1891-2000 is 0.46, which indicates poor rank correlation. (The 10% significance level is .549.) In other words, the ranking of the caseload had little connection to the ranking for the number of overruling cases.

45. See Figure 3.

46. See *supra* Figure 1.

2000.

Testing therefore compels us to reject the case load hypothesis. No test confirms the hypothesis that the court's rate of overruling is explained by the court's case load. Each test refutes the hypothesis. We must therefore look to the next hypothesis on our list.

*Hypothesis 2: "So Many Cases, So Little Time!"*

The second theory assumes that, because of the passage of time, there is more outdated and conflicting precedent languishing in the reports and therefore more precedent to overrule. Put differently, cases decided at the end of the Nineteenth Century would have less application to disputes that arose at the end of the Twentieth.

The data do not bear out this theory. The appellate courts of Delaware, New Hampshire, Maine, and Vermont were deciding appeals before Lewis and Clark came to the Great Falls of the Missouri. Yet their rates of overruling fail to approach that of the Montana Supreme Court.<sup>47</sup>

*Hypothesis 3: "The Current Court has More Integrity."*

The third explanation, that the current court is more intellectually honest because it does expressly what past courts have done impliedly or quietly, is not borne out by data. In fact, the opposite is true. During 1991-2000, the Montana Supreme Court was more active in impliedly overruling cases than were past courts.

In order to test this hypothesis, I pulled from Westlaw a list of every case decided by the Montana Supreme Court since 1889. I relied on Westlaw's *KeyCite* service to determine which among those cases had been "red-flagged."<sup>48</sup> I eliminated from the list those cases I had previously identified as having been expressly overruled. I reviewed Westlaw's history of the remaining red-flagged cases to identify those which were arguably impliedly or

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47. See *supra* Table 2.

48. Westlaw employs red and yellow flags to warn practitioners when a case lacks precedential effect or when the case's precedential effect has been questioned in some way. For example, a case that has been overruled or reversed or whose opinion has been vacated, among other things, will be red-flagged. A case that has been, among other things, distinguished by any court anywhere will be yellow-flagged.

tacitly overruled.

The resulting set included cases in which a later case “abrogated,” “limited,” “disagreed with,” “declined to follow,” “disapproved,” “rejected,” “abandoned,” “departed from,” “repudiated,” “refused to follow,” or “criticized” the questioned case, or in which a later case “recognized” that one of the foregoing had occurred with respect to the questioned case. I did not include cases in which the later case recognized that the questioned holding had been superseded by a statute, rule, or constitutional provision. I also did not include cases that had been distinguished.<sup>49</sup> I examined those cases that “abrogated, *et cetera*” earlier cases to determine what had been done. When a later case “recognized” an earlier adverse action, I read that later case to determine which case had “taken” the adverse action. For convenience, I will refer to these as “tacit” overrulings.

The results are set out in Table 4:

Decade	No. of cases tacitly overruling	No. of cases tacitly overruled
1891-1900	2	2
1901-1910	7	7
1911-1920	2	2
1921-1930	5	5
1931-1940	8	8
1941-1950	7	7
1951-1960	4	4
1961-1970	9	9
1971-1980	7	8
1981-1990	21	32
1991-2000	33	69

**Table 4. Cases Tacitly Overruling Precedent, by Decade (1891-2000).**

The hypothesis that the current court does expressly what prior Montana Supreme Courts did tacitly is not supported by

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49. A case that is repeatedly distinguished loses precedential value. I did not include such cases in the first set unless later cases “recognized” that repeatedly distinguished cases had been abrogated, limited, *et cetera*.

the data. In fact, the data shows that the current court was as active in tacitly overruling precedent as it was in expressly overruling past decisions. Moreover, the current court swept with a wide broom, overruling an average of two cases with every decision that tacitly overruled precedent.

The numbers for the 1991-2000 period are lower now than they will be. Later courts may recognize that the Montana Supreme Court of the 1990s tacitly overruled additional decisions. So we must reject the intellectual honesty theory.

*Hypothesis 4: "Too Many Decisions are in Conflict."*

The next justification for overruling argues that the court is merely doing its job by reconciling conflicting precedent. To determine if this explains the court's behavior, I read each of the 109 cases in order to identify the court's grounds for overruling. The results of my examination do not confirm this hypothesis. Of the 109 decisions expressly overruling precedent in the 1991-2000 decade, only sixteen resolved conflicts between or among prior decisions or lines of decision.<sup>50</sup> I should note, however, that in eighteen additional cases the court purported to resolve conflicts between precedents.<sup>51</sup> These, however, were cases that would normally have been distinguished on their facts or distinguished by changes in the language of the statute at issue. In those eighteen, a simple explanation as to why the earlier cases are distinguishable would have sufficed. The conflict hypothesis does not fully explain the court's action. I will elaborate further on this below, when I examine the court's decisions.

*Hypothesis 5: "Blame the Constitution! Full Speed Ahead!"*

The final explanation is that the adoption of the 1972 Constitution so altered the legal landscape that dozens of prior decisions became obsolete. My reading of the cases shows that this is not so. The hypothesis is readily destroyed by two observations. Of the 109 decisions, one dozen decided an issue of constitutional law. Only two suggested that the 1972 Constitution compelled the court's action.<sup>52</sup>

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50. See *infra* Part VI(A)(1).

51. See *infra* Table 5.

52. *Marshall v. State ex rel. Cooney*, 1999 MT 33, 293 Mont. 274, 975 P.2d 325; *Town*

I conclude that the frequency with which the Montana Supreme Court overruled precedent was extraordinary and that it cannot be explained by factors beyond the court's control. Nevertheless that is only half of the question. The court's decisions may not be explained by external factors, but they may still be reasonable. To test this, we must turn to the cases themselves.

## VI. THE COURT'S ARTICULATED REASONS FOR OVERRULING

The Montana Supreme Court overruled precedent in 109 cases during 1991-2000. This number describes only magnitude when we compare it with the frequency of overruling by other state courts and with the historical practice of the Montana Supreme Court. The number does not explain why the court overruled precedent in 109 cases. If the court overruled precedent in 109 cases because overruling was necessary, that tells us something about the state of the law. Then we may conclude that the law may have been stable, but that it was riddled with conflicting precedents and antiquated rules. On the other hand, if the court has been overruling precedent without good reason, that tells us something about the court.

To answer these questions I read each Montana Supreme Court opinion that overruled precedent with the following categories and questions in mind:

- What was the nature of the case? That is, was it a criminal case, a personal injury case, or another kind of proceeding?
- Who would benefit in the future from the change in the court's direction? My review of the cases generated these categories:

- (1) parties opposing the exercise of government civil power were favored or disfavored;
- (2) criminal defendants were favored or disfavored;
- (3) shareholder dissenters were favored or disfavored;
- (4) plaintiffs in workers compensation, personal injury, civil rights, or employment cases were favored or disfavored;
- (5) easement challengers were favored or disfavored;
- (6) spouses seeking property in dissolution proceedings

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*Pump, Inc. v. Bd. of Adjustment*, 1998 MT 294, 292 Mont. 6, 971 P.2d 349. I discuss *Marshall* below. The 1972 Montana Constitution has had a profound effect on Montana's jurisprudence. It just does not show up in those cases in which the court expressly overruled precedent.

- were favored or disfavored;
- (7) natural or non-custodial natural parents were favored or disfavored;
  - (8) children in child protection and similar cases were favored or disfavored;
  - (9) tenants in landlord-tenant disputes were favored or disfavored; and
  - (10) accused contemnors were favored or disfavored.

I tally these results below.<sup>53</sup>

• What was the issue before the court? If the nature of the case was "Personal Injury" and the answer to the second question was "Personal Injury Plaintiff Favored," the case could nevertheless encompass such issues as common law negligence, civil procedure, or statutory interpretation. I identified fifteen issues (the number in parentheses represents the number of cases in which they appear):

- statutory construction (48);
- constitutional law (12);
- criminal procedure (12);
- torts (10);
- evidence (7);
- civil procedure (5);
- jurisdiction (4);
- standard of appellate review (4);
- marital property (2);
- property (2);
- administrative law (2);
- taxation, contracts, appellate procedure, and standards of proof (1 each).<sup>54</sup>

• What were the majority's grounds for overruling? Most grounds were articulated by the court. When the grounds were not articulated I gleaned them from the opinion. While some readers may disagree with my categorization of a given case, I believe the patterns that I set forth here are accurate. My analysis revealed seven general categories:

- (1) The court perceived a conflict between lines of cases but the conflict was in fact nonexistent. These cases are those in which most courts distinguish rather than overrule the precedent.

53. See *infra* Table 6.

54. These total 112, not 109, because some cases addressed more than one issue.

- (2) There was an actual conflict between prior decisions or between lines of authority.
- (3) The court decided that a prior decision or prior line of cases was wrong or that another rule was better. These holdings were often justified by the court's manifest error doctrine<sup>55</sup>—its declaration that the prior decisions were "manifestly wrong."<sup>56</sup>
- (4) The court overruled a prior decision or prior decisions even though it did not have to, because either an act of the legislature or changes wrought by the 1972 Constitution had superseded the prior line of authority.
- (5) The development of the law called into question the utility or soundness of the overruled line of cases.
- (6) Experience with the rule or the development of society called into question the utility of the overruled line of cases.
- (7) The court overruled precedent, but overruling was not necessary to the resolution of issues raised by the case.

Here are the total number of decisions, by category, for 1991-2000:

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55. See discussion *infra* Section VII. It is inaccurate to call the manifest error doctrine a "doctrine." If there were an objective test to distinguish among decisions that were correct, in error, or manifestly in error, then we might call the manifest error claim a doctrine. All we can say now, however, is that an opinion is manifestly in error when a majority of justices say that it is.

56. See *Beckman v. Butte-Silver Bow County*, 2000 MT 112, ¶ 20, 299 Mont. 389, ¶ 20, 1 P.3d 348, ¶ 20; *State v. Gatts*, 279 Mont. 42, 51, 928 P.2d 114, 119 (1996); *Haugen v. Blaine Bank of Mont.*, 279 Mont. 1, 9, 926 P.2d 1364, 1368-1369 (1996); *State v. Long*, 216 Mont. 65, 73, 700 P.2d 153, 158 (1985) (Weber, J., concurring); *Formicove, Inc. v. Burlington N., Inc.*, 207 Mont. 189, 194-195, 673 P.2d 469, 472 (1983).

Reason	No. of Decisions
Another rule is better or the existing rule is wrong	47
Actual conflict between prior decisions	16
Perceived (but non-existent) conflict with another line of decisions	18
Development of law calls into question validity of past holding(s)	14
Experience has shown the rule to be unworkable or invalid	9
Legislature / new constitution has superseded the earlier case	4
Overruling is superfluous to the resolution of future cases	2

**Table 5. Reasons for Overruling (1991-2000).<sup>57</sup>**

Next, did the court favor any group of litigants? The decisions revealed this pattern:

Nature of Outcome	No. of Decisions
Pers. Injury/Workers' Comp./Civil Rights/Employee Pls. Favored	36
Pers. Injury/Workers' Comp./Civil Rights/Employee Pls. Disfavored	5
Pers. Injury/Workers' Comp./Civil Rights/Employee Pls. Neutral	1
Criminal Defendants Favored	21
Criminal Defendants Disfavored	14
Criminal Defendants Neutral	3
Government Opponent Favored	2
Government Opponent Disfavored	5
Spouse Seeking Marital Property Favored	5
Spouse Seeking Marital Property Disfavored	2
Spouse Seeking Marital Property Neutral	1
Easement Challenger Favored	2
Easement Challenger Disfavored	1
Easement Challenger Neutral	1

**Table 6. Five Categories of Cases (1991-2000).<sup>58</sup>**

57. The total is 100 because *State v. Lawrence* overruled two sets of cases for unrelated propositions and for different reasons. 285 Mont. 140, 159, 161, 948 P.2d 186, 198-99 (1997) (holding that claimed lapse of memory is an inconsistent statement that may be impeached, and overruling *McSloy* because *McSloy* was based on a now-repealed statute that was replaced by the Montana Rules of Evidence).

58. The results for the remaining categories of litigants were not statistically significant. ( $N \leq 2$ .)

### A. *Valid Reasons for Overruling.*

Some of the Montana Supreme Court's grounds for overruling are valid. Some are not. Occasionally a conflict arises between precedents or lines of precedent. The two may clash in a given case before the court. The outcome of the case may necessarily extinguish one line of authority. This circumstance will compel the court to overrule one set of authorities.

Past holdings can become obsolete in several ways. Society may evolve into forms that render the old rule meaningless, unworkable, or unjust. The passage of time may prove the fallacy of the underlying principle or the reliability of the facts on which the old rule was based.<sup>59</sup> The law evolves. New duties may accrue in the law and new immunities may arise as new facts call for new solutions. Development of the law may render "the old rule no more than a remnant of abandoned doctrine."<sup>60</sup> Finally, a rule that read well on paper may, once put into practice, prove unworkable or specious. These are valid reasons to overrule precedent. The Montana Supreme Court has had valid reasons for overruling precedent, although in a minority of the cases in which it has acted. I now consider them.

