WHEN HARD CASES MAKE BAD LAW: A THEORY OF HOW CASE FACTS AFFECT JUDGE-MADE LAW

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"Hard cases make bad law" is one of the most famous aphorisms in Anglo-American law. Its insight is that when strict application of a generally sound law would impose a special hardship on someone, a court may be tempted to distort the law to avoid the hardship. Scholars have long debated the meaning and truth of the aphorism, but the debate has suffered from an imprecise conceptualization of what makes a case "hard." This lack of precision limits our ability to disentangle and work through the important questions the aphorism raises about how the facts of a particular case affect judge-made law.

This Article introduces a mathematical model of adjudication that precisely defines the different ways in which a case might be "hard" and derives the conditions under which a court confronting a hard case may make bad law. The model helps us see that hard cases explain a surprising array of existing legal doctrines. It also shows how the institutional design of the legal system can exacerbate or ameliorate the tendency of hard cases to make bad law.

Specifically, the model demonstrates how hard cases may have distorted not just discrete rules but entire fields, like trademark genericide and Fourth Amendment law. And it shows that certain seemingly unconnected judicial practices—writing unpublished opinions, limiting and distinguishing precedent, liberally construing pleadings, and avoiding cases based on procedural technicalities—can be understood as strategies to guard against hard cases making bad law.

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The analysis also has three broader institutional implications. First, it shows that the main virtue of equity is not to protect particular parties from hardship, as conventionally supposed, but to protect the law from being distorted in order to protect parties from hardship. Second, it demonstrates how strong remedies can backfire by leading a court to shortchange the underlying right for fear of having to apply the remedy in a hard case. Finally, it shows that strict standing doctrine can distort substantive law by channeling lawmaking to hard cases. In all three contexts, my theory helps us see beyond familiar tradeoffs: given the tendency of hard cases to make bad law, the real alternative to a flexible-but-uncertain system may not be an inflexible system of generally good rules but rather an inflexible system of bad rules.

INTRODUCTION

Cindy Lee Garcia answered a casting call for *Desert Warrior* thinking she was going to play a bit part in an action flick.[1] But the film's writer-director had other plans. Unbeknownst to Garcia, the footage was turned into *Innocence of Muslims*, a propaganda piece that depicted the Muslim prophet Muhammad as a murderer and pedophile, and Garcia's lines were dubbed over to insult Muhammad.[2] The film caused worldwide protests, possibly including those culminating in the 2012 attack on the U.S. Consulate in Benghazi, Libya.[3] When a trailer featuring her brief appearance was posted on YouTube, Garcia received numerous death threats.[4] Alarmed, she sued YouTube to take down the trailer, claiming she owned the copyright in her performance.[5]

The claim would ordinarily be a loser. It is well settled that authorship of a "joint work" under the Copyright Act resides only in a creative "master mind" with "artistic control" over the work, which in the context of movies "limit[s] authorship to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter."[6]

But these were no ordinary circumstances. Moved by Garcia's plight, a panel of the Ninth Circuit ruled in her favor, holding that she had an independent copyright interest in her performance.[7] The decision twisted copyright doctrine. By holding that a five-second acting performance in a film constitutes a separate copyrightable work whose owner is entitled to enjoin distribution of the entire film, the court made the fate of a gigantic collective enterprise hostage to thousands of small contributors—precisely the kind of harm the well-established "master mind" standard was designed to guard against.[8]

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1 *See* Garcia v. Google, Inc., 786 F.3d 733, 737 (9th Cir. 2015) (en banc).

2 *Id.*

3 *See, e.g.*, David D. Kirkpatrick, *A Deadly Mix in Benghazi*, N.Y. TIMES (Dec. 28, 2013), https://www.nytimes.com/projects/2013/benghazi/index.html [https://perma.cc/D3UT-TNKF].

4 *Garcia*, 786 F.3d at 737–38.

5 *See* Garcia v. Google, Inc., 766 F.3d 929, 932 (9th Cir. 2014), *rev'd on reh'g en banc*, 786 F.3d 733 (9th Cir. 2015).

6 Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 2000).

7 *Garcia*, 766 F.3d at 933–35.

8 *See Aalmuhammed*, 202 F.3d at 1233, 1235–36 (explaining that an inclusive standard of authorship in joint works would impose immense transaction costs, especially in movies, which involve huge production teams).

Garcia illustrates the logic of the famous adage "hard cases make bad law": when applying a generally sound law would impose a special hardship on someone, courts are tempted to distort the law to avoid the hardship. This logic pinpoints a potential tension in judicial lawmaking—a tension between getting the law right and getting the right result between the parties. I call that a *rule-disposition tradeoff*. In this Article, I show that exploring this potential tradeoff using a formal model of the "hard cases" maxim reveals fresh insights into judicial lawmaking and the common law process.

The common law process—a term used here to denote the courts' significant role in elaborating the law through deciding cases—is a defining feature of American law.[9] It plays a prominent role not only in traditional common law areas like property and torts but also in many statutory fields,[10] such as antitrust[11] and intellectual property,[12] as well as in constitutional law.[13] There is accordingly an extensive literature on

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9 *See generally* OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); KARL N. LLEWELLYN, THE BRAMBLE BUSH (1930).

10 *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law."); Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 377 (2012) ("Section 2 [of the Voting Rights Act] delegates authority to the courts to develop a common law of racially fair elections, anchored by certain substantive and evidentiary norms, as well as norms about legal change.").

11 *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute."); Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1205–06 (2021) ("Scholars and judges widely agree . . . that the antitrust statutes are best understood as a legislative delegation to the courts to create an evolutionary and dynamic common law of competition.").

12 *See, e.g.*, Peter S. Menell, *The Mixed Heritage of Federal Intellectual Property Law and Ramifications for Statutory Interpretation*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 63, 64 (Shyamkrishna Balganesh ed., 2013) ("[I]ntellectual property reflects a mixed heritage in which courts, operating in what can most aptly be characterized as a common law mode, came to play a principal role in fleshing out and evolving terse early legislative enactments. . . . [T]he courts continue to play a central, although contextually variable, role in the evolution of IP law."); Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. REV. 51, 53 (2010) ("[T]he common law has been the dominant legal force in the development of U.S. patent law for over two hundred years.").

13 *See, e.g.*, Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) ("[A] surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as . . . a constitutional common law subject to amendment, modification, or even reversal by Congress."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) ("[I]t is the common law approach, not the approach that connects

lawmaking through case-by-case adjudication.[14] Some scholars have argued that cases generally make bad law[15] while others have tried to explain why hard cases are particularly apt to do so.[16] There is also a rich literature in law and economics on case-by-case evolution of the common law.[17]

None of these studies, however, has attempted rigorously to isolate the different senses in which a case might be "hard."[18] This omission is significant because it inhibits a precise understanding of how particular case characteristics affect general judge-made law. In this Article, I fill this gap by introducing and solving a formal model of adjudication.[19] My model generates

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law to an authoritative text, or an authoritative decision by the Framers or by 'we the people,' that best explains, and best justifies, American constitutional law today."); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1808 (2000) ("[T]he Justices customarily have approached the Fourth Amendment, as they have the rest of the Constitution, through the medium of earlier case law. The fundamental methods of American constitutional law are the fundamental methods of the common law . . . .").

14 *See supra* notes 9–13.

15 *See, e.g.*, Frederick Schauer, *Do Cases Make Bad Law*, 73 U. CHI. L. REV. 883, 883–84 (2006) (arguing that because cases are unrepresentative of the range of problems that the law would be called upon to resolve, case-by-case lawmaking makes bad law).

16 *See, e.g.*, R.F.V. Heuston, *Hard Cases Make Bad Law*, 2 DUBLIN U. L.J. 31, 35 (1978); Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law*, 48 WAKE FOREST L. REV. 989, 991–92 (2013); Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141, 1142 (2015).

17 Early works in this vein claimed that the common law tends toward efficiency. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1973); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 51 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977). Later, more sophisticated analyses reached more modest, though still often optimistic, conclusions. *See, e.g.*, Robert Cooter, Lewis Kornhauser & David Lane, *Liability Rules, Limited Information, and the Role of Precedent*, 10 BELL J. ECON. 366, 367 (1979) ("We show that legal standards of care, and the resulting care taken by victims and injurers, converge to an efficient level when the courts learn over time."); Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139, 140 (1980) (concluding that "blind evolution will not cause the legal system to reach the best state or continually to improve itself"); Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43, 43 (2007) ("[E]ven when judges are motivated by personal agendas, legal evolution is, on average, beneficial because it washes out judicial biases and renders the law more precise."); Scott Baker & Claudio Mezzetti, *A Theory of Rational Jurisprudence*, 120 J. POL. ECON. 513, 513 (2012) ("The law may converge to efficient or inefficient rules.").

18 In particular, the jurisprudence literature does not use formal models at all, which makes it hard to precisely tell apart different kinds of hard cases, and the models in the common law efficiency literature do not distinguish case characteristics, conceptualizing cases only as generic vehicles for lawmaking.

19 See *infra* Part II.A for a discussion of the virtues of formal modeling.

sharp predictions on how different senses of "hardness" affect the quality of lawmaking, laying bare nuances that would not be appreciated by informal analysis alone.[20]

Informed by judicial and academic usage, my model incorporates three senses of "hard": (1) *special hardship*, meaning salient facts that cannot be explicitly reflected in relevant doctrine (like Garcia's being tricked into appearing in a film that endangered her life, which is equitably salient but outside the reaches of copyright authorship doctrine);[21] (2) *importance*, meaning not the importance of the law at issue but the importance of the case's outcome (for example, a case deciding whether a new technology used by millions of people can lawfully continue or one that determines whether a popular politician can participate in an election is more important in this sense than one that affects only the two parties before the court); and (3) *difficulty* or *closeness*, meaning how close the facts of the case are to running afoul of the law (for example, under the law that determines whether someone is speeding on a highway, the case of someone driving at 66 mph is closer than that of one driving at 120 mph).[22]

These different characteristics, standing alone and acting together, affect the quality of lawmaking. In particular, I show that when a case does not pose a special hardship, importance and difficulty do not make a difference to lawmaking quality.[23] But when a case poses a special hardship, important cases are more likely than unimportant cases, and difficult cases are more likely than easy cases, to make bad law.[24] However, when bad law *is* made, difficult cases make less-bad law than easy cases.[25]

The main mechanism driving these results is the aforementioned rule-disposition tradeoff. Common law courts make law not in abstract contemplation of future possibilities but in the context of particular cases. They thus discharge two different functions at once: dispute settling and lawmaking. And their work is directed to two goals: a short-term goal of getting the right result between the parties and a long-term goal of establishing a law that works well over the run of future cases.