#### 1. *Actual Conflict Between Prior Decisions.*

Conflicts between past decisions or between lines of authority may arise in several ways. Occasionally it is the fault of attorneys who fail to advise the court of existing authority. As a result, the court may decide a case in a way that conflicts with that authority. This frequently happens in cases in which one party lacks counsel. The Montana Supreme Court was presented with that situation in *State v. Docken*.<sup>61</sup> Before *Docken*, the court had held in an earlier case<sup>62</sup> that when a suspended sentence was revoked and a second suspended sentence imposed, the second sentence could not be extended beyond the term of the first. Some years later, the court decided

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58. The results for the remaining categories of litigants were not statistically significant. ( $N \leq 2$ .)

59. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Lochner v. New York*, 198 U.S. 45 (1905)).

60. *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992).

61. 274 Mont. 296, 908 P.2d 213 (1995) (overruling *State v. Downing*, 181 Mont. 242, 593 P.2d 43 (1979)).

62. *State v. Downing*, 181 Mont. 242, 593 P.2d 43 (1979).

*Speldrich v. McCormick*,<sup>63</sup> which addressed the same issue. Speldrich was a prisoner appearing pro se and was not the best attorney. Neither he, nor the Assistant Attorney General opposing him, called *Downing* to the court's attention. As a result, *Speldrich*, although addressing the same kind of facts presented in *Downing*, reached the opposite conclusion. *Docken* resolved the conflict by overruling *Downing* and applying *Speldrich*.<sup>64</sup>

Perceived conflicts between decisions will commonly arise as the result of dictum in one of the decisions. In those instances the court can resolve the conflict without overruling the case by noting that the conflicting language is dictum. For example, *Downing v. Grover*<sup>65</sup> stated, in dictum, that a prescriptive easement could be proven by a preponderance of the evidence.<sup>66</sup> An earlier decision, *Kostbade v. Metier*, had addressed the standard of proof directly. The case held that a prescriptive easement must be shown by clear and convincing evidence.<sup>67</sup> *Kostbade* had not been considered by either of the parties in *Downing* or by the author of the *Downing* opinion, since the standard of proof was not at issue. As night follows day, however, the warring parties in *Wareing v. Schreckendgust*<sup>68</sup> each pointed to the standard that favored their argument. The court relied upon the earlier precedent and overruled *Downing*. This was unnecessary, as the court could simply have pointed out that the *Downing* language was dictum and was therefore not precedent.

Authorities not in conflict in earlier cases will clash when the facts of a particular case bring two principles into opposition. Such was the case in *Hilands Golf Club v. Ashmore*.<sup>69</sup> The Hilands Golf Club had sought judicial review of an adverse decision by the Montana Human Rights Commission. It served

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63. 243 Mont. 238, 794 P.2d 339 (1990).

64. *Docken*, 274 Mont. at 302-303, 908 P.2d at 216. The Montana Defender Project, which I directed, represented *Docken* in this appeal.

65. 237 Mont. 172, 772 P.2d 850 (1989).

66. *Downing*, 237 Mont. at 175, 772 P.2d at 852. I wonder where *Downing* found the standard. The opinion cites to *Grimley v. Estate of Spencer*, 206 Mont. 184, 670 P.2d 85 (1983), an action over the prescriptive use of water. *Grimley's* only reference to "preponderance" is actually a reference to the standard of review applied to the trial court's findings in an equity case. 206 Mont. at 201, 670 P.2d at 94.

67. *Kostbade v. Metier*, 150 Mont. 139, 143, 432 P.2d 382, 385 (1967).

68. 280 Mont. 196, 930 P.2d 37 (1996).

69. 277 Mont. 324, 922 P.2d 469 (1996).

a copy of its petition upon Ashmore by mail. Ashmore, relying upon an earlier administrative law decision,<sup>70</sup> pointed out that a petition for judicial review was a new proceeding. Therefore, the petitioner was required to serve the petition and summons on the opposing party in person in order to perfect its appeal. Hilands pointed to precedent that arose in the course of a Montana Administrative Procedure Act appeal, which had held that mail service, sans summons, would suffice. It also noted that another decision<sup>71</sup> had approved mail service. The court, relying in good part on the principle that we ought to keep things simple so long as a party is not prejudiced, overruled *Fife*, and approved service by mail.<sup>72</sup>

Conflicts between lines of authority do arise. In some of these and in other cases, the court acted properly to resolve the conflicts by overruling earlier decisions. The next significant area is that of the obsolete rule.

## *2. The Development of the Law Calls into Question the Validity of the Past Holding or Experience has Shown the Rule to be Unworkable or Invalid.*

Because Montana is one of fifty state jurisdictions, our common law does not develop in isolation. Frequently, and more frequently in the 1990s, the court looked beyond the state line and considered what was taking place elsewhere. The decisions of federal courts of appeals and of state appellate courts often informed the court that a line of Montana authority was questionable. This category is illustrated by *Busta v. Columbus Hospital Corporation*<sup>73</sup> and *Pierce v. ALSC Architects, P.S.*<sup>74</sup>

In *Busta*, the court surveyed the evolution of proximate cause in Montana, noting that foreseeability had crept into the definition of proximate cause, mainly by way of the court's intervening cause jurisprudence. Looking outside the state, the

70. *Fife v. Martin*, 261 Mont. 471, 863 P.2d 403 (1993).

71. *MCI Telecomms. Corp. v. Dept of Pub. Serv. Regulation*, 260 Mont. 175, 179, 858 P.2d 364, 367 (1993).

72. *Hilands*, 277 Mont. at 331, 922 P.2d at 473.

73. 276 Mont. 342, 916 P.2d 122 (1996) (overruling *Kitchen Krafters, Inc. v. Eastside Bank of Mont.*, 242 Mont. 155, 789 P.2d 567 (1990)).

74. 270 Mont. 97, 890 P.2d 1254 (1995) (overruling *Harrington v. LaBelle's of Colo., Inc.*, 235 Mont. 80, 765 P.2d 732 (1988), *Olson v. Kayser*, 161 Mont. 241, 505 P.2d 394 (1973), *Hannifin v. Cahill-Mooney Constr. Co.*, 159 Mont. 413, 498 P.2d 1214 (1972), and *Ulmen v. Schwieger*, 92 Mont. 331, 12 P.2d 856 (1932)).

court also observed that Montana was not alone in this error,<sup>75</sup> nor in recognizing that foreseeability has no role in proximate cause. Thus, the court properly overruled the line of cases that imported foreseeability into proximate cause.

*Pierce* addressed the accepted work defense.<sup>76</sup> The accepted work defense provides that a contractor is relieved of liability for its negligent construction, etc., when the work is accepted by the owner. Responsibility for a later injury caused by negligent construction then falls upon the owner. The accepted work doctrine had been approved, but not applied, in the 1932 case of *Ulmen v. Schweiger*.<sup>77</sup> Since then, it had been applied in Montana. The modern rule, now applied in the majority of state jurisdictions, provides that a contractor remains liable after the work has been accepted, when injury to a third party from the contractor's negligence is foreseeable.<sup>78</sup> *Pierce* adopted the modern rule, overruling *Ulmen* and its progeny.

The conclusion that a rule is unworkable is related to a conclusion that the rule is obsolete, but only in the sense that, in the second instance, the old rule, once practical, no longer fits. When a rule is adopted and the court later recognizes that it simply does not work in practice, the court properly discards it. But, unlike the obsolescence cases, the court may discard the rule without relying on the decisions of other jurisdictions. For example, *Leary v. Kelly Pipe Co.*<sup>79</sup> addressed the question of peremptory challenges to prospective jurors. *Leary* held that a party must show actual prejudice when he objects to a grant of additional peremptory challenges to a co-party who he believes is adverse to him. But how, unless you examine a juror's innermost thoughts, do you prove actual prejudice by the

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75. Foreseeability has a role in negligence. It helps determine whether the defendant owed a duty to the plaintiff. When a reasonable person could foresee that his act or omission might injure another or his property, the law imposes a duty to refrain from the act or omission. Foreseeability does not tell us whether the act or omission of the defendant was a proximate cause of injury. One can cause injury when the injury would not be foreseeable.

76. 270 Mont. at 107-108, 916 P.2d at 1260 (addressing question of whether the defendant could raise the accepted work defense).

77. 92 Mont. 331, 12 P.2d 856 (1932).

78. See Emmanuel S. Tison, *Modern Status of Rules Regarding Tort Liability of Building or Construction Contractor for Injury or Damage to Third Person Occurring after Completion and Acceptance of Work; "Foreseeability" or "Modern" Rule*, 75 A.L.R.5th 413 (2000).

79. 169 Mont. 511, 549 P.2d 813 (1976).

exclusion of that potential juror? The court considered that question in *King v. Special Resource Management, Inc.*,<sup>80</sup> and noted that it had previously criticized the rule.<sup>81</sup> The actual prejudice rule proved unworkable, therefore, the court overruled *Leary*.

The Montana Supreme Court does overrule prior authority for the right reasons. This occurred, however, in a minority of the 109 cases listed in the Appendix. More commonly, the court overruled precedent when it had no need to or when it merely wished to.

### *B. Invalid Reasons for Overruling.*

Unlike the preceding examples, the court's overruling practice is overwhelmingly premised on invalid reasons. In some cases the court perceives a conflict with a line of authority when the conflict is ethereal. The court also overrules superfluously when the act of overruling is not necessary to the result. Finally, the largest category is that in which the court believes the old rule is wrong or a new rule is better. Many of these cases are premised upon a doctrine of manifest error.

#### *1. Perceived, but, in Fact, Nonexistent Conflict with Another Line of Authority.*

We discover an interesting example of overruling cases unnecessarily in the "CI-75" case, *Marshall v. State ex rel. Cooney*.<sup>82</sup> Constitutional Initiative 75 proposed referring most taxes and many fees, and most increases in taxes and fees, to voters at the election immediately following their enactment by the local or state legislative body.<sup>83</sup> Montana voters approved CI-75 in the 1998 general election. Its opponents immediately challenged the initiative in court. The opponents contended that CI-75 violated the single amendment rule of article XIV, section 11, of the Montana Constitution, and this issue formed the heart of the *Marshall* dispute. Section 11 provided that if "more than

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80. 256 Mont. 367, 846 P.2d 1038 (1993).

81. 256 Mont. at 372, 846 P.2d at 1041 (citing *Hunsaker v. Bozeman Deaconess Found.*, 179 Mont. 305, 588 P.2d 493 (1978)).

82. 1999 MT 33, 293 Mont. 274, 975 P.2d 325.

83. MONT. CONST. art. VII, § 17 (amended 1998). The text may be found in Appendix A to the State of Montana's Response to the Original Application for Declaratory Judgment and Injunctive Relief in *Marshall*.

one amendment is submitted at the same election," then each amendment must be prepared so as to be "voted on separately."<sup>84</sup>

In three cases decided between 1906 and 1924,<sup>85</sup> the court had addressed a substantially similar single amendment rule<sup>86</sup> in different contexts. Suffice it to say that *Teague*, *Hay*, and *Cooney* concluded that a constitutional amendment, referred to the voters, that incidentally affected other parts of the constitution did not violate the single amendment rule. CI-75's supporters pointed to *Teague* and its successors and argued that the court had interpreted the 1889 Constitution's version of the single subject rule as permitting the survival of CI-75.

In *Marshall*, the court observed that CI-75 differed significantly from the constitutional amendments considered in *Teague*, *Hay*, and *Cooney*.<sup>87</sup> Unlike the provisions at issue in *Teague*, *Hay*, and *Cooney*, the court concluded that CI-75 expressly amended at least three separate provisions of the Montana Constitution.<sup>88</sup> This meant that *Marshall* was readily distinguishable from the earlier three cases and the court duly noted this.<sup>89</sup>

Instead of overruling the three cases, the court could have distinguished them. After all, they were perfectly good law for the proposition for which they stood. Nevertheless the court overruled them, "to the extent that" they were "in conflict" with the holding in *Marshall*.<sup>90</sup> The opinion does not discuss why the court did not distinguish the three cases instead of overruling them.

*Marshall* ignited a firestorm of criticism directed at the court and several of its justices. For years following the

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84. MONT. CONST. art. XIV, § 11.

85. *State ex rel. Teague v. Bd. of Comm'rs*, 34 Mont. 426, 87 P. 450 (1906); *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 P. 210 (1914); *State ex rel. Corry v. Cooney*, 70 Mont. 355, 225 P. 1007 (1924).

86. MONT. CONST. art. XIX, § 9 (1889) (amended 1970).

87. *Marshall*, ¶ 23.

88. *Id.* ¶¶ 20, 28 (Nelson, J., concurring). The Initiative created a new provision that referred to the state or local electorate most new taxes and many fees or increases in taxes and fees. It also expressly amended that provision of the constitution that denied the Governor the power to veto referenda by granting the Governor power to veto tax increases that were referred to the people for approval. MONT. CONST. art. VI, § 10(1). The third amendment expressly repealed the legislative and other immunity from suit provisions of article II, section 18, in cases where public officials violated the provisions of the initiative.