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20 *See infra* Proposition 1.

21 *See supra* notes 1–8 and accompanying text.

22 *See infra* Parts I,II.B.

23 *See infra* Part II.C, Remark 1; Part II.D, Proposition 1.1.

24 *See infra* Part II.D, Propositions 1.2–1.3.

25 *See infra* Part II.D, Proposition 1.4.

These goals are often in harmony. But they may clash in certain cases, like *Garcia*, that introduce a special hardship. My formal model shows when such clashes are more likely to occur and what happens when they do.

The analysis has important implications relating to equity, remedies, and standing. The traditional justification for equity is to protect parties from the hardship that would result from strict application of law.[26] But I argue that equity protects the law by giving courts a way to avoid a special hardship without having to distort law.[27] In this view, the main virtue of equity is not protecting sympathetic parties in discrete cases but protecting the law against distortion. My take on equity shares some features with ancient and modern accounts, from Aristotle to Henry Smith, that emphasize equity's law-improving function; however, it departs from them significantly in recognizing that a system without equity may not be a strict regime of good laws, nor a regime of rules hobbled by multifactor balancing tests, but rather a regime of bad laws. This insight leads to a more welcoming attitude toward equitable intervention, even when equity remains something of a wildcard.[28]

The analysis also reveals the weak side of seemingly strong remedies.[29] A strict remedy that invariably attaches whenever a right is violated makes courts more likely to distort law to avoid a hardship; by contrast, a malleable remedy that can be fitted to circumstances gives courts a way to avoid the hardship without having to distort law. So, somewhat perversely, asking more of the remedy may end up giving a party or an advocate less of the right. This has happened, I show, with advocates' championing of the Fourth Amendment exclusionary rule, which instead of firming up privacy rights by deterring violations has made courts more likely to water down rights for fear of having to apply the remedy.[30] By contrast, I argue that in the canonical cannibalism case *Regina v. Dudley & Stephens*,[31] relying on the Crown's mercy to soften the defendants' sentence allowed courts to circumvent a rule-disposition tradeoff and make good law.[32]

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26 *See infra* notes 215–18 and accompanying text.

27 *See infra* Part IV.A.

28 *See infra* notes 227–35 and accompanying text.

29 *See infra* Part IV.B.

30 *See infra* notes 238–45 and accompanying text.

31 (1884) 14 Q.B.D. 273.

32 *See infra* notes 246–61 and accompanying text.

Finally, the analysis shows that the law of standing (and justiciability more broadly) has a blind spot.[33] The principal rationales undergirding standing doctrine are the separation of powers[34] and the preservation of sharp adversarial contestation.[35] These are important considerations, but an equally important issue is missing from the picture—how standing affects substantive law by determining what kinds of cases make law. One of the main lessons of my analysis is that the kinds of cases used to make law affect the law that is made. It follows that standing affects law by controlling the flow of cases that make law. And the effect is greater than it first appears. It's not that courts will not make law addressing the kinds of issues posed by nonjusticiable cases; it's that courts will make such law using *other* cases that are more likely to be hard, potentially resulting in distortions. By denying standing to plaintiffs in recurring fact patterns that are less likely than those held to be justiciable to present hard cases, courts allow those recurring scenarios to be governed by ill-fitting rules.

Two caveats are in order about the scope of the analysis. First, this is an exercise in positive, not normative, theory. It shows what happens and why, not what ought to happen. Of course, as the word "bad" suggests, the positive theory has a close connection to normative implications. *Given* a normative benchmark, the analysis shows when, and by how much, courts are likely to fall short. But the normative benchmark is assumed, it is not derived. I do not offer a theory of what constitutes good law. Rather, I show how courts might fail to achieve what *they* understand to be good law. Emphatically, this does not assume that the status quo is good; it only assumes that there exists some legal rule that, however imperfect, works better than others, and that courts want to attain it.[36]

Second, my main object is not to verify or falsify the maxim but to probe its logic. This entails playing by the maxim's terms, even when they are contestable. Although some of the

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33 *See infra* Part IV.C.

34 *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 489 (1923); Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992); *see infra* note 266 and accompanying text.

35 *See e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962); *see infra* note 267 and accompanying text.

36 For a philosophical analysis of judicial uncertainty about good law, see Courtney M. Cox, *The Uncertain Judge*, 90 U. CHI. L. REV. 739 (2023); Courtney M. Cox, *Super-Dicta*, 173 U. PENN. L. REV. (forthcoming 2025).

maxim's assumptions can be reasonably challenged, the main point is to see how much insight can be gained from rigorous analysis of the maxim even when we grant its basic premises. Still, after setting forth the theory, I discuss what happens if we relax some of its assumptions, such as the precedential force of law. I focus on five judicial techniques to reduce the risk of hard cases making bad law—writing unpublished opinions, limiting precedent, distinguishing precedent, liberally construing pleadings, and avoiding hard cases—showing that they can be occasionally effective if used judiciously but cannot serve as reliable systematic safeguards against hard cases making bad law.[37]

The rest of this Article is organized as follows. Part I reviews the origins and usage of the "hard cases" maxim. Part II presents and solves a simple formal theoretical model to sharpen, enrich, and extend the maxim's qualitative insights. Part III applies the theory to explain patterns in caselaw and discusses judicial techniques to attenuate the tendency of hard cases to make bad law. Part IV draws out some implications of the theory for evaluating and designing legal institutions. The Conclusion offers a brief summary and synthesis.

I
ORIGINS AND USAGE OF THE MAXIM

Although similar ideas appeared in a legal context in the seventeenth and eighteenth centuries, the maxim in its present form was apparently first used in a number of English cases dating to the early nineteenth century.[38] The earliest usage appears to be *Hodgens v. Hodgens*.[39] The case facts are convoluted and colorful, involving underage marriage, kidnapping, and evasion of authorities by hiding in a cask of groceries.[40] To summarize: A wealthy wife left her husband and their two children. The husband petitioned the court for maintenance of the children out of the wife's property, claiming that his own resources were insufficient. Even though the law at the time did not recognize any duty of maintenance on the mother's part while the father was alive,[41] a court in Dublin ruled in favor of the father so the children would not become destitute.

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37 *See infra* Part III.C.

38 See Heuston, *supra* note 16, at 31–33, for a short and informative survey.

39 (1837) 7 Eng. Rep. 124; 4 Cl. & Fin. 323 (Eng.).

40 *See id.* at 124–26.

41 *See, e.g.*, *id.* at 124, 145.

On appeal the House of Lords reversed, Lord Wynford remarking as follows: "We have heard that hard cases make bad law. This is an extremely hard case, but it would indeed be making bad law . . . if your Lordships affirmed this order."[42] Lord Wynford expressed the hope that, even in the absence of any civil legal duty, "this lady will still recollect that there is another law by which she is bound,—the law of God and nature,—which will compel her suitably to maintain those children which she has brought into the world."[43] Courts, however, "have to decide this case according to the law."[44]

In *Winterbottom v. Wright*, Wright contracted with the Postmaster General to provide a coach to transport mail.[45] Atkinson separately contracted with the Postmaster General to furnish horses for the coach, and also hired Winterbottom to drive the coach.[46] Winterbottom was injured in an accident and sued Wright, claiming that latent defects in the coach caused the accident.[47] Notwithstanding Winterbottom's "unfortunate"[48] injury (he "had become lamed for life"[49]), the court held for Wright because his contractual duty to keep the coach safe was owed to the Postmaster General, not to Winterbottom, who was not party to any contract with Wright.[50] Baron Rolff wrote, "it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law."[51]

Hodgens and *Winterbottom* capture the intuitive essence of the aphorism: when a case presents a special hardship, the court is tempted to vary a generally sound law to avoid the hardship, resulting in a law that, though perhaps fine for the case at hand, is unsound as a general rule of conduct. This is how most commentators understand the maxim. For example, Glanville Williams wrote that "cases in which the moral indignation of the judge is aroused frequently make bad law."[52]

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42 *Id.* at 145.

43 *Id.*

44 *Id.*

45 (1842) 152 Eng. Rep. 402, 402; 10 M. & W. 109, 109.

46 *Id.* at 403.

47 *Id.*

48 *Id.* at 405.

49 *Id.* at 403.

50 *Id.* at 404–05.

51 *Id.* at 405–06.

52 GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 105. (1957).

Bryan Garner says the "catchphrase refers to the danger that a decision operating harshly on the defendant may lead a court to make an unwarranted exception or otherwise alter the law."[53] Max Radin and R.F.V. Heuston say essentially the same thing.[54] Along similar lines, Suja Thomas argues that "atypical" or "oddball" case facts tend to make bad law.[55] Frederick Schauer goes further with the idea, arguing that because cases (not just cases posing a special hardship) are unrepresentative of the range of problems that the law would be called upon to resolve, case-by-case lawmaking makes bad law.[56]

But *Hodgens* and *Winterbottom* do not express all there is to the maxim's qualitative insight. An important gloss was added by the dissenting opinion of Oliver Wendell Holmes, Jr. in *Northern Securities Co. v. United States*.[57] The case involved a government antitrust challenge to the merger of two railroad companies that created the Northern Securities Company to manage the holdings of two rail barons.[58] Northern Securities became one of the largest companies in the world at that time, stoking fears of monopoly.[59] The Supreme Court invalidated the combination, holding that mergers between directly competing firms are per se illegal.[60] (Northern Securities was subsequently broken up.) Justice Holmes wrote in dissent,

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[61]

This is the most-cited articulation of the maxim. It expresses the *Hodgens-Winterbottom* intuition about special hardships distorting sound legal judgment, but it also expresses

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53 BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 403 (3d ed. 2011).

54 MAX RADIN, THE LAW AND MR. SMITH 40–42 (1938); Heuston, *supra* note 16, at 31.

55 *See* Thomas, *supra* note 16; Thomas & Price, *supra* note 16.

56 Schauer, *supra* note 15.

57 193 U.S. 197 (1904).

58 *See id.* at 320–21; *see also* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 55–56 (2002).

59 *See* FRIEDMAN, *supra* note 58, at 55–56.

60 N. Secs. Co. v. United States, 193 U.S. 197, 331 (1904).

61 *Id.* at 400–01 (Holmes, J., dissenting).

something more. What Holmes adds is the idea of a case's "great"ness or importance. A case posing a special hardship always tempts the judge to bend the law to avoid the hardship, but the temptation is easier to resist when that hardship is localized—hence the decisions in *Hodgens* and *Winterbottom*, which recognize the distortionary temptation only to rebuff it. When the hardship relates to a pressing public concern, however, the temptation is harder to resist. This would explain, as Holmes saw it, the *Northern Securities* majority's succumbing to antimonopoly sentiment and veering from the sound path of law. (Of course, this is not to endorse Holmes's position in *Northern Securities*, much less the rules of *Hodgens* and *Winterbottom*; rather, the point of canvassing judicial usage is to get a feel for the maxim's logic.)

Having surveyed the aphorism's judicial usage, I think it's fair to say that the ideas in *Hodgens*, *Winterbottom*, and *Northern Securities*, taken together, capture the meaning of "hard cases make bad law" as generally used in judicial opinions. For example, I have reviewed all references to the aphorism in Supreme Court opinions and have found them to be variations on the same theme, sometimes in landmark cases, often quoting Holmes, and often in dissent.[62] Judicial usage, then, suggests two senses of a "hard" case: first, a case that poses a special hardship; second, a case that is particularly important.

But there is a third sense in which the concept of "hard cases" is commonly used in legal discourse. The third sense of "hard" is "difficult," the opposite of "easy." A hard case in this sense is a case that is not readily resolvable by reference to precedent or other authorities. To put it in the language of Ronald Dworkin's famous article of the same title, hard cases are those in which "no settled rule dictates a decision either way."[63] The question of how judges should go about deciding

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62 *E.g.*, United States v. Clark, 96 U.S. 37, 49 (1877) (Harlan, J., dissenting); Allen v. Morgan Cnty., 103 U.S. 515, 515 (1880); FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946); Dennis v. United States, 341 U.S. 494, 528 (1951) (Frankfurter, J., concurring); N.Y. Times Co. v. United States, 403 U.S. 713, 752–53 (1971) (Harlan, J., dissenting); *id.* at 759 (Blackmun, J., dissenting); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 505 (1977) (Burger, C.J., dissenting); Green v. Georgia, 442 U.S. 95, 98 (1979) (Rehnquist, J., dissenting); Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 654–55 (1989) (Marshall, J., dissenting); Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 207 (1991) (O'Connor, J., dissenting); Bd. of Cnty. Comm'rs. v. Umbehr, 518 U.S. 668, 710 (1996) (Scalia, J., dissenting); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 899 (2009) (Roberts, C.J., dissenting); Kansas v. Carr, 577 U.S. 108, 135 (2016) (Sotomayor, J., dissenting).

63 Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975); *accord* Joshua B. Fischman, *How Many Cases Are Easy?*, 13 J. LEGAL ANALYSIS 595,

hard cases is a central problem of jurisprudence.[64] It is also a question addressed in the extra-judicial writings of judges, where difficult cases are sometimes called, helpfully, "close" cases.[65] To my knowledge, the aphorism has never been used to mean "difficult cases make bad law."[66] Nevertheless, it is natural to ask how the difficulty of a case influences the quality of judicial lawmaking, and how difficulty interacts with the other two senses of hardness.[67] My model will therefore incorporate this third sense of hardness alongside the other two.

II
A Simple Model of Hard Cases

This Part takes the qualitative intuitions gathered from surveying the aphorism's usage and sharpens them with the aid of some mathematics. My aim is to build the simplest model that can capture these intuitions and the different meanings of "hard." Though the model is abstract, I illustrate its operation throughout with a speeding example and keep technical discussion to a minimum (often in footnotes).[68]

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596 (2021) (discussing "hard cases where legal materials do not provide clear answers").

64 *See, e.g.*, Dworkin, *supra* note 63; Richard A. Posner, The Problematics of Moral and Legal Theory (2002); Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *in* Ronald Dworkin 22 (Arthur Ripstein ed., 2007).

65 *See, e.g.*, Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think (2008)*, 108 Mich. L. Rev. 859, 864 (2010).

66 However, Justice Stevens was fond of "easy cases make bad law," and other Justices have said the same. *See, e.g.*, Burnham v. Superior Ct., 495 U.S. 604, 640 (1990) (Stevens, J., concurring); Ankenbrandt v. Richards, 504 U.S. 689, 717-18 n.* (1992) (Stevens, J., concurring); Hudson v. United States, 522 U.S. 93, 106 (1997) (Stevens, J., concurring); O'Bannon v. Town Ct. Nursing Ctr., 447 U.S. 773, 804 (1980) (Blackmun, J., concurring); Heckler v. Chaney, 470 U.S. 821, 840 (1985) (Marshall, J., concurring). In using this variation, the Justices seemed to think they were inverting the traditional expression, which is not right because the opposite of "hard" in the traditional usage is not "easy." The line of thought behind this variation is indistinct, but the idea might be that easy cases embolden judges to make careless pronouncements about the law that, though harmless in the simple case at hand, may engender problems in other cases that introduce additional dimensions or difficulties. This idea is related (though not identical) to the possibility that "hard cases make good law," touched upon in Part III.D, *infra*.

67 For an effort at empirically estimating the proportion of easy and difficult cases, see Fischman, *supra* note 63.

68 Technically minded readers may wish to consult the more complicated models that I develop and solve in Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation*, 51 J. Legal Stud. 133 (2022). That article builds on the basic model by integrating impact litigators and appellate courts, focusing

A. The Value of Models

Before presenting the model, it might be useful to say a few words about the value of formal models as a tool of legal theory.[69] Formal models provide a way to build theory that is both precise and rigorous. Precision can be attained in stating both a model's assumptions and its conclusions (like the "remark" and "proposition" below). The value of precision in conclusions is that it makes clear what the analyst is saying—which both enhances understanding and makes it easier to verify (or falsify) the statements, including by subsequent empirical investigation. Similarly, the value of precision in assumptions is that it makes the premises of the analysis both more comprehensible and more open to contestation.

Formal models are sometimes criticized for their "unrealistic assumptions." The criticism might be true of some models, but as a general critique of the field it is misguided. Every logical argument (formal or not) proceeds upon assumptions, and every logical argument about the real world relies implicitly or explicitly on some model of the phenomenon under study that simplifies or abstracts away from some of its features.[70] For example, consider a customer who is navigating a crowded supermarket in New York or a designer planning the layout of such a supermarket. They would have to rely on a model of how customers and salespeople behave to guide their decisions—in the case of the customer, decisions such as when to stop or go, and in the case of the designer, decisions about how to design the space. This model would assume certain things about customers' and salespeople's preferences, for example that they would prefer to get their shopping done quickly and avoid fights and accidents. It would also make assumptions about what these people can do (their "action space," in the jargon of game theory),[71] such as limits on their speed and agility, and the fact that they cannot fly. Just as importantly, the

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on strategic interaction between different players, whereas this Article presents only the basic model and focuses on developing its legal and policy implications.

69 What follows is a brief statement of my own reasons for finding formal models worthwhile, which the reader may take as the perspective of one scholar working on applied modeling in law and economics. For lengthier treatment of issues raised by formal modeling in social science, see the sources cited in note 73, *infra*.

70 For a discussion with examples, see Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 525–27 (1997).

71 *See* Robert Gibbons, *An Introduction to Applicable Game Theory*, 11 J. ECON. PERSPS. 127, 128–29, 132 (1997).

model would exclude a great deal of information about these actors—like how long their hair is or what color clothes they are wearing—because this information is not relevant for navigating the space (though it is relevant for other purposes). Likewise, when scholars discuss the probable impact of a law, they make assumptions about the preferences and action spaces of people subject to the law and those in charge of enforcing it. The distinction between informal and formal models in this respect is not between realistic and unrealistic assumptions, and certainly not between assumption-free and assumption-laden argument, but only that the assumptions underlying formal models are laid bare, opening them up to critique. For example, in a formal model, the actors' preferences are often made explicit by use of a "payoff function" or "utility function" (like equation (1) below).

Openly and precisely stated assumptions, like precise conclusions, facilitate criticism and the growth of knowledge. In addition, they hold the argument to a high standard by making it hard for the analyst to change premises midway through the argument. For example, once a payoff function explicitly specifies a person's preferences, the analyst cannot sneak in additional preferences.

This last point relates to the value of rigor. A formal model's rigor comes from having a tight, systematic, verifiable way of getting from the assumptions to the conclusions. Mathematical deduction follows a system that minimizes looseness, inconsistency, and mistake. Those trained in the method can spot inconsistencies in premises and in argument, mistakes or unwarranted leaps of logic, and imprecision in statement far more reliably than is attainable with informal logic. Formal presentation thus ensures that the analysis proceeds on track and as promised by tying the analyst's hands and making slippages transparent. As such, one can be more confident that the conclusions are sound. So, even when solving a model reaches a result that seems intuitive, the model has added value. Frequently, a useful formal model also reaches results that would not have been intuited informally.[72]

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[72] For example, in this Article, though the basic insight about a special hardship tempting the court to distort the law can be appreciated informally, the more precise breakdown of the three senses of "hard" and how they affect lawmaking would not be possible without the aid of some formalism. There are more counterintuitive results about the influence of strategic impact litigators on lawmaking in my more technical treatment of this topic. *See* Shahshahani, *supra* note 68, Propositions 2–3. In the case of counterintuitive results, the supporting intuition

These values make formal models a useful tool for building positive theory. That is why they are the chief method of theory building in political science and law and economics, and virtually the only method of theory building in economics, as one can confirm by picking up a top journal in any of these fields.[73] Formal models are particularly useful for theorizing about structured environments like legal institutions and judicial decision making, where high-stakes interactions follow well-established rules.[74] That is not to say that formal models are equally useful in all areas of social science,[75] and emphatically not to say that informal work cannot be highly valuable in studying highly structured institutional settings.[76] But the preceding discussion hopefully gives readers a sense of why the math to come has a real payoff.

B. Building Blocks

I now analytically conceptualize every word of the saying.