89. *Marshall*, ¶ 18.

90. *Id.* ¶ 23.

*Marshall* decision, an advertisement for the Montana Conservatives carried on radio stations across Montana pointed out that the court had gone out of its way to overrule 100 years of precedent to reach the result that it desired. The desired result, according to the Montana Conservatives, was to defeat the will of the people.

As a result of *Marshall*, the court lost much of its legitimacy with many Montana citizens. It is true that CI-75's supporters may have criticized the court had *Marshall* distinguished rather than overruled *Teague* and its friends. But they could not have accurately claimed that the court went out of its way to strike down CI-75 by overruling a line of authority.

*Marshall* was not the only case of its kind. Unlike Great Britain, Montana enjoys the well established principle that the court should not emphasize one piece of evidence over another in a jury trial.<sup>91</sup> One way of emphasizing testimony is by sending a transcript or an audible recording into the jury room. The principle does not apply to non-testimonial evidence, such as a surveillance tape. A surveillance tape, even though it may contain statements by a defendant or by a witness, is not evidence of testimony, but it is evidence of a transaction. Therefore, it is allowed in the jury room as the court held in the 1987 case of *State v. Morse*.<sup>92</sup>

In a later decision, *State v. Bales*,<sup>93</sup> a negligent homicide case, the prosecutor offered an audio tape of a police officer's interrogation of the defendant. On the tape, the defendant says that he had a couple of beers and that he "killed his girlfriend." The tape was admitted and went into the jury room. Bales contended that the tape was testimonial and that it should not have gone into the jury room as a piece of evidence. The State pointed to *Morse*, which was inapposite, to support its position. Even though *Morse* was distinguishable and was good law for its proposition, the court overruled it "to the extent that" it conflicted with the court's evidentiary decision.<sup>94</sup> Oddly, following these gymnastics, the court concluded that sending the interrogation tape to the jury room was harmless error and affirmed the conviction. This makes this case eligible not only for the perceived conflict category, but also for the next

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91. *State v. Harris*, 247 Mont. 405, 416-18, 808 P.2d 453, 459-60 (1991).

92. 229 Mont. 222, 232-33, 746 P.2d 108, 114-15 (1987).

93. 1999 MT 334, 297 Mont. 402, 994 P.2d 17.

94. *Id.* ¶ 22.

category—superfluous overruling.

*2. Overruling, While Otherwise Reasonable, Appears to Be Superfluous to the Resolution of Future Cases or to the Issue Before the Court.*

The court occasionally identifies peculiarities in the opinions of earlier decisions in the course of surveying the law applicable to the issue at hand. These quirks, whether they are apparent or potential conflicts between or among statements in earlier cases, appear to make the court, or at least a majority of the panel, uneasy. The court has addressed these quirks by overruling one or more prior decisions. In these cases overruling was not necessary to the outcome of the issue before the court. Here are some examples:

In *State v. Helfrich*,<sup>95</sup> the court held unconstitutional the “criminal defamation” statute.<sup>96</sup> This means, of course, that the statute could not be enforced. Why, then, would the court overrule the holding in *Griffin v. Opinion Publishing Co.*,<sup>97</sup> which stated that truth is an affirmative defense to the charge of criminal defamation and that “good faith” and “justifiable ends” also constitute affirmative defenses that must be proven by the defendant? If the statute is void and no longer enforceable, then it should not matter whether good faith is an affirmative defense that must be proven by the defendant or whether absence of good faith is an element to be proved by the state.

A superfluous overruling occurred in *Bush v. Montana Department of Justice*,<sup>98</sup> which established the prerequisites for the giving of a breath alcohol or blood alcohol test under Montana’s implied consent laws. The implied consent statute<sup>99</sup> required that an officer have “reasonable grounds to believe” that a motorist was driving under the influence, among other things, and that the motorist be under arrest for DUI before the officer could demand a breath sample. The court tangled with

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95. 277 Mont. 452, 922 P.2d 1159 (1996).

96. MONT. CODE ANN. § 45-8-212 (1995).

97. 114 Mont. 502, 138 P.2d 580 (1943).

98. 1998 MT 270, 291 Mont. 359, 968 P.2d 716 (overruling *McCullugh v. State*, 259 Mont. 406, 856 P.2d 958 (1993), *Boland v. State*, 242 Mont. 520, 792 P.2d 1 (1990), *Gebhardt v. State*, 238 Mont. 90, 775 P.2d 1261 (1989), and *Suspension of Driver's License of Blake*, 220 Mont. 27, 712 P.2d 1338 (1986)).

99. MONT. CODE ANN. § 61-8-402 (1997).

two lines of cases. One line equated “reasonable grounds to believe” with a probable cause standard.<sup>100</sup> The other line equated it with the lesser “particularized suspicion” standard.<sup>101</sup> The court adopted the particularized suspicion standard and overruled those cases that required probable cause. Nevertheless it went on to note that the implied consent statute also required that the motorist be under arrest before a breath sample could be demanded. The prerequisite for arrest is . . . probable cause! The court thus held that probable cause is a prerequisite to demanding a breath sample.<sup>102</sup>

These overrulings were superfluous. In *Helfrich*, the statute having been struck down, the question of the burden of proof was not material to the decision. The *Helfrich* holding will give succor to a future lawyer seeking support for a claim that the plaintiff bears the burden of proving absence of good faith in a civil libel action. The reasonable suspicion/probable cause issue continues to give the court difficulty in other areas, and *Bush* adds unnecessarily to the confusion. Perhaps some future panel will overrule these cases “to the extent that . . . .”

### 3. Cases Overruled Unnecessarily Because the Legislature or the 1972 Constitution Has “Overruled” the Earlier Case.

Some defenders of the court have suggested that the adoption of the 1972 Constitution explains the high rate of overruling cases.<sup>103</sup> We now come directly to that claim. The court has overruled precedent because of changes in written law, but only in five cases.<sup>104</sup> Of these five, only two involved a change between the 1889 and 1972 Constitutions.<sup>105</sup>

If the legislature or the Constitutional Convention has rewritten the law, why is it necessary to overrule a case that interpreted the now repealed or amended provision? The

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100. See *Bush*, ¶ 9.

101. *Id.*

102. *Id.* ¶ 22. Probable cause after *Bush* is also a prerequisite to the other subdivisions of Montana Code Annotated section 61-8-402.

103. See *supra* text pp. 61-62.

104. See *Marshall v. State ex rel. Cooney*, 1999 MT 33, 293 Mont. 274, 975 P.2d 325; *Town Pump, Inc. v. Bd. of Adjustment*, 1998 MT 294, 292 Mont. 6, 971 P.2d 349; *State v. Lawrence*, 285 Mont. 140, 948 P.2d 186 (1997); *State v. Kuntz*, 265 Mont. 253, 875 P.2d 1034 (1994); *Talley v. Flathead Valley Cmty. Coll.*, 259 Mont. 479, 857 P.2d 701 (1993).

105. *Marshall*, 1999 MT 33, 293 Mont. 274, 975 P.2d 325; *Town Pump, Inc.*, 1998 MT 294, 292 Mont. 6, 971 P.2d 349 (1998) (overruling *State v. Haswell*, 147 Mont. 492, 414 P.2d 652 (1966)).

legislature has done the overruling for us. The situation then calls for nothing more than to point out that the law has changed. The precedent remains good authority for the former legislative act—the former act simply is no longer in effect.

For example, *Teamsters v. Cascade County School District No. 1*<sup>106</sup> construed the Code's definition of "school teacher" to include teachers in the higher education system. Two decades later, in *Talley v. Flathead Valley Community College*,<sup>107</sup> a community college instructor, relying on *Teamsters*, claimed that he had been tenured under the rules governing school teachers. The College quickly pointed out the fact that the higher education code had been amended. Community college instructors were now expressly included under the new code, and not under any common law, primary, or secondary school definition of teacher. The College was right, but the court found it necessary to overrule *Teamsters*.<sup>108</sup> The mischief will appear if the legislature later amends the statute to return to the *Teamsters* definition of "teacher."

#### 4. *The Old Rule Was Wrong or a New Rule Is Better.*

Most frequently, the Montana Supreme Court panel of the 1990s disagreed with a holding of one of its predecessors. This practice is the greatest source of instability in the court's jurisprudence. The court ratcheted a rule one way, then another, sometimes seemingly to fit the facts or the result. In doing so, it invited mischief beyond instability—the kind of mischief that comes from an untried rule. One such case is *State v. Lane*.<sup>109</sup>

When a defendant is sentenced for a crime, the sentence is audibly pronounced from the bench and is then reduced to writing. Occasionally the sentencing judge would omit a provision from the sentence and call the defendant back into court to correct the omission. Defendants objected to this

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106. 162 Mont. 277, 511 P.2d 339 (1973).

107. 259 Mont. 479, 857 P.2d 701 (1993).

108. *Talley*, 259 Mont. at 485, 857 P.2d at 704 (failing to explain why overruling was necessary when the legislature had already done it).

109. *State v. Lane*, 1998 MT 76, 288 Mont. 286, 957 P.2d 9 (overruling *State v. Graveley*, 275 Mont. 519, 915 P.2d 184 (1996), *State v. Mason*, 253 Mont. 419, 833 P.2d 1058 (1992), *State v. Wirtala*, 231 Mont. 264, 752 P.2d 177 (1988), and *State v. Enfinger*, 222 Mont. 438, 722 P.2d 1170 (1986)).

process on double jeopardy grounds when the second sentence was more severe, claiming that the judge could not increase a sentence once it had been imposed.

A mixture of conflicting statements in the Code was one source of confusion over the judge's power. According to the Code, a "sentence" is a judicial disposition of a criminal case following conviction.<sup>110</sup> A "judgment," however, is the court's adjudication of guilt and the sentence pronounced by the court.<sup>111</sup> The Code then declares that a sentence must be rendered in open court<sup>112</sup> and the defendant must be present when this is done.<sup>113</sup> In other words, the sentence is typically audible. Although the Code demands a judgment be rendered in open court,<sup>114</sup> the Code also demands that the judgment be signed and entered on the record.<sup>115</sup> As a result, the judgment, which sets out the adjudication of guilt and sets forth the sentence, is both audible and written.

In *Enfinger*, the defendant complained on appeal because the district court orally sentenced him, then called him back and imposed a more severe sentence.<sup>116</sup> The court held that *Enfinger's* sentence was not final until it was filed, that is, until it was reduced to writing.<sup>117</sup> The court noted that this rule was "well-established."<sup>118</sup> Because the sentence was not final, defendants were not put twice in jeopardy by the second imposition of sentence. *Wirtala* and *Mason* were decided on similar facts and followed *Enfinger*.<sup>119</sup>

*Graveley*<sup>120</sup> presented different facts. At his sentencing hearing, Graveley was sentenced to serve forty years in the custody of the Department of Corrections. The lower court orally declared that ten of those years were to be spent "in a

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110. MONT. CODE ANN. § 46-1-202(25) (1999).

111. *Id.* § 46-1-202(10).

112. MONT. CODE ANN. § 46-18-115 (1999).

113. MONT. CODE ANN. §§ 46-16-121(1) to -123 (1999).

114. MONT. CODE ANN. § 46-18-102(1) (1999). It seems the legislature conflated "judgment" with "sentence" in this provision.

115. MONT. CODE ANN. § 46-18-116 (1999).

116. *Enfinger*, 222 Mont. at 444, 722 P.2d at 1174.

117. *Enfinger*, 222 Mont. at 444, 722 P.2d at 1174.

118. *Enfinger*, 222 Mont. at 444, 722 P.2d at 1174 (quoting *State v. Diaz*, 673 P.2d 501, 502 (N.M. 1983)).

119. *Wirtala*, 231 Mont. at 270, 752 P.2d at 181; *Mason*, 253 Mont. at 425, 833 P.2d at 1061-62.

120. 275 Mont. 519, 915 P.2d 184 (1996).

prison environment."<sup>121</sup> The sentence was imposed in open court and the defendant was hauled off to the State Prison. After his arrival he discovered that the sentence recited in his written judgment provided that he would be committed to the custody of the Department of Corrections for a period of forty years, omitting the ten-year "prison environment" condition. He complained, thinking apparently that under the oral pronouncement he would spend only ten years in prison. He contended that the more severe sentence could not be imposed without returning him to open court. The court concluded, however, that the difference favored the defendant (he could spend less than ten years in a prison environment) and affirmed the lower court. Justice Leaphart dissented, contending that the instant the defendant was removed from the court room he began serving the oral sentence.<sup>122</sup> Anything imposed later put the defendant twice in jeopardy.<sup>123</sup>

*Lane*<sup>124</sup> completed the possible combinations of written and oral sentences. In *Lane's* case, the oral sentence was pronounced in open court in the presence of the defendant. The written sentence, however, turned out to be much more favorable to him. One year after the written sentence had been signed, the sentencing judge entered a nunc pro tunc order that conformed the written judgment to the more severe, audible, version.<sup>125</sup> *Lane*, who had a dozen years of precedent on his side, not surprisingly argued that the first written judgment was final and could not be altered. Not so, said the court. The sentence imposed in open court now "controls" because the defendant has a right to be present when sentence is imposed.<sup>126</sup> *Enfinger*, *Wirtala*, *Mason*, and *Graveley* were overruled.<sup>127</sup>

One thing binds all five cases: the criminal defendant came up on the short end each time. In each, the rule was adopted, tweaked, or overruled, preserving a sentence that fell more heavily on the appealing defendant. This was not purposeful, but you cannot persuade these prisoners that the decisions were

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121. *Graveley*, 275 Mont. at 522, 915 P.2d at 186.

122. *Graveley*, 275 Mont. at 526, 915 P.2d at 189.

123. *Graveley*, 275 Mont. at 526, 915 P.2d at 189.

124. 1998 MT 76, 288 Mont. 286, 957 P.2d 9.

125. *Id.* ¶ 10.

126. *Id.* ¶ 48.

127. *Id.* ¶¶ 40, 41.

not designed to keep them in prison longer.

When the court attempted to craft the “right” rule—without asking whether the old rule was working well—it created new mischief. *Enfinger*, *Wirtala*, and *Mason* did not conflict with *Lane*. The court premised the *Lane* result on the defendant’s right of confrontation, that is, his right to be present at his sentencing. Remember, in all three of the prior cases, the defendant was returned to court for imposition of the corrected oral sentence. *Lane* reopens the question that *Enfinger*, *Wirtala*, and *Mason* had answered affirmatively. Can a district judge recall a defendant on the same day and, in open court, orally “correct” an oral sentence?

Other mischief followed. Formerly the judgment was final when “signed and entered on the record.”<sup>128</sup> In his concurring opinion, Justice Nelson pointed out that the court’s holding in *Lane* left the time of finality up in the air.<sup>129</sup> *Lane*, as a result, occasioned amendments to Montana Rule of Appellate Procedure 5(b), and to Montana Code Annotated section 46-18-116. Rule 5(b) specifically referenced the entry of judgment referred to in Montana Code Annotated section 46-18-116, and treated notices of appeal filed between the time of the oral pronouncement of sentence and the entry of judgment as having been filed on the day judgment was entered. The court revised Rule 5(b) to provide that the time for filing a notice of appeal ran from the entry of the written judgment. The legislature corrected the damage to section 46-18-117 by repealing it and amending section 46-18-116.<sup>130</sup> Section 46-18-116 now provides that a written sentence that differs from the oral may be corrected on request filed within 120 days of the filing of the written judgment.<sup>131</sup> It also provides, however, that the court may correct a “factually erroneous sentence or judgment at any time.”<sup>132</sup> We do not know yet whether a “factually erroneous” sentence is one that differs from what the sentencing judge intended.

In this same category (“*The Old Rule Was Wrong or a New Rule Is Better*”) the court has a habit of ignoring a fundamental

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128. MONT. CODE ANN. § 46-18-116 (1999). See MONT. R. APP. P. 5(b) (1999) (providing that an appeal must be taken within sixty days of entry of judgment).

129. *Lane*, ¶ 59.

130. 2001 Mont. Laws 321.

131. MONT. CODE ANN. § 46-18-116(2) (2001).

132. *Id.* § 46-18-116(3).

principle: that the legislature's acquiescence in a supreme court's interpretation of a statute is presumptive evidence of the correctness of the construction.<sup>133</sup> One of the purposes of statutory construction is to create certainty in the law.<sup>134</sup> It is the antithesis of stability when an appellate court adopts one construction of a statute and a later panel, merely by exercising greater wisdom than the first, adopts an opposite construction. Such an approach is not branch-respecting. *State v. Strizich*<sup>135</sup> illustrates the problem.

Anyone who has practiced in the criminal law arena knows the difference between a motion and order to suppress, and a motion and order in limine. An order to suppress addresses a claim that the state's officers obtained physical evidence or a defendant's statement by violating the law. An order in limine, in contrast, is a pretrial order that typically applies the rules of evidence and determines the admissibility of legally obtained evidence.

In Montana, the legislature has limited the state's ability to appeal the results of criminal cases.<sup>136</sup> Among other things, the state may appeal from "any court order" "suppressing evidence"<sup>137</sup> or "suppressing a confession or admission."<sup>138</sup> Such appeals are taken before trial—that is, before jeopardy attaches to the defendant.

In *State v. Carney*,<sup>139</sup> the court held that rulings on the admissibility of evidence, made during trial, could not be appealed by the State. Jeopardy had attached, and permitting the state to appeal an evidentiary ruling would expose the defendant to multiple trials—prohibited by double jeopardy clauses of the Montana and United States Constitutions. In *State v. Yarns* and *State v. T.W.*, the court concluded that double jeopardy was not a concern when evidentiary rulings were made

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133. *State v. Snider*, 168 Mont. 220, 226, 541 P.2d 1204, 1208 (1975); *State ex rel. Roeder v. State Bd. of Equalization*, 133 Mont. 393, 400, 324 P.2d 1057, 1061 (1958); 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 49.10 (6th ed. 2000).

134. Quentin Johnstone, *An Evaluation of the Rules of Statutory Construction*, 3 U. KAN. L. REV. 1, 8-9 (1954).

135. *State v. Strizich*, 286 Mont. 1, 952 P.2d 1365 (1997) (overruling *State v. Yarns*, 252 Mont. 45, 826 P.2d 543 (1992), and *State v. T.W.*, 220 Mont. 280, 715 P.2d 428 (1986)).

136. MONT. CODE ANN. § 46-20-103 (2001).

137. *Id.* § 46-20-103(2)(e).

138. *Id.* § 46-20-103(2)(f).

139. 219 Mont. 412, 714 P.2d 532 (1986).

in the context of a pretrial order granting or denying a motion in limine. In such cases the order was a pre-trial order and jeopardy had not attached because the appeal was filed before the trial. Like a pretrial order suppressing evidence on constitutional grounds, an appeal from the order was permitted by Montana Code Annotated section 46-20-103(2)(e), the statute that speaks of appeals from orders "suppressing" evidence.

In 1991, five years after *T.W.*, the legislature overhauled Title 46, the criminal procedure code.<sup>140</sup> It left Montana Code Annotated section 46-20-103(2)(e) unchanged, leading to the conclusion that the legislature approved the court's interpretation of the statute. The following year *Yarns* approved *T.W.*<sup>141</sup>

In *Strizich*, the defendant asked the court to reconsider its holdings in *T.W.* and *Yarns*. *Strizich* presented a minor twist. In *Strizich* the State had appealed from City Court to the District Court after the City Court had issued an adverse order governing the admissibility of evidence. All such appeals result in a trial de novo in the district court.

Notably, nothing was called to the *Strizich* Court's attention that was not available to the *T.W.* and *Yarns* panels. The court looked at decisions from other jurisdictions that distinguished suppression orders from orders in limine. It considered policy claims that speculated that permitting appeals of pretrial orders in limine, "would require that this court micro-manage the discretionary functions of trial courts"<sup>142</sup> and "would allow the State to avoid justice court or city court jurisdiction altogether anytime it decides it would be tactically advantageous to do so."<sup>143</sup> It concluded, "that certainly was not the intent of the Legislature when it authorized appeals based on the 'suppression of evidence.'"<sup>144</sup> *T.W.* and *Yarns* are overruled.

By the time *Strizich* was decided, the construction of the statute had been settled for over a decade. The *Strizich* Court was not presented with evidence or information that demonstrated that the expanded rule had in fact compelled the court to "micro-manage." No one had called to the court's attention an abuse of the expanded power to appeal. The court observed that the prosecution might avoid city or justice court jurisdiction

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140. 1991 Mont. Laws 3011.

141. *Yarns*, 252 Mont. at 50, 862 P.2d at 546.

142. *Strizich*, 286 Mont. at 10, 952 P.2d at 1371.

143. *Strizich*, 286 Mont. at 10, 952 P.2d at 1371.

144. *Strizich*, 286 Mont. at 10, 952 P.2d at 1371.

when it was tactically advantageous to do so. However, despite ten years' experience with the rule, the court did not conclude that prosecutors had regularly avoided city or justice court jurisdiction by that device, even though they may have done so in *Strizich*. In any event, the court's concern about prosecutors avoiding city or justice court jurisdiction was equally applicable to motions to suppress, filing of which was required before trial.<sup>145</sup> A pretrial motion in limine, in contrast, is not required to preserve the admissibility issue.<sup>146</sup> In many cases a defendant could defeat the prosecution's expanded power to appeal simply by raising the evidentiary objection during trial, after jeopardy had attached.

The flavor of *Strizich* pervades nearly all of the court's "*The Old Rule Was Wrong or a New Rule Is Better*" jurisprudence and much of its overruling jurisprudence. On reading *Strizich*, we realize that the court feels free to second-guess its predecessors. As it did in *Strizich*, the court has repeatedly ignored the legislature's acquiescence in long-standing statutory construction, seemingly substituting its wisdom for the wisdom of earlier Montana Supreme Courts and for the wisdom of members of dozens of legislative sessions.

*Rasmussen v. Lee*<sup>147</sup> offers another example. For over fifty years, Montana Code Annotated section 70-27-108(2) and its R.C.M. predecessor permitted an agricultural tenant to holdover for an additional year when the landlord did not demand possession within sixty days after expiration of the lease term.<sup>148</sup> The *Hamilton-Holliday* line of cases interpreted and applied this provision to holdovers without regard to whether the termination was for non-payment of rent or for other reasons.<sup>149</sup>

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145. See MONT. CODE ANN. § 46-13-101(1) (1997).

146. See MONT. R. EVID. 103(a)(1); *State v. Fuhrman*, 278 Mont. 396, 402-403, 925 P.2d 1162, 1165 (1996), *overruled on other grounds* by *State v. Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (holding that a motion in limine may be used to preserve evidentiary issue without objection at trial).

147. *Rasmussen v. Lee*, 276 Mont. 84, 916 P.2d 98 (1996) (overruling *Holliday Land & Livestock Co. v. Pierce*, 174 Mont. 393, 571 P.2d 93 (1977), *Pipkin v. Connolly*, 167 Mont. 284, 538 P.2d 347 (1975), *Miller v. Meredith*, 149 Mont. 125, 423 P.2d 595 (1967), *Kenfield v. Curry*, 145 Mont. 174, 399 P.2d 999 (1965), *Enott v. Hinkle*, 140 Mont. 206, 369 P.2d 413 (1962), and *Hamilton v. Rock*, 121 Mont. 245, 191 P.2d 663 (1948)).

148. MONT. CODE ANN. § 70-27-108(2) (1996); MONT. REV. CODE ANN. § 93-9703 (1947).

149. *Holliday*, 174 Mont. at 396, 571 P.2d at 95; *Pipkin*, 167 Mont. at 290, 538 P.2d at 349-350; *Miller*, 149 Mont. at 129, 423 P.2d at 597; *Kenfield*, 145 Mont. at 178, 399 P.2d at 1002; *Enott*, 140 Mont. at 209, 369 P.2d at 415; *Hamilton*, 121 Mont. at 248, 191 P.2d

Nevertheless, in *Rasmussen*, the court reinterpreted the statute, despite a half-century of legislative acquiescence in the interpretation, and held that this provision applies only where the termination is for non-payment of rent.

The goal of stability in the law was fostered by the *Hamilton–Holliday* line of cases. For fifty years, tenants and landlords knew what their respective rights and interests were upon termination of the lease. Agricultural leases could be written in reliance upon a settled interpretation of the statute. *Rasmussen* put existing leases in jeopardy. If that was not enough, *Rasmussen* was distinguishable on its facts from its predecessors.

*Lane*, *Strizich*, and *Rasmussen* illustrate several points. In each of these cases, as in all forty-seven decisions in which the court discarded a rule it did not like, the court second-guessed the analysis or reasoning of those who had gone before it and reached a different conclusion. In each case the rule had been long established. Additionally, the rule appeared to be working well. Finally, in those cases that questioned the correctness of the original statutory interpretation, the legislature had acquiesced in the statutory interpretation.

This last point cannot be emphasized enough. Of the court's 109 decisions overruling precedent, forty-eight involved questions of statutory interpretation or the application of a statute that had been resolved by the Montana Supreme Court in the past.<sup>150</sup> At some point, and especially where the legislature did not act to overrule the court's interpretation, parties are entitled to rely upon the court's statutory construction. When a court does not honor a settled construction simply because it disagrees with it, it defeats predictability. Businesses cannot feel confident in their business decisions. Lawyers cannot give reliable advice. Individuals cannot act secure in the belief that their actions comply with the law. After all, the law's interpretation may change next week.

The court often rationalized its action by describing the earlier decision as "manifestly wrong." In the following section, I discuss the problem with the court's "manifest error" principle. The problem is that there is no manifest error principle.

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at 665.

150. See *supra* p. 63.

## VII. MANIFEST ERROR?

When the court has concluded that an earlier decision was wrong or that another rule is better, it has frequently claimed that overruling was proper because the prior decision was "manifestly wrong."<sup>151</sup> A review of the decisions in this area reveal that the court's manifest error jurisprudence was not premised upon a principle that it consistently applied.