Hard. The model incorporates all three senses of hardness. *Special hardship* is modeled as a latent dimension of case facts that, for whatever reason, cannot be explicitly fitted into applicable law (like Garcia's predicament, which was outside the purview of copyright authorship doctrine).[77] *Importance* is modeled as the weight that the court gives to the case's disposition. Note well that this refers to the intrinsic dispositional importance of the case, in line with Holmes's notion of "immediate

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is often constructed by the analyst *after* solving the model and comprehending the forces at play.

73 On the use of models in social science, see, e.g., CHARLES M. CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER 69–82 (2000); Charles M. Cameron & Rebecca Morton, *Formal Theory Meets Data*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 784 (Ira Katznelson & Helen V. Milner eds., 2002); KEVIN A. CLARKE & DAVID M. PRIMO, A MODEL DISCIPLINE: POLITICAL SCIENCE AND THE LOGIC OF REPRESENTATIONS (2012); SCOTT ASHWORTH, CHRISTOPHER R. BERRY & ETHAN BUENO DE MESQUITA, THEORY AND CREDIBILITY: INTEGRATING THEORETICAL AND EMPIRICAL SOCIAL SCIENCE (2021).

74 Invitations to academic lawyers to incorporate the tools of formal modeling, especially game theory, include Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1990); DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW (1994); GAME THEORY AND THE LAW (Eric B. Rasmusen ed., 2008).

75 *See* CAMERON, *supra* note 73, at 73–78 (discussing when the tools of formal theory will be more or less useful).

76 For an example of a valuable and influential exercise in building informal positive theory for a highly structured institutional-legal context, see Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

77 See *infra* Part II.D for discussion of why doctrine might be under-inclusive.

overwhelming interest,"[78] not its doctrinal importance. Finally, *difficulty* is conceptualized as how close the case is to the court's preferred line dividing legal from illegal conduct.

Cases. The way I model "cases" and "law" follows the "case space" framework.[79] This approach was pioneered by Lewis Kornhauser and is now common in studies of judicial decision making in political science.[80] A case is modeled as a bundle of facts—more precisely, facts that are legally relevant or that the judge thinks should be legally relevant. The *law* (or *rule*)[81] divides the set of possible facts (the "fact space") in two, each corresponding to a *disposition*, meaning a win or loss for either party. To take a very simple example, the case could consist of someone driving at a particular speed, and the rule could be a speed limit, such that those driving above the speed limit would get one disposition (liable for speeding) and those driving below the speed limit would get another disposition (not liable).[82] To sum up: a case consists of a set of facts, and the court decides the disposition of the case (who wins) by announcing a rule that demarcates the boundary of legal conduct.[83] Figure 1 shows rules in one- and two-dimensional case space. A one-dimensional rule may be referred to as a cutpoint rule.

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78 N. Secs. Co. v. United States, 193 U.S. 197, 400 (1904).

79 *See* Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 446–48 (1992).

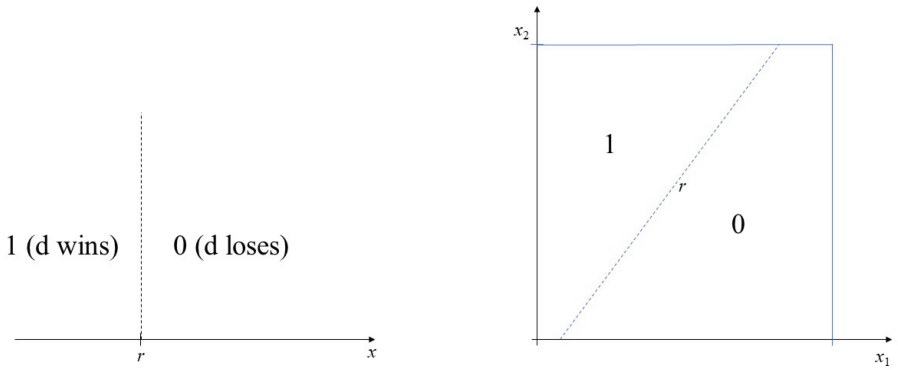
80 *See id.* For overviews see Jeffrey R. Lax, *The New Judicial Politics of Legal Doctrine*, 14 ANN. REV. POL. SCI. 131, 133 (2011); John P. Kastellec, *The Judicial Hierarchy*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (William R. Thompson ed., 2017). *See also, e.g.*, Sepehr Shahshahani, *The Fact-Law Distinction: Strategic Factfinding and Lawmaking in a Judicial Hierarchy*, 37 J.L. ECON. & ORG. 440 (2021) (using a case space model to show how standards of review structure strategic interaction between appellate and trial courts).

81 The terms "law" and "rule" are used interchangeably throughout the model. Although the term "rule" may conjure up the perennial question of rules versus standards, it's best for purposes of following the model to set aside that distinction and think of the law without regard to whether it's a rule or a standard.

82 Any number of examples could be given, but I will use the speeding example because it easily illustrates the math. The idea of a court setting a speed limit is not entirely fanciful. *See, e.g.*, ALA. CODE § 32-5A-170 (2021) ("No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing."); HAW. REV. STAT. § 291C-101 (2022) (same).

83 Technically, a case x is a point in fact space $X \subset R^n$ and a rule r is a hyperplane dividing the fact space into two half spaces, each corresponding to a disposition $d \in \{0,1\}$.

FIGURE 1: Rules in one-dimensional (left) and two-dimensional (right) case space. For example: In the lefthand-side figure, x may be the driver's speed and r may be a speed limit, such that those driving above the speed limit are held liable and those driving below it escape liability. In the righthand-side figure, the speed limit varies with road conditions. If x_1 indexes the driver's speed and x_2 indexes road quality, with higher values representing better road conditions, then the rule r specifies which combinations of speed-quality result in liability.



Make. The idea of a case "making" law presupposes that the rule of the case will apply beyond that case. In a speeding case, for example, the court cannot just say whether this particular driver is liable but must announce some rule (e.g., a speed limit or a range of permissible and impermissible speeds) that will apply to similarly situated drivers in the future.

Bad. Badness captures the extent to which the dispositions produced by the law over the expected run of future cases overlap with the dispositions that would have been produced by the court's ideal rule. In one-dimensional fact space, the badness of a rule is captured by how close it is to the ideal rule. To go back to the speeding example, if the ideal speed limit is 65 mph, then a rule that sets the speed limit at 75 mph is less bad than one that sets it at 85 mph because it would adjudicate speeding cases in a way that is closer to how the ideal rule would adjudicate them.[84]

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84 A technical note: I will assume throughout that the distribution of case facts is uniform over the fact space. The assumption is common in the literature. *E.g.*, Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four*, 15 J. THEORETICAL POL. 61, 64 (2003); Gennaioli & Shleifer, *supra* note 17, at 48; Deborah Beim, Alexander V. Hirsch & Jonathan P. Kastellec, *Whistleblowing and Compliance in the Judicial Hierarchy*, 58 AM. J. POL. SCI. 904, 907 (2014). A similar exercise could be carried out for an arbitrary distribution (with appropriate assumptions about its support and density), but

Law. As discussed above, a "law" means a rule that divides the fact space into half spaces corresponding to two dispositions (liable or not liable). Such rules are illustrated in Figure 1.

Payoff function. The final piece of the model's setup is to consider the court's goals or desiderata in decision making (its "preferences," in social scientific terminology). In formal models, these are specified with a "payoff function" (or "utility function").[85] Simply put, the greater the value of the payoff function (U in equation (1) below), the more satisfied the court is. Given the qualitative discussion, we must make clear that the court cares both about the disposition of the case at hand and about the rule made by the case (which determines the disposition of future cases).[86] In one-dimensional fact space,[87] this is captured by

$$U = -|r - H| + e\mathbb{1}\{d = d_H\} \tag{1}$$

where r is the rule of the case, H is the court's ideal rule, and e is the dispositional payoff, which accrues if and only if the disposition of the case (d) conforms to the court's ideal disposition (d_H).[88] Ideal disposition means the disposition demanded by the court's ideal rule. For example, for a court whose ideal speed limit is 65 mph, the ideal disposition is "not liable" in cases where the driver was driving below 65 mph and "liable" in cases where the driver was driving above 65 mph. Formally, for a one-dimensional ideal rule,

$$d_H = \begin{cases} 1 \text{ if } x < H \\ 0 \text{ if } x \geq H \end{cases} \tag{2}$$

The first term in the payoff function in equation (1) ($-|r - H|$) is the court's rule utility, which is higher when the rule is set closer to the court's ideal rule, with a maximum value of 0

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the uniform distribution is simple and allows for a clean focus on the effects of hardness.

85 Needless to say, this does not in any way imply a monetary payoff. Nor does it imply that "utility" is an easily measurable coin.

86 *See supra* Part I.

87 "One-dimensional fact space" means that the legally relevant facts can be expressed in one dimension—for example, when the only information that is required to know whether a driver is illegally speeding is how fast she was driving.

88 In case any clarification is needed, the symbol $\mathbb{1}$ preceding the curly brackets in equation (1) denotes an indicator function, meaning a function which takes the value 1 if the statement inside the curly brackets holds and 0 otherwise.

when the rule is set exactly at the court's ideal point.[89] And the second term (the e term) is disposition utility, which can be either 0 (the wrong disposition from the perspective of the court's ideal rule) or e (the right disposition), with e capturing the case's importance.

The building blocks of the model are now in place. To summarize: The court decides a case by choosing a rule, which generates its payoff per equation (1). Our object is to examine how the hardness of the case (in three different senses) influences the quality of the rule. Before proceeding to solve the model, it is worth pausing to note three features of the setup.

First, the way I have modeled cases, dispositions, and rules captures two important features of the common law process. First, it takes the reason-giving requirement seriously. The court cannot just say "plaintiff wins"; it must articulate why plaintiff wins, and the reason must have some generality. Indeed, giving a reason that is so *sui generis* or overfitted that it applies only to the case at hand is practically no different than saying "plaintiff wins." Second, and relatedly, the setup recognizes that two essential functions of common law courts—lawmaking (deciding the governing law) and dispute settling (deciding the case's disposition)—are different but inextricably linked. The analysis that follows exploits these key features by showing how various characteristics of a particular case shape the law that is made in the context of that case but will apply more broadly.

Second, not every case makes law. Some cases involve routine application of previously settled law. This is not a model of such cases. The focus, rather, is on cases in which the court has occasion to make law for a previously unconsidered fact pattern (a case of first impression) or to reconsider an old law. That is where the aphorism has bite.

Third, the court's payoff function (equation (1)) reflects a certain myopia. A farsighted judge—meaning one who is concerned about all future cases and potential cases—would not care about the disposition of the particular case at hand, because the importance of one case pales in comparison with the great run of future cases. However, in line with the aphorism (and longstanding lawyerly intuition), the judge in the model

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89 A technical note: The reduced form $-|r - H|$ used for the court's rule utility can be microfounded as expected future disposition utility. Calculating expected future disposition utility from two-dimensional cases as a function of different one-dimensional rules shows that rule utility is indeed single-peaked and symmetric around a maximum at $r = H$ (though the microfounded form of the loss function is quadratic rather than linear).

cannot abstract away from the circumstances of this case and focus only on the law that is best for all cases. That is why the judicial payoff function contains not only the rule payoff ($-|r - H|$) but also a disposition payoff (e) for getting the particular case right.[90]

C. Perfect Doctrine

Having specified the model, I now solve it to help understand how a case's hardness affects the quality of law. It is useful to start by solving the model in an idealized context. In this context, the law is "perfect" or "perfectly inclusive" in the sense that it incorporates all relevant facts. In other words, there are no "special hardships" of which the law cannot take account. This captures the view that the law can be infinitely capacious in taking account of all manner of details and idiosyncrasies. It is an idealistic and unrealistic view, but useful, as we shall see, as a theoretical benchmark.

Given perfect doctrine, the court's unique optimal action would be to set the rule at its ideal point (in one-dimensional fact space, this would be $r = H$). This rule is the unique maximizer of the rule component of the court's payoff function (because there is no distance between the rule and the court's ideal rule), and it also guarantees the correct disposition. The choice is uniquely optimal irrespective of case importance or case difficulty. In particular, case importance does not matter because, given perfectly inclusive doctrine, the ideal rule decides all cases correctly; there is never a rule-disposition tradeoff. To take a simple example, if the ideal speed limit is 65 mph, then the court would simply announce that rule, which *both* maximizes the rule component of the payoff function (there is no distortion away from the ideal rule) *and* ensures the correct disposition in every case (drivers going above 65 mph are held liable and others are absolved of liability). This is all straightforward; the purpose is simply to establish a benchmark for later analyses, which is captured by the following remark.

Remark 1: If doctrine is perfectly inclusive then cases never make bad law.

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90 Those who prefer thinking in psychological terms may wish to think of this feature of the court's payoff function as an inconsistency in preferences. If allowed to stand back and make law in light of the aggregate distribution of cases, the court's payoff function would have only the rule component; however, given that the court makes law in the context of a particular case, its payoff function at the moment it makes law also incorporates a concern for getting that case right. So the court's preferences looking over the run of all cases may be inconsistent with its preferences at the time of making law in the context of a given case.

D. Under-Inclusive Doctrine

Now consider a law that cannot reflect all relevant facts. The reason why additional facts cannot be incorporated into doctrine is beyond the scope of the inquiry; suffice it to say that there might be many such reasons. For example, the legislature may have cabined the factors that courts can consider. Or it might be that incorporating additional factors would make the law too complicated to provide meaningful notice to those who would be expected to comply with it, or would create too many loopholes for clever actors, or would be too costly to enforce. Whatever the reason might be, it is common that doctrine cannot take cognizance of all conceivably relevant facts. As a canonical English case put it, "Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances."[91] For example, the actor's plight in *Garcia* was salient but not within the purview of copyright authorship doctrine.[92]

In particular, suppose that perfect doctrine would take account of facts in two dimensions (x_1 and x_2) but in practice doctrine can only consider facts in one dimension (x_1). To keep with the speeding example, suppose that speed limits would ideally account for both road conditions and a car's speed, but practically it is feasible to only consider speed. To develop intuition, suppose the court's ideal perfectly inclusive rule (the "first-best rule") is $x_1 = x_2$ (the 45-degree line), yielding ideal dispositions

$$d_H = \begin{cases} 1 \text{ if } x_1 < x_2 \\ 0 \text{ if } x_1 \geq x_2 \end{cases} \quad (3)$$

That is, the court's ideal disposition is that defendant wins when x_1 is less than x_2 but plaintiff wins when x_1 is greater than or equal to x_2. But, given under-inclusiveness, the court must choose a rule of the form $r = x_1$, yielding

$$d = \begin{cases} 1 \text{ if } x_1 < r \\ 0 \text{ if } x_1 \geq r \end{cases} \quad (4)[93]$$

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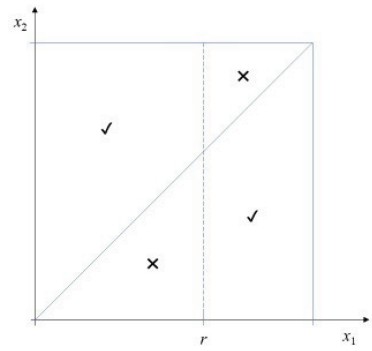
91 The Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 486; 1 Ch 1, 6.

92 *See supra* notes 1–8 and accompanying text.

93 A technical note: To avoid epsilon problems, assume the court can choose either disposition when $x_1 = r$. For an explanation of epsilon problems, see *infra* note 101 and accompanying text.

Clearly, then, doctrine is unavoidably imperfect: for any rule choice, some cases will not be decided as the first-best rule mandates. Figure 2 illustrates this dispositional imperfection of under-inclusive rules.

FIGURE 2: The ideal rule ($x_1 = x_2$) incorporates facts in two dimensions, but the practically feasible rule r can take cognizance of facts in only one dimension (x_1). Inevitably, for any choice of r, some cases will be wrongly decided (marked ✗).



Given that doctrine is under-inclusive and the first-best rule infeasible, the court's rule utility is maximized by the "second-best rule"—i.e., the rule that would decide the largest possible mass of cases in accordance with the first-best rule. In other words, the best rule is the choice of r in Figure 2 that would maximize the areas marked ✓ (equivalently, minimize the areas marked ✗).[94] Simple calculus verifies that the second-best rule is r = ½.[95] The question whether hard cases make bad law can now be understood as whether difficult or important cases are more likely (than easy or unimportant cases) to cause the court to deviate from its second-best rule.

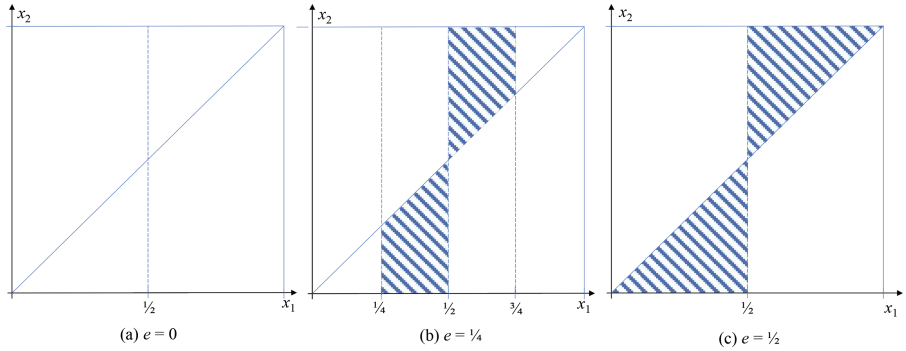
First consider case importance. A case comes before the court. The court must decide whether to choose the second-best rule or deviate from it to get the right disposition, thus making bad law. The court would be willing to sacrifice the second-best rule if and only if $e > |x_1 - ½|$. That is, the court would be willing to make bad law if x_1 falls in the

94 Formally, one should pick r to maximize $Pr(d = d_H)$.

95 In case any elaboration is needed, the optimization problem is to pick r to minimize $(r^2 + (1 - r)^2)/2$. The first-order condition yields $r = ½$, and the second-order condition is satisfied because the minimand is convex.

interval ($½ - e$, $½ + e$), but not outside it.[96] So an increase in case importance (e) increases the probability of making bad law by expanding this interval, as shown in Figure 3.

FIGURE 3: Case facts in the shaded regions make bad law. In panel (a), cases are utterly unimportant ($e = 0$), so no cases make bad law. In panel (b), cases are moderately important ($e = ¼$), so the court is willing to sacrifice the rule to the disposition whenever $x_1 \in (¼, ¾)$, and in this interval some cases make bad law. In panel (c), cases are very important ($e = ½$), so the court is always willing to sacrifice the rule to the disposition, and a case makes bad law whenever the dispositions demanded by the second-best rule ($x_1 = ½$) and the first-best rule ($x_1 = x_2$) disagree.



Next consider case difficulty or closeness. This can be conceptualized as the distance between the legally articulable dimension of case facts and the second-best rule (that is, $|x_1 - ½|$), which captures the idea that close cases could go the other way if the case facts were just a little bit different. (Keep in mind that more difficult cases are *closer* to the cutpoint.) It is clear from Figure 3 (panels (b)-(c)) that difficult cases are more likely to make bad law. When the first dimension of case facts is closer to the second-best cutpoint, the probability of conflict between the first-best and second-best dispositions is higher (note the greater prevalence of shaded regions when x_1 is closer to ½), meaning the case is more likely

96 Even inside this interval, a case does not pose a rule-disposition tradeoff when $x \in \{(x_1, x_2) \mid x_1 \in (1/2 - e, 1/2) \text{ and } x_1 < x_2\} \cup \{(x_1, x_2) \mid x_1 \in (1/2, 1/2 + e) \text{ and } x_1 > x_2\}$. If so then the court need not make bad law, though it would be willing to do so if the tradeoff were posed.

to pose a rule-disposition tradeoff, which is a necessary condition for making bad law.[97]

A simple example might be useful to drive home these conclusions. Suppose that, ideally, the speed limit would take account of road conditions, but for whatever reason (e.g., administrability) the legislature has mandated that courts should establish a uniform speed limit.[98] In this situation (an "underinclusive law"), no uniform speed limit is ideal (or "first-best") because any uniform speed limit would get some cases wrong from the perspective of the ideal speed limit that also considers road conditions (like the areas marked ✕ in Figure 2). Still, there exists a uniform speed limit that is better than all other uniform speed limits—i.e., one that would decide the greatest possible mass of cases in accord with the ideal speed limit. This is the "second-best" rule. Suppose the second-best rule is 65 mph. Then, a case makes bad law when the court deviates from setting the speed limit at 65 mph in order to get the right disposition (liable or not liable for speeding) in that case. To begin, for there to be a possibility of rule distortion, there needs to be a rule-disposition tradeoff (the areas marked ✕ in Figure 2); if the dispositions mandated by the first-best and second-best rules are not in conflict (the areas marked ✓ in Figure 2), then there is no need to distort the law. More difficult cases make rule distortion more likely because they make a rule-disposition tradeoff more likely. In terms of the speeding example, it is more likely that the ideal disposition and the disposition mandated by the second-best rule of 65 mph would conflict when the driver's speed is close to 65 mph. (To see this graphically, note that for any vertical sliver of the graph in Figure 3, the shaded areas constitute a greater portion of the sliver when the sliver is close to the second-best cutpoint $x_1 = ½$.) More important cases also make rule distortion more likely, though for a different reason than more difficult cases—namely, if there is a rule-disposition tradeoff, the court is more likely to sacrifice the rule if it cares more about the disposition. For example, suppose someone is driving at a speed that does not violate the second-best, 65-mph speed limit but does violate the ideal

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97 Formally, $Pr(r \neq 1/2 \mid X_1 = x_1)$ is decreasing in $|x_1 - ½|$. That is, for $x_1 < 1/2$, $\frac{\partial Pr(X_2 < X_1 \mid X_1 = x_1)}{\partial x_1} > 0$, and for $x_1 > 1/2$, $\frac{\partial Pr(X_2 > X_1 \mid X_1 = x_1)}{\partial x_1} < 0$.