Nevertheless when we examine the opinions that form the foundation of the court's asserted basis for its power to overrule prior decisions that are "manifestly wrong," a principle emerges. It is not, however, employed by today's court. We begin with *State ex rel. Peery v. District Court*,<sup>152</sup> to which the current court has pointed as its authority for overruling a decision that is manifestly wrong. *Peery* addressed the question of whether *stare decisis* directs the court's interpretation of a constitutional provision when the court is satisfied that the interpretation was "manifestly wrong."<sup>153</sup> *Peery* relied upon statements from earlier Montana Supreme Court decisions that said the same thing: "The rule of *stare decisis* will not prevail where it is demonstrably made to appear that the construction placed upon the constitutional provision in the former decision is manifestly wrong."<sup>154</sup> This, of course, is no principle at all. It is, rather, a self-interested grant of power, a lesser degree of *l'état, c'est moi*. Among the cases that *Peery* cites, only *State ex rel. Sparling* applied this statement in a manner that explains it.

*State ex rel. Sparling* and *State ex rel. Kain* considered two statutes adopted to address the Great Depression.<sup>155</sup> The legislature had sought to grant relief to distressed landowners who, by reason of drought and the economic times, were unable to pay their property taxes. *Kain* applied an earlier decision, *Sanderson v. Bateman*,<sup>156</sup> which had struck down a similar law in 1927.<sup>157</sup> The *Sanderson* case addressed a 1923 legislative act

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151. See *supra* notes 55-56 and accompanying text.

152. 145 Mont. 287, 400 P.2d 648 (1965).

153. *Peery*, 145 Mont. at 310, 400 P.2d at 660.

154. *State ex rel. Sparling v. Hitsman*, 99 Mont. 521, 525, 44 P.2d 747, 749 (1935). See also *State ex rel. Kain v. Fischl*, 94 Mont. 92, 97, 20 P.2d 1057, 1059 (1933) (per curiam).

155. 1933 Mont. Laws 61; 1935 Mont. Laws 133.

156. 78 Mont. 235, 253 P. 1100 (1927).

157. Because of drought and the post-World War I crash in grain prices, the Depression savaged Montana years before it began in the rest of the country. See JOSEPH KINSEY HOWARD, MONTANA: HIGH, WIDE, AND HANDSOME 218-224 (1943).

that permitted delinquent property tax payers to redeem their property from the county by paying the past due taxes plus seven percent, even if interest on the past due taxes exceeded seven percent. The court applied a constitutional provision that prohibited the legislature from transferring or extinguishing obligations or liabilities to the state or local governments<sup>158</sup> and struck down the law. In *Kain*, the court concluded that the 1933 redemption act was practically indistinguishable from the 1923 version. It applied the rule of stare decisis and voided the 1933 act on the same grounds as *Sanderson*.<sup>159</sup> The *Sparling* Court, two years later, considered a yet more generous version of the 1933 law that permitted the landowner to tender the past due taxes, without payment of any interest or penalties.<sup>160</sup> The *Sparling* Court, however, recognized the breadth and depth of the emergency and concluded that it was not bound by stare decisis.<sup>161</sup> The court overruled *Kain* and *Sanderson* on “manifest error” grounds—concluding that interest and penalties were not the obligations and liabilities to which the constitution referred.

The *Sparling* Court noted the rule that stare decisis should apply unless “it is demonstrably made to appear that the [earlier] construction . . . is manifestly wrong.”<sup>162</sup> The *Kain* Court had observed that a constitutional interpretation at issue in the case should stand, absent “cogent reasons to the contrary.”<sup>163</sup> In other words, the “manifest error” doctrine should be applied conservatively. Under the *Sparling/Kain* principle, a later appellate court’s view that an earlier court’s interpretation contained an error, even an apparent error, should not result in overruling in the absence of other, cogent reasons.

The court went on to describe cogent reasons to overrule *Kain* and *Sanderson*.<sup>164</sup> Its description of these reasons adds to this conservative view of manifest error. Remember, the *Sparling* Court concluded that interest and penalties were not the obligations and liabilities the constitution referred to,

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158. MONT. CONST. art. V, § 39 (1889).

159. *Kain*, 94 Mont. at 97, 20 P.2d at 1059.

160. 99 Mont. at 523, 44 P.2d at 748; 1935 Mont. Laws 133.

161. *Sparling*, 99 Mont. at 525-26, 44 P.2d at 749.

162. *Sparling*, 99 Mont. at 525, 44 P.2d at 749 (citing *Kain*, 94 Mont. at 97, 20 P.2d at 1059).

163. *Kain*, 94 Mont. at 97, 20 P.2d at 1059.

164. *Sparling*, 99 Mont. at 527-30, 44 P.2d at 750-751.

contrary to *Kain* and *Bateman*.<sup>165</sup>

In the course of addressing its departure, the court noted that the precedents did not “relate to titles or involve vested rights, and do not establish rules of trade, property, or contract, etc.”<sup>166</sup> Overruling the precedents would therefore not alter rules upon which people had relied and would not affect vested rights. Second, the court observed that the development of the law had called into question the validity of *Sanderson* and *Kain*. Other states had altered their own precedents with respect to similar statutes or had reached different conclusions.<sup>167</sup> With respect to *Sanderson*’s and *Kain*’s definition of “penalty,” the court noted disagreements in other Montana cases.<sup>168</sup> Finally, the court observed that an emergency had been “established.”<sup>169</sup> The court concluded that these were cogent reasons to overrule the prior decisions.

This highlights the difference between the “manifest error” doctrine employed by the Montana Supreme Court today and the doctrine upon which the court purports to draw. The current doctrine suffers from the mark of *Kain*. Today’s doctrine is best described as error that is manifest whenever a majority of the court says it is. The source of the doctrine is different. The original “manifest error” doctrine recognized that, although an earlier opinion may have contained errors of reasoning or analysis, and a later court may recognize an error, that is not necessarily a reason for the later court to overrule the prior case. Prudence is called for. If the “erroneous” rule is of the kind that people rely upon in the conduct of their affairs, then it especially should not be altered absent “cogent reasons.”<sup>170</sup> If development of the law, changes in society, or changes in the context in which the rule operated call into question the validity of the old rule, it may be overruled.

It is reasonable to conclude that the court need not be convinced that the rule is outdated or questionable. If the rule was in error in the beginning, the court could overrule it more freely, provided it or a similar rule had been questioned by other

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165. *Sparling*, 99 Mont. at 530, 44 P.2d at 751.

166. *Sparling*, 99 Mont. at 525, 44 P.2d at 749.

167. *Sparling*, 99 Mont. at 526, 44 P.2d at 749.

168. *Sparling*, 99 Mont. at 528, 44 P.2d at 750.

169. *Sparling*, 99 Mont. at 526, 44 P.2d at 750 (noting, however, that an emergency alone would not warrant overruling precedent).

170. *Kain*, 94 Mont. at 97, 20 P.2d at 1059.

jurisdictions or so long as experience suggested it was less functional than first thought. These should not be theoretical observations, like the kind we see in *Strizich*, but practical determinations made on information in the briefs, or, if necessary, on the basis of information provided in a friend of the court brief.

### VIII. TOWARD A PRINCIPLED APPROACH TO STARE DECISIS

The current Montana Supreme Court lacks a consistent approach to stare decisis. The court overrules cases unnecessarily, injuring the legitimacy of the institution. The court overrules cases when it dislikes long established rules, rules of recent vintage, or when it disagrees with the thinking of its predecessors. This fosters instability in the law. The court should adopt a more principled and conservative approach.

We must consider another matter. To some degree, albeit not consciously, the Montana Supreme Court has followed a civil law model.<sup>171</sup> In those cases categorized as "*The Old Rule was Wrong or the New Rule is Better*," the court has considered either a Restatement,<sup>172</sup> another common law rule,<sup>173</sup> a statute that has codified the common law,<sup>174</sup> a statute that has replaced the common law,<sup>175</sup> or it has applied a statute differently than did a prior court.<sup>176</sup> In these cases, the court appears to apply the

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171. This realization is not far-fetched. In 1931, Cambridge's Professor Arthur Goodhart predicted:

[I]n no distant time the American doctrine will approximate to that of the civil law. This will be due in large part to five reasons: (1) the uncontrollable flood of American decisions, (2) the predominant position of constitutional questions in American law, (3) the American need for flexibility in legal development, (4) the method of teaching in the American law schools, and (5) the restatement of the law by the American Law Institute.

ARTHUR L. GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 65 (1931).

172. *Beckman v. Butte-Silver Bow County*, 2000 MT 112, 299 Mont. 389, 1 P.3d 348 (applying RESTATEMENT (SECOND) OF TORTS §§ 414, 416, 427); *Richardson v. Corvallis Pub. Sch. Dist. No. 1*, 286 Mont. 309, 950 P.2d 748 (1997) (applying RESTATEMENT (SECOND) OF TORTS § 343(A)(1)).

173. An example of a such a common law rule is the "fence out" rule, overruled in *Larson-Murphy v. Steiner*, 2000 MT 334, 303 Mont. 96, 15 P.3d 1205.

174. See *Whidden v. John S. Nerison, Inc.*, 1999 MT 10, 294 Mont. 346, 981 P.2d 271 (concluding that the "at will" doctrine has been repealed by the Wrongful Discharge Act).

175. Workers' compensation legislation has replaced the common law, for example. See *Sherner v. Conoco, Inc.*, 2000 MT 50, 298 Mont. 401, 995 P.2d 990 (reinterpreting the intentional injury exception to workers' compensation's exclusive remedy).

176. See *Albright v. State*, 281 Mont. 196, 933 P.2d 815 (1997) (interpreting notice rules for property tax assessments).

statute or Restatement provision in order to achieve a just result. This is typical of a civil law tradition where the judge's "function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union."<sup>177</sup> A statute is thus interpreted, but no single or binding interpretation is necessarily followed or employed.<sup>178</sup> As a result, in a civil law jurisdiction, the meaning and application of a statute may change to fit new circumstances even if the text of the statute does not change.<sup>179</sup>

I doubt that the court has adopted a civil law approach consciously, although this pattern appears in its decisions. Nevertheless, the court has not expressed a sentiment to follow a civil law tradition, so I will turn to what I think is necessary to correct the current court's approach to *stare decisis*.

A principled approach should begin with the values that are advanced by a doctrine of *stare decisis*. These include predictability, fairness, efficiency, institutional integrity, and respect for the legislative branch.<sup>180</sup> When a court considers overruling precedent, it should first weigh these values.

What impact will overruling have on predictability and stability of social relations? In the areas of contracts, wills and estates, commercial dealings, and property, predictability is highly important. Many rely upon existing law when preparing a document that describes future relations. Interpretations of the constitution ought also to remain stable because the constitution is the fundamental law. Instability in constitutional interpretation invites instability in the rules that are extrapolated from the constitution.

Long-standing interpretations of a statute ought to remain undisturbed out of respect for the legislative branch. One might argue that because Montana elects its judges, the act of overruling an earlier interpretation of a statute is less antidemocratic. However, we do not elect judges to make or remake state policy outside the area of the common law. The judicial power is the power to decide disputes and to make

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177. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 36 (Stanford Univ. Press, 2d ed. 1985).

178. *Id.* at 45-46.

179. *Id.* at 47.

180. *See supra* Part II.

binding orders.<sup>181</sup> When a statute has received an authoritative construction from an earlier Montana Supreme Court, there is no dispute over the interpretation to decide. When a court overrules its earlier construction of a statute because it now questions the earlier reasoning, it is not deciding—it is legislating. It treats precedent as if it were the property of the court to be disposed of freely. Precedent, however, is public property.

When authorities appear to be in conflict, the court should prefer distinguishing them to overruling them. Precedent should be overruled when the conflict between two lines of authority cannot be reconciled. Whenever the court overrules a prior decision, “to the extent that . . . ,” we may conclude that the prior case may be distinguished.

The court should develop a principled manifest error doctrine. It should not be enough for a majority of the court's members to question the reasoning of an earlier panel, even if it may be fairly characterized as “wrong.”<sup>182</sup> A principled manifest error doctrine will weigh the values of stare decisis when members of the court think the precedent was incorrectly decided. Before a “wrong” decision is overruled, it should also be in disrepair, it should have been regularly disregarded, or it should have fallen into disrespect. It should be seen as working unfavorably before it is overruled.<sup>183</sup> *State ex rel. Sparling* offers an example of this approach.

But this is not really a manifest error doctrine. It is a doctrine of flexible stare decisis, a doctrine that American jurisdictions have tended towards throughout the Twentieth Century. So, in the end, it is not necessary that the prior court be wrong. It is only necessary for the rule to be flawed in application. In that case, and I draw the line at reinterpreting an act of the legislature, the court should not hesitate to discard it.

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181. See *State ex rel. Bennett v. Bonner*, 123 Mont. 414, 425, 214 P.2d 747, 753 (1950).