98 Alternatively, think of this as a speed limit that is uniform for any given weather condition, whereas ideally we would want the speed limit to take account of both weather and road conditions.

speed limit that considers road conditions. Then the court is more likely to distort the second-best speed limit and impose liability if a lot depends on the decision—for example, if the driver is Al Capone and he has been escaping the clutches of the law for a variety of other offences, so the only way to hold him legally accountable is to get him for speeding.[99]

The analysis so far has clarified three points. First, a case posing a special hardship can make bad law, capturing the intuition in *Hodgens* and other cases. Second, when a case poses a special hardship, important cases are more likely than unimportant cases to make bad law, capturing Holmes's intuition in *Northern Securities*. Third, when a case poses a special hardship, difficult cases are more likely than easy cases to make bad law, a relationship that has not been considered before.

Formal analysis allows us to say still more. The qualitative intuition is that hard cases make bad law, but how bad? In other words, if there is a deviation from the second-best rule, how large is that deviation? For example, if the second-best rule is a speed limit of 65 mph, then a speed limit of 70 mph is less bad than a speed limit of 100 mph.[100] Consider again, for any level of case importance, the region of case facts that would make bad law. Within that region, as Figure 3 makes clear (shaded areas in panels (b)-(c)), more difficult cases actually make *less*-bad law. That is so because, when case facts along the legally articulable dimension (x_1) are close to the second-best cutpoint, the court can flip the disposition of the case by only a small deviation from the second-best rule. By contrast, when case facts are far from the second-best cutpoint (easy cases), the level of rule distortion necessary to flip the disposition is high. For example, suppose the defendant would be liable under the ideal speed limit that considers road conditions but not under the second-best speed limit because

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99 In other words, importance and difficulty have a similar effect but operate through different mechanisms. More important cases are more likely to make bad law because they make it more likely that the court would distort the law if a rule-disposition tradeoff occurs, whereas more difficult cases are more likely to make bad law because they make it more likely that a rule-disposition tradeoff would occur. As I will explain momentarily in the main text, difficult cases also make it more likely that the court would distort the rule if a rule-disposition tradeoff occurs, albeit through a different mechanism than important cases. Namely, closer cases are more likely to make bad law because the extent of rule distortion required to save the disposition is smaller when the case is closer to the second-best cutpoint.

100 *See also supra* note 84 and accompanying text.

he was driving below 65 mph. Suppose further that the case is sufficiently important that the court would be willing to distort the second-best speed limit to hold the defendant liable. So we are assuming that bad law is being made, and we ask how bad. The answer is that the law would be less bad if the case were closer, for example if the defendant were driving at 60 mph rather than 50 mph, because the court would only need to distort the speed limit to 60 mph rather than to 50 mph to hold the defendant liable.[101] In sum, when making bad law, more difficult cases make less-bad law.[102]

The insights from the model's analysis are summarized as follows.

Proposition 1: When the court makes law by deciding a case, the following statements are true:

1. *Cases not posing a special hardship never make bad law.*
2. *Among cases that pose a special hardship, more important cases are more likely to make bad law.*
3. *Among cases that pose a special hardship, more difficult cases are more likely to make bad law.*
4. *Conditional on making bad law, more difficult cases make less-bad law.*

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[101] This example also serves to illustrate the concept of an epsilon problem, mentioned in note 93 above. Supposing the defendant is driving at 60 mph and the court is willing to distort the second-best law (65 mph) to hold him liable, how far should the court distort the law? If the defendant's speed needs to be *strictly above* the speed limit for liability to attach, then the question does not have an answer. To wit, the court should distort the law as little as possible while still holding the defendant liable, so intuitively the court should hold the speed limit to be *just below* 60 mph. But that does not work, because for any number smaller than 60, there is a larger number that is still smaller than 60 (e.g., the court can improve on 59.99 by going to 59.999, and then to 59.9999, and so forth). Note that a symmetric problem would arise on the other side if the defendant were driving *above* the second-best speed limit and the court wanted to absolve him of liability by setting the speed limit *just above* his speed. It is to make such problems solvable that I impose the assumption that the court can decide the case either way if the speed is exactly equal to the speed limit (i.e., if $x_1 = r$). Then, the answer to our hypothetical would be that the court should distort the speed limit to exactly 60 mph. Another way of solving the problem would be to assume that there is some minimum increment in setting speed limits—e.g., that speed limits must be whole numbers. In that case, the intuitive idea of "*just below* 60 mph" would translate into a unique number, namely 59 mph. For technical reasons, it is preferable to assume that the court can choose either disposition when the case is exactly at the cutpoint rule than to discretize the rule space.

[102] There is no analogous effect for case importance; assuming a case is making bad law, the degree of badness does not change in case importance.

III
APPLICATIONS AND LIMITATIONS OF THE THEORY

This Part provides examples of the maxim at work and discusses some ways of limiting its distortionary logic. The discussion serves as a foundation for the lessons derived in Part IV for evaluating and designing legal institutions. Although I will maintain that certain cases made bad law, the main aim of this Part is not to debate the merits of any particular decision but to show that my model of hard cases helps explain salient patterns in the law.

A. Rule Distortion

The logic of "hard cases make bad law" is not limited to the old cases that apparently gave rise to the saying. A famous illustration is *Bush v. Gore*, which determined the winner of the 2000 U.S. Presidential election.[103] In a *per curiam* opinion split 5-4 along ideological lines, the U.S. Supreme Court reversed the judgment of the Florida Supreme Court ordering a recount of Presidential election ballots in Florida, holding that such a recount would violate the Equal Protection Clause by treating voters disparately.[104] Halting the recount had the effect of confirming the pre-recount results, so George W. Bush beat Al Gore to become the 43rd President of the United States.

The decision has been much talked about, and this is no place to relitigate its merits.[105] Suffice it to say that it has all the hallmarks of a hard case making bad law. The case was hard both in the sense of incorporating salient extra-doctrinal facts and in the sense of being important. And the case apparently made bad law: Justice Stevens's lament in dissent that "the loser" from the decision was "the Nation's confidence in the judge as an impartial guardian of the rule of law"[106] has been widely echoed, and the decision was received negatively by the public, major newspapers, and law professors.[107] One

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103 531 U.S. 98 (2000).

104 *Id.* at 103.

105 For a guide to the endless literature, see Richard L. Hasen, *A Critical Guide to* Bush v. Gore *Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004).

106 *Bush*, 531 U.S. at 129 (Stevens, J., dissenting).

107 A survey by David Cole found that of the thirty-six unsigned editorials in the top twenty newspapers by circulation in the week following the decision, eighteen were critical, twelve were neutral, and six were positive; of the thirty-nine signed op-eds published in the same newspapers in the same time period, twenty-six were critical, five were neutral, and eight were positive; and of the seventy-eight law review articles published in 2001–2004 commenting on the decision,

can plausibly conclude that the case's high stakes, combined with the fact that an explicit weighing of the stakes was outside the reaches of relevant doctrine, made for a decision that distorted law to arrive at a desired outcome—an interpretation on all fours with the logic of the maxim.[108]

A less famous illustration comes from how trademark law responded to online abuses.[109] When the Internet first became widely available, in the days before effective search engines (principally Google), people located the websites they wanted by directly typing the address (URL) into their web browser, so having an intuitive, guessable domain name was quite important. Realizing this, "cybersquatters" registered domain names that conjured the name of existing entities to freeride on their name or extract payment from them.[110] At the time, there were no laws targeting the problem of cybersquatting, so victims sought recourse in other legal claims, including trademark dilution. But there was a problem with this tactic: only "famous" trademarks were statutorily eligible for dilution claims.[111]

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thirty-five were critical, thirty-two were neutral, and eleven were positive. *See* David Cole, *The Liberal Legacy of* Bush v. Gore, 94 GEO. L.J. 1427 (2006). Another sign of the legal academy's disesteem of the opinion is the harshly critical statement signed by over 625 law professors that appeared in a number of publications, including as an advertisement in the *New York Times*. The letter is reproduced in Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 GEO. L.J. 173, 188 n.62 (2001). For more on the professoriate's attitude, see Hasen, *supra* note 105.

108 Some readers might wonder whether even the disposition in *Bush v. Gore*, let alone the law, was good. This raises an issue about important cases (the second sense of hard) that is beyond the scope of this Article but might be worth exploring in future research. Namely, in my model, importance does not impose any distortion unless the case also poses a special hardship (*see supra* Remark 1 and Proposition 1.1). Importance is not distortionary on its own but rather increases the probability of distortion in cases of special hardship. But one can argue that importance—of its own, even in the absence of a special hardship—creates a sort of pressure that distorts sound judicial judgment. Some readers might interpret *Bush v. Gore* this way, along with Holmes's reference to "hydraulic pressure" in *N. Secs. Co. v. United States*, 193 U.S. 197, 400–01 (Holmes, J., dissenting).

109 This paragraph draws on 2 PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES & SHYAMKRISHNA BALGANESH, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 1102–04 (2023).