182. See *supra* Part VI(B)(4). It is fair to say the reasoning of the cases overruled in *Strizich* were “wrong,” but the resulting rule worked well enough in practice. See Monaghan, *supra* note 11, at 762 (“Whether a precedent is seen as clearly wrong is often a function of the judge's self-confidence more than of any objective fact.”).

183. See HENRY AGARD WALLACE, WHOSE CONSTITUTION?, in *STILL LAW OF THE LAND?: ESSAYS ON CHANGING INTERPRETATIONS OF THE CONSTITUTION* 10 (Lissa Roche ed., 1987).

## CONCLUSION

Between 1991 and 2000, the Montana Supreme Court overruled cases at an unprecedented rate. No other state court took a similar approach. In no other decade was the Montana Supreme Court as active.

Many may disagree with my categorization of these cases. It is perfectly arguable that some decisions I find justifiable are not, and that some decisions I criticize are justifiable. Any number of decisions could fall into more than one category.

Nevertheless, the pattern illustrates something. Moving a case here or changing the category of one or two there does not alter the picture. The court was active and was often irrationally active. If we set aside a tendency to act in a civil law tradition, the court's activity can be explained only by a lack of adherence to principle when overruling its precedent. By remembering and applying the values of *stare decisis*, the court may return predictability to Montana's jurisprudence.

*EPILOGUE*

A review of the Montana Supreme Court's approach to precedent during 1991-2000 remains relevant today. In the three years that have passed since the end of 2000, the Montana Supreme Court has overruled its precedent in thirty-two cases, a rate similar to that of 1991-2000.

## APPENDIX A

1. *Sleath v. West Mont Home Health Servs., Inc.*, 2000 MT 381, 304 Mont. 1, 16 P.3d 1042 (overruling *McAlpine v. Rhone-Poulenc Ag. Co.*, 285 Mont. 224, 947 P.2d 474 (1997)).
2. *Hartle v. Nelson*, 2000 MT 356, 303 Mont. 264, 15 P.3d 484 (overruling *McDonald v. Mont. Wood Co.*, 14 Mont. 88, 35 P. 668 (1894)).
3. *Larson-Murphy v. Steiner*, 2000 MT 334, 303 Mont. 96, 15 P.3d 1205 (overruling *Indendi v. Workman*, 272 Mont. 64, 899 P.2d 1085 (1995) (for three separate propositions, although I don't think *Indendi* is overruled); *Yager v. Deane*, 258 Mont. 453, 853 P.2d 1214 (1993); *Williams v. Selstad*, 235 Mont. 137, 766 P.2d 247 (1988); *State ex rel. Martin v. Finley*, 227 Mont. 242, 738 P.2d 497 (1987); *Siegfried v. Atchison*, 219 Mont. 14, 709 P.2d 1006 (1985); *Ambrogini v. Todd*, 197 Mont. 111, 642 P.2d 1013 (1982); *Sanders v. Mount Haggin Livestock Co.*, 160 Mont. 73, 500 P.2d 397 (1972); *Jenkins v. Valley Garden Ranch, Inc.*, 151 Mont. 463, 443 P.2d 753 (1968); *Bartsch v. Irvine Co.*, 149 Mont. 405, 427 P.2d 302 (1967)).
4. *Chandler v. Mahoney*, 2000 MT 294, 302 Mont. 309, 18 P.3d 312 (overruling *State v. Pendergrass*, 281 Mont. 129, 932 P.2d 1056 (1997)).
5. *Huether v. Dist. Court*, 2000 MT 158, 300 Mont. 212, 4 P.3d 1193 (overruling *Sistok v. Kalispell Reg'l Hosp.*, 251 Mont. 38, 823 P.2d 251 (1991)).
6. *Dobrocke v. City of Columbia Falls*, 2000 MT 179, 300 Mont. 348, 8 P.3d 71 (overruling *Buck v. State*, 222 Mont. 423, 723 P.2d 210 (1986), and, impliedly, *Sullivan v. City of Butte*, 104 Mont. 225, 65 P.2d 1175 (1937)).
7. *Watters v. Guaranty Nat'l Ins. Co.*, 2000 MT 150, 300 Mont. 91, 3 P.3d 626 (overruling *Juedeman v. Nat'l Farmers Union Prop. & Cas. Co.*, 253 Mont. 278, 833 P.2d 191 (1992); *Thompson v. State Farm Mut. Ins. Co.*, 161 Mont. 207, 505 P.2d 423 (1973)).
8. *Beckman v. Butte-Silver Bow County*, 2000 MT 112, 299 Mont. 389, 1 P.3d 348 (overruling *Kemp v. Big Horn County Elec. Coop., Inc.*, 244 Mont. 437, 798 P.2d 999 (1990); *Micheletto v. State*, 244 Mont. 483, 798 P.2d 989 (1990); *Kemp v. Bechtel Constr. Co.*, 221 Mont. 519, 720 P.2d 270 (1986)).
9. *Sherner v. Conoco, Inc.*, 2000 MT 50, 298 Mont. 401, 995 P.2d 990 (overruling *Calcaterra v. Mont. Res.*, 1998 MT 187, 289 Mont. 424, 962 P.2d 590; *Schmidt v. State*, 286 Mont. 98, 951 P.2d 23 (1997); *Lockwood v. W.R. Grace & Co.*, 272 Mont. 202, 900 P.2d 314 (1995); *Blythe v. Radiometer Am., Inc.*, 262 Mont. 464, 866 P.2d 218 (1993); *Noonan v. Spring Creek Forest Prods., Inc.*, 216 Mont. 221, 700 P.2d 623 (1985); *Millers Mut. Ins. Co. v. Strainer*, 204 Mont. 162, 663 P.2d 338 (1983); *Great W. Sugar Co. v. Dist. Court*, 188 Mont. 1, 610 P.2d 717 (1980)).
10. *State v. LaMere*, 2000 MT 45, 298 Mont. 358, 2 P.3d 204 (overruling *State v. Robbins*, 1998 MT 297, 292 Mont. 23, 971 P.2d 359).
11. *State v. Bales*, 1999 MT 334, 297 Mont. 402, 994 P.2d 17 (overruling *State v. Morse*, 229 Mont. 222, 746 P.2d 108 (1987)).
12. *State v. Waters*, 1999 MT 229, 296 Mont. 101, 987 P.2d 1142 (overruling *City of Bozeman v. Peterson*, 227 Mont. 418, 739 P.2d 958 (1987); *State v. Redding*, 208 Mont. 24, 675 P.2d 974 (1984)).

13. *State v. Montoya*, 1999 MT 180, 295 Mont. 288, 983 P.2d 937 (overruling *State v. Gunderson*, 282 Mont. 183, 936 P.2d 804 (1997); *State v. White*, 200 Mont. 123, 650 P.2d 765 (1982); *State v. Davison*, 188 Mont. 432, 614 P.2d 489 (1980)).
14. *Estate of Lande*, 1999 MT 179, 295 Mont. 277, 983 P.2d 316 (overruling *Craver v. Waste Mgmt. Partners*, 265 Mont. 37, 874 P.2d 1 (1994)).
15. *State v. Worrall*, 1999 MT 55, 293 Mont. 439, 976 P.2d 968 (overruling *State v. Feland*, 267 Mont. 112, 882 P.2d 500 (1994); *State v. Mosley*, 260 Mont. 109, 860 P.2d 69 (1993); *State v. Sykes*, 194 Mont. 14, 663 P.2d 691 (1983)).
16. *Craig v. Schell*, 1999 MT 40, 293 Mont. 323, 975 P.2d 820 (overruling *Lyndes v. Scofield*, 180 Mont. 177, 589 P.2d 1000 (1979)).
17. *Marshall v. State ex rel. Cooney*, 1999 MT 33, 293 Mont. 274, 975 P.2d 325 (overruling *State v. Cooney*, 70 Mont. 355, 225 P. 1007 (1924); *State v. Alderson*, 49 Mont. 387, 142 P. 210 (1914) (Hay); *State v. Bd. of Comm'rs*, 34 Mont. 426, 87 P. 450 (1906) (Teague)).
18. *Whidden v. John S. Nerison, Inc.*, 1999 MT 110, 294 Mont. 346, 981 P.2d 271 (overruling *Medicine Horse v. Trustees*, 251 Mont. 65, 823 P.2d 230 (1991)).
19. *Lewis v. B & B Pawnbrokers, Inc.*, 1998 MT 302, 292 Mont. 82, 968 P.2d 1145 (overruling *Celmer v. Schmitt*, 198 Mont. 271, 645 P.2d 946 (1982)).
20. *Town Pump, Inc. v. Bd. of Adjustment*, 1998 MT 294, 292 Mont. 6, 971 P.2d 349 (overruling *State ex rel. City of Libby v. Haswell*, 147 Mont. 492, 414 P.2d 652 (1966)).
21. *State v. Kuneff*, 1998 MT 287, 291 Mont. 474, 970 P.2d 556 (overruling *State v. Siegal*, 281 Mont. 250, 934 P.2d 176 (1997); *State v. Rydberg*, 239 Mont. 70, 778 P.2d 902 (1989)).
22. *Bush v. Mont. Dep't of Justice*, 1998 MT 270, 291 Mont. 359, 968 P.2d 716 (overruling *McCullugh v. State*, 259 Mont. 406, 856 P.2d 958 (1993); *Jess v. State*, 255 Mont. 254, 841 P.2d 1137 (1992); *Grinde v. State*, 249 Mont. 77, 813 P.2d 473 (1991); *Boland v. State*, 242 Mont. 520, 792 P.2d 1 (1990); *Gebhardt v. State*, 238 Mont. 90, 775 P.2d 1261 (1989); *State v. Lee*, 232 Mont. 105, 754 P.2d 512 (1988); *In re Suspension of Driver's License of Blake*, 220 Mont. 27, 712 P.2d 1338 (1986); *State v. Davis*, 190 Mont. 285, 620 P.2d 1209 (1980)).
23. *In re Marriage of Beadle*, 1998 MT 225, 291 Mont. 1, 968 P.2d 698 (overruling *Goodmunson v. Goodmunson*, 201 Mont. 535, 655 P.2d 509 (1982)).
24. *State v. Dahlin*, 1998 MT 113, 289 Mont. 182, 961 P.2d 1247 (overruling *State v. McCartney*, 179 Mont. 49, 585 P.2d 1321 (1978)).
25. *Hulse v. State Dep't of Motor Vehicles*, 1998 MT 108, 289 Mont. 1, 961 P.2d 75 (overruling *State v. Purdie*, 209 Mont. 352, 680 P.2d 576 (1984)).
26. *Hansen v. 75 Ranch Co.*, 1998 MT 77, 288 Mont. 310, 957 P.2d 32 (overruling *McCann Ranch, Inc. v. Quigley-McCann*, 276 Mont. 205, 915 P.2d 239 (1996)).
27. *Town of Whitehall v. Preece*, 1998 MT 53, 288 Mont. 55, 956 P.2d 743 (overruling *Choteau County v. Grossman*, 172 Mont. 373, 563 P.2d 1125 (1977); *Dieruf v. City of Bozeman*, 173 Mont. 447, 568 P.2d 127 (1977)).

28. *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997) (overruling *Juedeman v. Nat'l Farmers Union Prop. & Cas. Co.*, 253 Mont. 278, 833 P.2d 191 (1992)).

29. *State v. Lane*, 1998 MT 76, 288 Mont. 286, 957 P.2d 9 (overruling *State v. Graveley*, 275 Mont. 519, 915 P.2d 184 (1996); *State v. Mason*, 253 Mont. 419, 833 P.2d 1058 (1992); *State v. Wirtala*, 231 Mont. 264, 752 P.2d 177 (1988); *State v. Enfinger*, 222 Mont. 438, 722 P.2d 1170 (1986)).

30. *State v. Olson*, 286 Mont. 364, 951 P.2d 571 (1997) (overruling *State v. Medina*, 245 Mont. 25, 798 P.2d 1032 (1990); *State v. Howie*, 228 Mont. 497, 744 P.2d 156 (1987); *State v. D.B.S.*, 216 Mont. 234, 700 P.2d 630 (1985); *State v. Rogers*, 213 Mont. 302, 692 P.2d 2 (1984)).

31. *Richardson v. Corvallis Pub. Sch. Dist. No. 1*, 286 Mont. 309, 950 P.2d 748 (1997) (overruling *Davis v. Church of Jesus Christ of Latter Day Saints*, 244 Mont. 61, 796 P.2d 181 (1990); *Blaskovich v. Noreast Dev. Corp.*, 242 Mont. 326, 790 P.2d 977 (1990); *Boehm v. Alanon Club*, 222 Mont. 373, 722 P.2d 1160 (1986); *Kronen v. Richter*, 211 Mont. 208, 683 P.2d 1315 (1984); *Krone v. McCann*, 196 Mont. 260, 638 P.2d 397 (1982); *Cereck v. Albertson's Inc.*, 195 Mont. 409, 637 P.2d 509 (1981); *Rennick v. Hoover*, 186 Mont. 167, 606 P.2d 1079 (1980); *Dunham v. Southside Nat'l Bank*, 169 Mont. 466, 548 P.2d 1383 (1976); *Demaree v. Safeway Stores, Inc.*, 162 Mont. 47, 508 P.2d 570 (1973); *Uhl v. Abrahams*, 160 Mont. 426, 503 P.2d 26 (1972); *Willis v. St. Peter's Hosp.*, 157 Mont. 417, 486 P.2d 593 (1971); *Luebeck v. Safeway Stores, Inc.*, 152 Mont. 88, 446 P.2d 921 (1968); *Regedahl v. Safeway Stores, Inc.*, 149 Mont. 229, 425 P.2d 335 (1967)).