110 *See, e.g.*, Intermatic Inc. v. Toeppen, 947 F. Supp. 1227, 1230 (N.D. Ill. 1996) (noting that defendant had registered 240 Internet domain names, including deltaairlines.com, greatamerica.com, neiman-marcus.com, crateandbarrel.com, and ussteel.com). *See generally* Greg Miller, *Cyber Squatters Give Carl's Jr., Others Net Loss*, L.A. TIMES (July 12, 1996), https://www.latimes.com/archives/la-xpm-1996-07-12-mn-23458-story.html [https://perma.cc/DX7C-B4KU].

111 *See* Federal Trademark Dilution Act (FTDA) of 1995, Pub. L. 104–98, 109 Stat. 985 (codified at 15 U.S.C. § 1125(c)). The FTDA has been superseded by

Faced with this problem, and keen to avoid the manifest injustice of cybersquatters profiting from their parasitic conduct, some courts distorted trademark dilution law by diluting the fame requirement and finding all kinds of not-famous trademarks to be famous.[112]

As the model predicts, the presence of a second dimension of case facts that was salient to a just disposition of the case but beyond the ken of the law being invoked to resolve the case caused some courts to bend the law to achieve the right outcome.[113] Doing so expanded the scope of trademark dilution liability beyond its statutory authorization and created a conflict with other caselaw that meaningfully policed dilution's fame requirement.[114]

The problem was not solved until the enactment of congressional legislation and international procedures targeting cybersquatting, which took the pressure off dilution law.[115] Then, in

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the Trademark Dilution Revision Act (TDRA) of 2006, Pub. L. 109–312, 120 Stat. 1730 (codified at 15 U.S.C. § 1125(c)). *See infra* notes 116–17 and accompanying text (discussing the interpretation of "famous" under the TDRA).

112 *See, e.g.*, *Intermatic*, 947 F. Supp. at 1239 ("Intermatic," though noting that fame was not disputed); Hasbro, Inc. v. Internet Ent. Grp., Ltd., No. C96-130WD, 1996 WL 84853, at *1 (W.D. Wash. Feb. 9, 1996) ("Candy Land," without even discussing the fame requirement); Panavision Int'l, L.P. v. Toeppen, 945 F. Supp. 1296, 1302 (C.D. Cal. 1996), *aff'd*, 141 F.3d 1316 (9th Cir. 1998) ("Panavision" and "Panaflex"); Teletech Customer Care Mgmt. (California), Inc. v. Tele-Tech Co., 977 F. Supp. 1407, 1413 (C.D. Cal. 1997) ("TeleTech"); Archdiocese of St. Louis v. Internet Ent. Grp., Inc., 34 F. Supp. 2d 1145, 1146 (E.D. Mo. 1999) ("Papal Visit 1999," "Pastoral Visit," "1999 Papal Visit Official Commemorative Items," and "Papal Visit 1999, St. Louis," without even discussing the fame requirement); Kraft Foods Holdings, Inc. v. Helm, 205 F. Supp. 2d 942, 946 (N.D. Ill. 2002) ("Velveeta").

113 Courts' bending of trademark dilution law to catch cybersquatters was apparently not limited to the fame requirement; they also diluted the requirement that the defendant use a similar mark *in commerce*. *See* J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25A:41 (5th ed.) (observing that "Some Courts Stretch[ed] the Point" and "overlooked the legal niceties" of the use-in-commerce requirement (citing Green Prods. Co. v. Indep. Corn By-Prods. Co., 992 F. Supp. 1070 (N.D. Iowa 1997))).

114 *See, e.g.*, Trs. of Columbia Univ. v. Columbia/HCA Healthcare Corp., 964 F. Supp. 733, 750 (S.D.N.Y. 1997) ("Columbia" for healthcare services associated with Columbia University); Lane Cap. Mgmt., Inc. v. Lane Cap. Mgmt., Inc., 15 F. Supp. 2d 389, 400 (S.D.N.Y. 1998), *aff'd*, 192 F.3d 337 (2d Cir. 1999) ("Lane Capital Management"); Hasbro, Inc. v. Clue Computing, Inc., 66 F. Supp. 2d 117, 132 (D. Mass. 1999), *aff'd*, 232 F.3d 1 (1st Cir. 2000) ("Clue" boardgame); Blue Man Prods., Inc. v. Tarmann, 75 U.S.P.Q.2d 1811, 1822 (T.T.A.B. 2005), *rev'd on other grounds*, No. CIV.A. 05-2037 (JDB), 2008 WL 6862402 (D.D.C. Apr. 3, 2008) ("Blue Man Group").

115 *See* Anticybersquatting Consumer Protection Act (ACPA) of 1999, Pub. L. 106–113, 113 Stat. 1501 (codified at 15 U.S.C. § 1125(d); ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), adopted Aug. 26, 1999, *available at*

its subsequent revamp of the dilution statute, Congress fixed the caselaw's checkered treatment of the fame requirement by explicitly defining a "famous" mark as one that is "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner."[116] Courts have appropriately interpreted this as a demanding requirement that disqualifies the vast majority of trademarks, even those that have acquired "niche fame" in certain localities or industries.[117]

Another illustration of hard cases making bad law is *Garcia v. Google*, which opened this Article.[118] Moved by Garcia's predicament, the Ninth Circuit distorted wise and well-settled copyright authorship doctrine to protect her from special hardship.[119] But it bears noting that the Ninth Circuit took the case en banc and reversed the panel's decision.[120] Seen in light of the model, this can be explained by the fact that x_2 was in the right place to generate bad law but e was not. The case was "hard" in the first sense of posing a special hardship but not in the second sense of being greatly important, involving as it did the misfortune of only a single individual, however sympathetic. It was a hard case like *Hodgens* or *Winterbottom* but not a great case like *Northern Securities* or *Bush v. Gore*, so the temptation to make bad law was easier to resist.

B. Field Distortion

A hard case, as we saw, can distort the law. And if hard cases recur frequently in a field, then the entire field—not just some branch of doctrine—may be distorted. Some fields are particularly susceptible to this dynamic. These are fields in

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https://www.icann.org/resources/pages/policy-2024-02-21-en [https://perma.cc/BK8D-2EVL].

116 15 U.S.C. § 1125(c)(2)(A).

117 *See, e.g.*, Milbank Tweed Hadley & McCloy LLP v. Milbank Holding Corp., No. CV 06-187-RGK (JTLX), 2007 WL 1438114, at *4 (C.D. Cal. Feb. 23, 2007) ("Milbank"); Bd. of Regents, Univ. of Tex. Sys. *ex rel.* Univ. of Tex. at Austin v. KST Elec., Ltd., 550 F. Supp. 2d 657, 679 (W.D. Tex. 2008) (University of Texas's longhorn silhouette logo); Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc., 703 F. Supp. 2d 671, 699–700 (W.D. Ky. 2010), *aff'd*, 679 F.3d 410 (6th Cir. 2012) (dripping-wax-seal design of Maker's Mark bourbon bottle); Coach Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1373 (Fed. Cir. 2012) ("Coach" handbags and accessories); S&P Glob. Inc. v. S&P Data LLC, 619 F. Supp. 3d 445, 466 (D. Del. 2022) ("S&P" financial data services).

118 766 F.3d 929 (9th Cir. 2014).

119 *See supra* notes 1–8 and accompanying text.

120 Garcia v. Google, Inc., 786 F.3d 733, 733–34 (9th Cir. 2015) (en banc).

which hard cases recur frequently because doctrinal issues are often posed in cases involving parties who are (un)sympathetic for reasons unrelated to the central purpose of the doctrine. This Part provides two illustrations of such distorted fields.

First, consider the doctrine of genericide in trademark law. To appreciate the problem, a brief introduction to the purposes of trademark law is in order. By granting producers the exclusive right to use their marks to identify the source of their goods or services, trademark law reduces consumer search costs and encourages producer investments in quality by ensuring that producers can effectively signal the provenance of their superior products, which would not be possible if other producers could tread on their marks.[121] These purposes are well served by "distinctive" marks that are capable of identifying the source of products (e.g., Kodak for film), but not by "generic" marks that refer to the product itself rather than just its source (e.g., Cookie for cookies).[122] Trademarking a generic mark would be tantamount to a monopoly on a useful word, raising rivals' communication costs and consumers' search costs and subverting the competitive purposes of trademarks.[123] Trademark law therefore does not protect generic marks.[124]

The problem of field distortion arises in connection with terms that were once distinctive brand identifiers but have arguably become generic through common use over time. Courts are sometimes called upon to decide whether a once-distinctive term has become generic ("genericide"). This decision requires determining whether "the primary significance of the term in the minds of the consuming public is . . . the product [or] the producer."[125] Examples of genericide include aspirin,

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121 *See, e.g.*, Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995); Groeneveld Transp. Efficiency, Inc. v. Lubecore Int'l, Inc., 730 F.3d 494, 511–14 (6th Cir. 2013); Sepehr Shahshahani & Maggie Wittlin, *The Missing Element in Trademark Infringement*, 110 IOWA L. REV. 1247, 1250, 1255 (2025). *See also* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (showing that quality will deteriorate without a mechanism for credibly signaling provenance).

122 *See* Shahshahani & Wittlin, *supra* note 121, at 1255–56.

123 *See, e.g.*, Otokoyama Co. v. Wine of Japan Imp., Inc., 175 F.3d 266, 270 (2d Cir. 1999) (explaining that the exclusion of generic marks from trademark protection "protects the interest of the consuming public in understanding the nature of goods offered for sale, as well as a fair marketplace among competitors by insuring that every provider may refer to his goods as what they are" (quoting *CES Publ'g Corp. v. St. Regis Publ'ns, Inc.*, 531 F.2d 11, 13 (2d Cir. 1975))).

124 *Id.*; *see also* 15 U.S.C. § 1064(3) (providing that the registration of generic marks may be cancelled at any time).

125 Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 118 (1938).

cellophane, elevator, escalator, and thermos; examples of successful defenses against claims of genericide include Plexiglas, Teflon, Xerox, and Google.