32. *Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. 60, 951 P.2d 1 (1997) (overruling *Wisher v. Higgs*, 257 Mont. 132, 849 P.2d 152 (1993); *Major v. N. Valley Hosp.*, 233 Mont. 25, 759 P.2d 153 (1988); *Monroe v. Harper*, 164 Mont. 23, 518 P.2d 788 (1974)).

33. *State v. Strizich*, 286 Mont. 1, 952 P.2d 1365 (1997) (overruling *State v. Yarns*, 252 Mont. 45, 826 P.2d 543 (1992); *State v. T.W.*, 220 Mont. 280, 715 P.2d 428 (1986)).

34. *State v. Lawrence*, 285 Mont. 140, 948 P.2d 186 (1997) (overruling *State v. McSloy*, 127 Mont. 265, 261 P.2d 663 (1953)).

35. *State v. Lawrence*, 285 Mont. 140, 948 P.2d 186 (1997) (overruling *State v. Goodwin*, 249 Mont. 1, 813 P.2d 953 (1991)).

36. *Lynch v. Reed*, 284 Mont. 321, 944 P.2d 218 (1997) (overruling *Hackley v. Waldorf-Hoerner Paper Prods. Co.*, 149 Mont. 286, 425 P.2d 712 (1967)).

37. *State v. Granby*, 283 Mont. 193, 939 P.2d 1006 (1997) (overruling *State v. Walsh*, 281 Mont. 70, 931 P.2d 42 (1997)).

38. *State v. Hendrickson*, 283 Mont. 105, 939 P.2d 985 (1997) (overruling *Maney v. State*, 255 Mont. 270, 842 P.2d 704 (1992)).

39. *Erickson v. State ex rel. Bd. of Med. Exam's*, 282 Mont. 367, 938 P.2d 625 (1997) (overruling *Gilpin v. Bd. of Nursing*, 254 Mont. 308, 837 P.2d 1342 (1992); *Mills v. Comm'r of Ins.*, 226 Mont. 387, 736 P.2d 102 (1987)).

40. *Trankel v. State*, 282 Mont. 348, 938 P.2d 614 (1997) (overruling *Evans v. Mont. Nat'l Guard*, 223 Mont. 482, 726 P.2d 1160 (1986)).

41. *Orozco v. Day*, 281 Mont. 341, 934 P.2d 1009 (1997) (overruling *Remington v. Mont. Dep't of Corr. & Human Servs.*, 255 Mont. 480, 844 P.2d 50 (1992)).

42. *Albright v. State*, 281 Mont. 196, 933 P.2d 815 (1997) (overruling *Butte Country Club v. Dep't of Revenue*, 186 Mont. 424, 608 P.2d 111 (1980)).
43. *In re Estate of Hill*, 281 Mont. 142, 931 P.2d 1320 (1997) (overruling *Seman v. Lewis*, 252 Mont. 508, 830 P.2d 1294 (1992)).
44. *Madill v. State Comp. Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997) (overruling *Field v. Sears, Roebuck & Co.*, 257 Mont. 81, 847 P.2d 306 (1993); *Komeotis v. Williamson Fencing*, 232 Mont. 340, 756 P.2d 1153 (1988); *Lasar v E.H. Oftedahl & Sons*, 222 Mont. 251, 721 P.2d 352 (1986)).
45. *Wareing v. Schreckendgust*, 280 Mont. 196, 930 P.2d 37 (1996) (overruling *Brown v. Tintinger*, 245 Mont. 373, 801 P.2d 607 (1990); *Downing v. Grover*, 237 Mont. 172, 772 P.2d 850 (1989)).
46. *Hafner v. Mont. Dep't of Labor and Indus.*, 280 Mont. 95, 929 P.2d 233 (1996) (overruling *Stine v. W. Fed. Sav. Bank*, 266 Mont. 83, 879 P.2d 53 (1994); *Connolly v. Mont. Bd. of Labor Appeals*, 226 Mont. 201, 734 P.2d 1211 (1987)).
47. *In re Marriage of Cowan*, 279 Mont. 491, 928 P.2d 214 (1996) (overruling in part *In re Marriage of Malquist*, 266 Mont. 447, 880 P.2d 1357 (1994); *In re Marriage of Durbin*, 251 Mont. 51, 823 P.2d 243 (1991)).
48. *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 929 P.2d 205 (1996) (overruling *Getten v. Liberty Mut. Ins. Co.*, 240 Mont. 90, 782 P.3d 1267 (1989); *Hall v. State Comp. Ins. Fund*, 218 Mont. 180, 708 P.2d 234 (1985); *Brandner v. Travelers Ins. Co.*, 179 Mont. 208, 587 P.2d 933 (1978)).
49. *Kills On Top v. State*, 279 Mont. 384, 928 P.2d 182 (1996) (overruling *State v. Kills on Top*, 243 Mont. 56, 793 P.2d 1273 (1990)).
50. *Plumb v. Fourth Judicial Dist. Court*, 279 Mont. 363, 927 P.2d 1011 (1996) (overruling *Craig v. Mont. Tenth Judicial Dist. Court*, 262 Mont. 201, 864 P.2d 791 (1993); *State ex rel. Nelson v. Mont. Ninth Judicial Dist. Court*, 262 Mont. 70, 863 P.2d 1027 (1993); *Associated Press v. State*, 250 Mont. 299, 820 P.2d 421 (1991); *State ex rel. Racicot v. Dist. Court*, 244 Mont. 521, 798 P.2d 1004 (1990)).
51. *State v. Gatts*, 279 Mont. 42, 928 P.2d 114 (1996) (overruling *State v. Fertterer*, 255 Mont. 73, 841 P.2d 467 (1992)).
52. *Haugen v. Blaine Bank*, 279 Mont. 1, 926 P.2d 1364 (1996) (overruling *Livingston v. Treasure County*, 239 Mont. 511, 781 P.2d 1129 (1989)).
53. *In re M.L.M.*, 278 Mont. 505, 926 P.2d 694 (1996) (overruling *In re F.H.*, 272 Mont. 342, 901 P.2d 96 (1995); *Lewis v. Catholic Soc. Servs.*, 253 Mont. 369, 833 P.2d 1023 (1992)).
54. *Keating v. Sherlock*, 278 Mont. 218, 924 P.2d 1297 (1996) (overruling *State ex rel. Forsythe v. Dist. Court*, 216 Mont. 480, 701 P.2d 1346 (1985); *State ex rel. LaFlesch v. Dist. Court*, 165 Mont. 302, 529 P.2d 1403 (1974)).
55. *Estate of Strever v. Cline*, 278 Mont. 165, 924 P.2d 666 (1996) (overruling *Schafer v. State*, 181 Mont. 102, 592 P.2d 493 (1979); *Brown v. First Fed. Sav. & Loan Ass'n*, 154 Mont. 79, 460 P.2d 97 (1969); *Lencioni v. Long*, 139 Mont. 135, 361 P.2d 455 (1961)).
56. *State v. Helfrich*, 277 Mont. 452, 922 P.2d 1159 (1996) (overruling *Griffin v. Opinion Publ'g Co.*, 114 Mont. 502, 138 P.2d 580 (1943)).

57. *Hilandis Golf Club v. Ashmore*, 277 Mont. 324, 922 P.2d 469 (1996) (overruling *Fife v. Martin*, 261 Mont. 471, 863 P.2d 403 (1993)).
58. *State v. Tadewaldt*, 277 Mont. 261, 922 P.2d 463 (1996) (overruling *State v. Pierce*, 199 Mont. 57, 647 P.2d 847 (1982)).
59. *In re A.R.A.*, 277 Mont. 66, 919 P.2d 388 (1996) (overruling *In re Paternity of C.G.*, 228 Mont. 118, 740 P.2d 1139 (1987); *Brost v. Glasgow*, 200 Mont. 194, 651 P.2d 32 (1982)).
60. *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 916 P.2d 122 (1996) (overruling *Kitchen Krafters, Inc. v. Eastside Bank*, 242 Mont. 155, 789 P.2d 567 (1990)).
61. *Roberts v. Empire Fire & Marine Ins. Co.*, 276 Mont. 225, 915 P.2d 872 (1996) (order denying motion to dismiss) (overruling *Kinion v. Design Sys., Inc.*, 190 Mont. 226, 620 P.2d 852 (1980); *Shields v. Pirkle Refrigerated Freightlines*, 181 Mont. 37, 591 P.2d 1120 (1979)).
62. *Rasmussen v. Lee*, 276 Mont. 84, 916 P.2d 98 (1996) (overruling *Holliday Land & Livestock Co. v. Pierce*, 174 Mont. 393, 571 P.2d 93 (1977); *Pipkin v. Connolly*, 167 Mont. 284, 538 P.2d 347 (1975); *Miller v. Meredith*, 149 Mont. 125, 423 P.2d 595 (1967); *Kenfield v. Curry*, 145 Mont. 174, 399 P.2d 999 (1965); *Enott v. Hinkle*, 140 Mont. 206, 369 P.2d 413 (1962); *Hamilton v. Rock*, 121 Mont. 245, 191 P.2d 663 (1948)).
63. *Stratemeyer v. Lincoln County*, 276 Mont. 67, 915 P.2d 175 (1996) (overruling *Rouse v. Anaconda-Deer Lodge County*, 250 Mont. 1, 817 P.2d 690 (1991)).
64. *Turner v. Mountain Eng'g and Constr., Inc.*, 276 Mont. 55, 915 P.2d 799 (1996) (overruling *Traders State Bank v. Mann*, 258 Mont. 226, 852 P.2d 604 (1993); *Moore v. Hardy*, 230 Mont. 158, 748 P.2d 477 (1988); *LeClair v. Reiter*, 233 Mont. 332, 760 P.2d 740 (1988); *First Nat'l Bank v. Giles*, 225 Mont. 467, 733 P.2d 357 (1987); *First Sec. Bank v. Income Props., Inc.*, 208 Mont. 121, 675 P.2d 982 (1984); *Mont. Nat'l Bank v. State Dep't of Revenue*, 167 Mont. 429, 539 P.2d 722 (1975) (reviving *Gallatin Trust & Sav. Bank v. Henke*, 154 Mont. 170, 461 P.2d 448 (1969))).
65. *State v. Loh*, 275 Mont. 460, 914 P.2d 592 (1996) (overruling *State v. Stubbs*, 270 Mont. 364, 892 P.2d 547 (1995); *State v. Williams*, 268 Mont. 428, 887 P.2d 1171 (1994); *State v. Hembd*, 235 Mont. 361, 767 P.2d 864 (1989); *State v. Osteen*, 216 Mont. 258, 700 P.2d 188 (1985); *State v. O'Neill*, 208 Mont. 386, 679 P.2d 760 (1984); *State v. Godsey*, 202 Mont. 100, 656 P.2d 811 (1982); *State v. Lane*, 175 Mont. 225, 573 P.2d 198 (1977); *State v. Gallagher*, 162 Mont. 155, 509 P.2d 852 (1973)).
66. *Heiat v. E. Mont. Coll.*, 275 Mont. 322, 912 P.2d 787 (1996) (overruling *Kenyon v. Stillwater County*, 254 Mont. 142, 835 P.2d 742 (1992)).
67. *Porter v. Galarneau*, 275 Mont. 174, 911 P.2d 1143 (1996) (overruling *In re Marriage of Elser*, 271 Mont. 265, 895 P.2d 619 (1995); *AgAmerica, FCB v. Robson*, 272 Mont. 413, 901 P.2d 100 (1995); *Brockie v. Omo Constr., Inc.*, 268 Mont. 519, 887 P.2d 167 (1994); *Ihler v. Chisholm*, 259 Mont. 240, 855 P.2d 1009 (1993); *Haines Pipeline Constr., Inc. v. Mont. Power Co.*, 251 Mont. 422, 830 P.2d 1230 (1991); *West-Mont Cmty. Care v. Bd. of Health & Env'tl. Scis.*, 217 Mont. 178, 703 P.2d 850 (1985); *Lee v. Flathead County*, 217 Mont. 370, 704 P.2d 1060 (1985)).
68. *Malee v. Dist. Court*, 275 Mont. 72, 911 P.2d 831 (1996) (overruling *State ex rel. Kidder v. Dist. Court*, 155 Mont. 442, 472 P.2d 1008 (1970); *State ex rel. Porter v. First Judicial Dist.*, 123 Mont. 447, 215 P.2d 279 (1950); *State ex rel. Stagg v. Dist. Court*, 76 Mont. 495, 248 P.2d 213 (1926)).

69. *Tillett v. Lippert*, 275 Mont. 1, 909 P.2d 1158 (1996) (overruling *Frank DeHaan, Inc. v. Gallatin-Madison Ranch Co.*, 250 Mont. 304, 820 P.2d 423 (1991); *Ivins v. Hardy*, 134 Mont. 445, 333 P.2d 471 (1958), *cert. denied*, 359 U.S. 1001 (1959); *Ivins v. Hardy*, 123 Mont. 513, 217 P.2d 204 (1950)).
70. *State v. Docken*, 274 Mont. 296, 908 P.2d 213 (1995) (overruling *State v. Downing*, 181 Mont. 242, 593 P.2d 43 (1979)).
71. *Glenn v. Grosfield*, 274 Mont. 192, 906 P.2d 201 (1995) (overruling *Scott v. Weinheimer*, 140 Mont. 554, 374 P.2d 91 (1962)).
72. *Haag v. Mont. Sch. Group Ins. Auth.*, 274 Mont. 109, 906 P.2d 693 (1995) (overruling *Solheim v. Tom Davis Ranch*, 208 Mont. 265, 677 P.2d 1034 (1984)).
73. *Kills On Top v. State*, 273 Mont. 32, 901 P.2d 1368 (1995) (overruling *State v. Henricks*, 206 Mont. 469, 672 P.2d 20 (1983)).
74. *Allers v. Riley*, 273 Mont. 1, 901 P.2d 600 (1995) (overruling *Ahmann v. Am. Fed. Sav. & Loan Ass'n*, 235 Mont. 184, 766 P.2d 853 (1988); *Easterday v. Canty*, 219 Mont. 420, 712 P.2d 1305 (1986)).
75. *In re Marriage of Miller*, 273 Mont. 286, 902 P.2d 1019 (1995) (overruling *In re Marriage of Lyman*, 233 Mont. 283, 762 P.2d 203 (1988); *Witbart v. Witbart*, 216 Mont. 178, 701 P.2d 339 (1985); *In re Marriage of Madden*, 211 Mont. 237, 683 P.2d 493 (1984); *Pilati v. Pilati*, 181 Mont. 182, 592 P.2d 1374 (1979); *In re Bad Yellow Hair*, 162 Mont. 107, 509 P.2d 9 (1973)).
76. *State v. Bullock*, 272 Mont. 361, 901 P.2d 61 (1995) (overruling *State v. Sorenson*, 243 Mont. 321, 792 P.2d 363 (1990); *State v. Bennett*, 205 Mont. 117, 666 P.2d 747 (1983); *State v. Dess*, 201 Mont. 456, 655 P.2d 149 (1982); *State v. Charvat*, 175 Mont. 267, 573 P.2d 660 (1978)).
77. *State v. Rothacher*, 272 Mont. 303, 901 P.2d 82 (1995) (overruling *State v. Byers*, 261 Mont. 17, 861 P.2d 860 (1993); *State v. Van Dyken*, 242 Mont. 415, 791 P.2d 1350 (1990); *State v. McKimmie*, 232 Mont. 227, 756 P.2d 1135 (1988); *State v. Sigler*, 210 Mont. 248, 688 P.2d 749 (1984); *State v. Starr*, 204 Mont. 210, 664 P.2d 893 (1983)).
78. *State v. Egelhoff*, 272 Mont. 114, 900 P.2d 260 (1995) (overruling *State v. Byers*, 261 Mont. 17, 861 P.2d 860 (1993)).
79. *Kloepfer v. Lumbermens Mut. Cas. Co.*, 272 Mont. 78, 899 P.2d 1081 (1995) (overruling *Stevens v. State Comp. Mut. Ins. Fund*, 268 Mont. 460, 886 P.2d 962 (1994); *Baeta v. Don Tripp Trucking*, 254 Mont. 487, 839 P.2d 566 (1992); *Witty v. Pluid*, 220 Mont. 272, 714 P.2d 169 (1986)).
80. *First Call, Inc. v. Capital Answering Serv., Inc.*, 271 Mont. 425, 898 P.2d 96 (1995) (overruling *State ex rel. Equity Supply Co. v. Dist. Court*, 159 Mont. 34, 494 P.2d 911 (1972); *Whitcraft v. Semenza*, 145 Mont. 94, 399 P.2d 757 (1965)).
81. *Greens at Fort Missoula, LLC v. City of Missoula*, 271 Mont. 398, 897 P.2d 1078 (1995) (overruling *Lowe v. City of Missoula*, 165 Mont. 38, 525 P.2d 551 (1974)).
82. *Sacco v. High Country Indep. Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995) (overruling *Lence v. Hagadone Inv. Co.*, 258 Mont. 433, 853 P.2d 1230 (1993); *Doohan v. Bigfork Sch. Dist. No. 38*, 247 Mont. 125, 805 P.2d 1354 (1991); *Niles v. Big Sky Eyewear*, 236 Mont. 455, 771 P.2d 114 (1989); *First Bank (N.A.)-Billings v. Clark*, 236

Mont. 195, 771 P.2d 84 (1989); *Shiplet v. First Sec. Bank of Livingston, Inc.*, 234 Mont. 166, 762 P.2d 242 (1988); *Frigon v. Morrison-Maierle, Inc.*, 233 Mont. 113, 760 P.2d 57 (1988); *Johnson v. Supersave Mkts., Inc.*, 211 Mont. 465, 686 P.2d 209 (1984)).

83. *Burlingham v. Mintz*, 270 Mont. 277, 891 P.2d 527 (1995) (overruling *Negard v. Feda's Estate*, 152 Mont. 47, 446 P.2d 436 (1968)).

84. *Pierce v. ALSC Architects, P.S.*, 270 Mont. 97, 890 P.2d 1254 (1995) (overruling *Harrington v. LaBelle's of Colo., Inc.*, 235 Mont. 80, 765 P.2d 732 (1988); *Olson v. Kayser*, 161 Mont. 241, 505 P.2d 394 (1973); *Hannifin v. Cahill-Mooney Constr. Co., Inc.*, 159 Mont. 413, 498 P.2d 1214 (1972); *Ulmen v. Schwieger*, 92 Mont. 331, 12 P.2d 856 (1932)).

85. *State v. Pastos*, 269 Mont. 43, 887 P.2d 199 (1994) (overruling *State v. Sierra*, 214 Mont. 472, 692 P.2d 1273 (1985)).

86. *Uhler v. Doak*, 268 Mont. 191, 885 P.2d 1297 (1994) (overruling *Boles v. Simonton*, 242 Mont. 394, 791 P.2d 755 (1990)).

87. *In re Marriage of Malquist*, 266 Mont. 447, 880 P.2d 1357 (1994) (overruling *Thompson v. Thompson*, 193 Mont. 127, 630 P.2d 243 (1981)).

88. *Warnack v. Coneen Family Trust*, 266 Mont. 203, 879 P.2d 715 (1994) (overruling *Murray v. Countryman Creek Ranch*, 254 Mont. 432, 838 P.2d 431 (1992); *Granite County v. Komberec*, 245 Mont. 252, 800 P.2d 166 (1990); *Johnson v. McMillan*, 238 Mont. 393, 778 P.2d 395 (1989); *Thomas v. Barnum*, 211 Mont. 137, 684 P.2d 1106 (1984); *Hayden v. Snowden*, 176 Mont. 169, 576 P.2d 1115 (1978); *Taylor v. Petranek*, 173 Mont. 433, 568 P.2d 120 (1977); *Yecny v. Day*, 174 Mont. 442, 571 P.2d 386 (1977); *Harland v. Anderson*, 169 Mont. 447, 548 P.2d 613 (1976); *Lunceford v. Trenk*, 163 Mont. 504, 518 P.2d 266 (1974); *Scott v. Weinheimer*, 140 Mont. 554, 374 P.2d 91 (1962)).

89. *State v. Kuntz*, 265 Mont. 253, 875 P.2d 1034 (1994) (overruling *State v. Brown*, 38 Mont. 309, 99 P. 954 (1909)).

90. *In re Marriage of Smith*, 264 Mont. 306, 871 P.2d 884 (1994) (overruling in part *Isaak v. Smith*, 257 Mont. 176, 848 P.2d 1014 (1993)).

91. *In re Marriage of Caras*, 263 Mont. 377, 868 P.2d 615 (1994) (overruling in part *In re Marriage of Caras*, 254 Mont. 169, 835 P.2d 715 (1992)).

92. *McDowell v. McDowell*, 263 Mont. 252, 868 P.2d 1250 (1994) (overruling *In re Gulette*, 173 Mont. 132, 566 P.2d 396 (1977)).

93. *DeVoe v. Dep't of Revenue*, 263 Mont. 100, 866 P.2d 228 (1993) (overruling *Northwest Land & Dev. v. State Tax Appeal Bd.*, 203 Mont. 313, 661 P.2d 44 (1983)).

94. *State v. Turner*, 262 Mont. 39, 864 P.2d 235 (1993) (overruling *State v. Goodwin*, 249 Mont. 1, 813 P.2d 953 (1991)).

95. *Talley v. Flathead Valley Cmty. College*, 259 Mont. 479, 857 P.2d 701 (1993) (overruling *Teamsters v. Cascade County Sch. Dist. No. 1*, 162 Mont. 277, 511 P.2d 339 (1973)).

96. *In re Estate of Shaw*, 259 Mont. 117, 855 P.2d 105 (1993) (overruling *First Westside Nat'l Bank v. Llera*, 176 Mont. 481, 580 P.2d 100 (1978); *Marshall v. Minlschmidt*, 148 Mont. 263, 419 P.2d 486 (1966)).

97. *Eschler v. Eschler*, 257 Mont. 360, 849 P.2d 196 (1993) (overruling *Soha v. West*,

196 Mont. 95, 637 P.2d 1185 (1981)).

98. *Schneeman v. State*, 257 Mont. 254, 848 P.2d 504 (1993) (overruling *Slater v. Employment Sec. Div.*, 208 Mont. 166, 676 P.2d 220 (1984)).

99. *State v. Johnson*, 257 Mont. 157, 848 P.2d 496 (1993) (overruling *State v. Laubach*, 201 Mont. 226, 653 P.2d 844 (1982)).

100. *King v. Special Res. Mgmt., Inc.*, 256 Mont. 367, 846 P.2d 1038 (1993) (overruling *Leary v. Kelly Pipe Co.*, 169 Mont. 511, 549 P.2d 813 (1976)).

101. *State v. Cameron*, 255 Mont. 14, 839 P.2d 1281 (1992) (overruling *State v. Frates*, 160 Mont. 431, 503 P.2d 47 (1972)).

102. *Foster v. Albertsons, Inc.*, 254 Mont. 117, 835 P.2d 720 (1992) (overruling *Fellows v. Sears, Roebuck & Co.*, 244 Mont. 7, 795 P.2d 484 (1990); *Smith v. Mont. Power Co.*, 225 Mont. 166, 731 P.2d 924 (1987); *Brinkman v. State*, 224 Mont. 238, 729 P.2d 1301 (1986)).

103. *State v. Bower*, 254 Mont. 1, 833 P.2d 1106 (1992) (overruling *State v. Cope*, 250 Mont. 387, 819 P.2d 1280 (1991); *Interstate Prod. Credit Ass'n v. DeSaye*, 250 Mont. 320, 820 P.2d 1285 (1991)).

104. *Francetich v. State Comp. Mut. Ins. Fund*, 252 Mont. 215, 827 P.2d 1279 (1992) (overruling *Brandner v. Travelers Ins. Co.*, 179 Mont. 208, 587 P.2d 933 (1978)).

105. *Bache v. Gilden*, 252 Mont. 178, 827 P.2d 817 (1992) (overruling *Barrett v. ASARCO, Inc.*, 234 Mont. 229, 763 P.2d 27 (1988); *Sikorski v. Olin*, 174 Mont. 107, 568 P.2d 571 (1977)).

106. *State Comp. Mut. Ins. Fund v. Lee Rost Logging*, 252 Mont. 97, 827 P.2d 85 (1992) (overruling *City of Billings v. Billings Firefighters Local 521*, 200 Mont. 421, 651 P.2d 627 (1982)).

107. *In re Marriage of Miller*, 251 Mont. 300, 825 P.2d 189 (1992) (overruling *In re Custody of C.C.*, 215 Mont. 72, 695 P.2d 816 (1985)).

108. *In re Marriage of Durbin*, 251 Mont. 51, 823 P.2d 243 (1991) (overruling *In re Marriage of Gallant*, 241 Mont. 363, 786 P.2d 1193 (1990); *In re Marriage of Tefft*, 192 Mont. 456, 682 P.2d 1094 (1981)).

109. *State v. Imlay*, 249 Mont. 82, 813 P.2d 979 (1991) (overruling *State v. Donnelly*, 244 Mont. 371, 798 P.2d 89 (1990)).

110. *State v. Staat*, 248 Mont. 291, 811 P.2d 1261 (1991) (overruling *State v. McPherson*, 236 Mont. 484, 771 P.2d 120 (1989)).