In my view, genericide cases as a category pose a "hard cases make bad law" problem because they effectively ask a court to punish a manufacturer for its success. As a matter of trademark policy, there is no difference between a mark that is generic to begin with and one that was once distinctive and has now become generic; in both cases the mark fails to serve as a source identifier today, and granting an exclusive right to its use would be harmful because it would raise rivals' communication costs and consumers' search costs.[126] But, in practice, courts treat the two categories of generic marks differently. As the brand names mentioned in the last paragraph indicate, genericide cases often involve an extremely successful company whose name has become synonymous with the product it sells. So although the policy behind the refusal of trademark protection to generic marks does not depend on *how* a mark became generic, judges' natural reluctance to punish a company for being too good is apt to result in troubling pronouncements in genericide cases.

For example, in a recent case involving Google, the Ninth Circuit stated, "[e]ven if we assume that the public uses the verb 'google' in a generic and indiscriminate sense, this tells us nothing about how the public primarily understands the word itself."[127] Contemplate the absurdity of this sentence—the court is saying that the primary public use of a term "tells us nothing" about the primary public understanding of that term.

The problem with the case is not that Google should have lost and forfeited its mark; as the concurring opinion pointed out, the record evidence provided ample reasons to reject the contention that "google" has become a generic term, without any need to hold that evidence of usage as a verb is categorically irrelevant.[128] The problem is that, in its zeal to protect Google against an interloper, the court held that an obviously probative category of evidence is irrelevant as a matter of law, distorting doctrine with potentially adverse consequences for future cases. The hard cases logic operates much as before; the difference is that here the problem arises not because of one case's peculiar facts but generically in a category of cases.

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126 *See supra* notes 123–24 and accompanying text.

127 Elliott v. Google, Inc., 860 F.3d 1151, 1159 (9th Cir. 2017).

128 *See id.* at 1163 (Watford, J., concurring).

My second illustration of field distortion speaks to a broader field. The Fourth Amendment protects people against unreasonable searches and seizures.[129] This protection, held the Warren Court, embodies an "exclusionary rule" that makes evidence uncovered by violating the Fourth Amendment inadmissible in criminal prosecutions.[130] Fourth Amendment doctrine for the past half century or more has developed almost exclusively in the context of whether inculpatory evidence is to be excluded from a criminal trial—with the consequence that citizens' privacy rights have been eroded because of judges' natural aversion to the idea that "the criminal is to go free because the constable has blundered."[131] Judicial reluctance to suppress evidence of criminal wrongdoing has distorted Fourth Amendment law.[132]

For example, the "third party doctrine" holds that a person does not have a "reasonable expectation of privacy"[133] in information voluntarily conveyed to third parties, so the government's acquiring such information does not constitute a "search" or "seizure" triggering the Fourth Amendment's application.[134] The rule was originally developed in cases where a criminal defendant had confided incriminating information to

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129 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

130 Mapp v. Ohio, 367 U.S. 643, 655 (1961).

131 People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.).

132 *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) ("Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated."); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 403–04 (1999) (arguing that judges are apt to adopt a cramped conception of the Fourth Amendment because, "under the exclusionary regime, the Fourth Amendment is virtually always associated with a criminal").

133 Whether a person has a "reasonable expectation of privacy" in certain information or in a certain location was first articulated by Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967), as the touchstone for determining whether the Fourth Amendment's protection applies. Harlan's view subsequently became law. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001).

134 *See, e.g.*, United States v. Miller, 425 U.S. 435, 443 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed").

an undercover informant.[135] But it would later operate to erase Fourth Amendment protection for entire categories of personal information that citizens routinely and without much practical choice disclose to private parties such as banks, phone companies, and email and Internet service providers. For example, the Supreme Court held in *United States v. Miller* that a person has no Fourth Amendment interest in her bank records,[136] and in *Smith v. Maryland* that installation of a pen register on a phone was not a search triggering Fourth Amendment protection.[137]

The Supreme Court has recently awakened to the threat that a broad third-party doctrine poses to citizen privacy in the digital age, and has shown signs of willingness to curb the doctrine's reach.[138] But as long as Fourth Amendment law is primarily made in cases where the immediate consequence of upholding the right is to suppress evidence of crime, these hard cases will continue to make bad law.[139]

C. Judicial Techniques for Circumventing the Maxim

In the model a case makes law and the law sticks for future cases. In reality things are not so cut and dried. Judges can soften the punch of the maxim by limiting the extent to which the law made in one case applies to similar cases in the future. This Part discusses the uses and limitations of five such limiting techniques: (1) disposing of cases by nonprecedential unpublished opinions, (2) ignoring a precedent or limiting it to its facts, (3) creating dubious distinctions to distinguish

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135 *See* On Lee v. United States, 343 U.S. 747, 757 (1952); Lopez v. United States, 373 U.S. 427, 440 (1963); Hoffa v. United States, 385 U.S. 293, 311 (1966).

136 425 U.S. 435, 446 (1976).

137 442 U.S. 735, 745–46 (1979).

138 *See* Carpenter v. United States, 585 U.S. 296, 309–10 (2018) (holding that the government's obtaining information about individuals' locations from their cell phone carriers constituted a Fourth Amendment "search" and "declin[ing] to extend *Smith* and *Miller* to cover these novel circumstances"); United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties . . . This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.").

139 Unsympathetic parties have also made for bad law in the field of sexual offenses, though there the distortion has come just as much from legislatures as from courts. For an account of the historical trends inspiring "sexual psychopath statutes" in the mid-twentieth century, see Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317 (1998).

inconvenient precedents, (4) liberally construing the pleadings, and (5) deciding not to decide a case.

1. *Unpublished Opinions*

Unpublished opinions seem like a convenient device for evading the rule-disposition tradeoff posed by hard cases. The idea of an unpublished opinion is that the law it proclaims is not binding or precedential—which is to say, not really law. By allowing a court to dispose of a case without having to make law, unpublished opinions escape the horns of the rule-disposition dilemma.

Unpublished opinions are so prevalent today that it's natural to think of them as the primary device for avoiding the hard cases logic.[140] It is important to note, though, that this is not their principal use. As anyone who has recently clerked can attest, courts use unpublished opinions mainly not to dispose of hard cases (in any sense of the term) but to dispose of easy cases. Unpublished opinions are most heavily used in cases that are thought to demand nothing more than routine application of established law, such that writing an elaborate opinion does not seem worth the cost in judicial resources, especially if large numbers of similar cases arise frequently.[141] The main category in the federal courts is *pro se* prisoner petitions, multitudes of which are disposed of by unpublished opinion.[142] Indeed many federal judges have a separate track for summarily disposing of such cases with the aid of staff attorneys, outside the regular process of deliberation with colleagues and term law clerks.[143] Of course, this is not to say that the practice is

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140 According to official government statistics published by the Administrative Office of the U.S. Courts, unpublished opinions have constituted over eighty-five percent of all opinions in the U.S. courts of appeals in every fiscal year since 2015. *See U.S. Courts of Appeals Judicial Facts and Figures*, *Table 2.5*, U.S. CTS. (Sept. 30, 2021), https://www.uscourts.gov/sites/default/files/data_tables/jff_2.5_0930.2021.pdf [https://perma.cc/3ASQ-EGBA].

141 For example, in the fiscal year ending 2020, unpublished opinions constituted only sixty-one percent of signed opinions, but they made up ninety-nine percent of unsigned opinions. *See id.* Figures for other years are similar. *See id.*

142 *See* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 549–60 (2020) (showing that the increase in the use of unpublished opinions does not correlate strongly with overall case volume but does correlate strongly with the volume of *pro se* cases, which are predominantly filed by prisoners).

143 *See, e.g.*, David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668–69 (2005) (calling these "Track Two cases").

desirable but simply to drive home the point that the main use of unpublished opinions is to dispose of easy cases.

Be that as it may, it remains to explore the effectiveness of unpublished opinions as a protection against hard cases. As discussed, the logic of how unpublished opinions avoid the rule-disposition dilemma is facially sound. Three factors, however, curtail their usefulness.

First, important cases (the second sense of hard) by their nature receive great attention. The court's opinion is widely anticipated and scrutinized, so issuing a summary disposition that does not provide robust legal reasoning and purports not to bind would not be feasible. It would come off as such a cop-out that the device's usefulness would be outweighed by its reputational cost. For example, it would be unthinkable to dispose of a case like *Northern Securities* or *Bush v. Gore* by summary, nonbinding order. That courts are constrained not to use unpublished opinions in important cases, combined with the finding that important cases are more likely to make bad law (Proposition 1.2), implies that unpublished opinions are least useful as a circumventing device when they are most needed.

Second, the idea that unpublished opinions are not really precedent becomes difficult to sustain as their number increases.[144] In the federal context, the efforts of courts in certain jurisdictions to assign unpublished opinions to oblivion were doomed by the enactment in 2006 of Federal Rule of Appellate Procedure 32.1,[145] which bars courts from prohibiting the citation of unpublished opinions.[146] Some state jurisdictions still have no-citation rules, but the trend seems to be increasingly permissive of citation.[147] Of course, permitting the citation of unpublished opinions does not mean treating them as binding.

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144 *See U.S. Courts of Appeals Judicial Facts and Figures, Table 2.5*, *supra* note 140.

145 For background on the rule and the controversy surrounding its enactment, see Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003); Partrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23 (2005); Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705 (2006).

146 FED. R. APP. P. 32.1(a). Of course, federal district court opinions are never binding, so unpublished status does not make a difference there. *See, e.g.*, Nat'l Union Fire Ins. Co. v. Allfirst Bank, 282 F. Supp. 2d 339, 351 (D. Md. 2003); Calhoun v. Colvin, 959 F. Supp. 2d 1069, 1077 n.6 (N.D. Ill. 2013).

147 *See, e.g.*, Barnett, *supra* note 145; Lauren S. Wood, *Out of Cite, Out of Mind: Navigating the Labyrinth That is State Appellate Courts' Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561 (2016); Logan Hetherington, *Keeping Up with*

But, as their citation is progressively allowed and they become more visible, it becomes more difficult for courts to ignore them or pretend that they don't exist.

Third, and perhaps most importantly, widespread use of unpublished opinions to circumvent the hard cases logic threatens to undermine the rule of law. Systematic use of unpublished opinions to avoid making law in hard cases would amount to abandoning the requirement of judicial reason-giving and, ultimately, the fundamental idea that courts follow law rather than doing whatever they want.[148] One need not be a naïve idealist to recognize that most judges would be resistant to this notion of their role. Indeed, one need not appeal to judges' internal constraints (though I believe those to be real) to see that they would be wary of tactics that undermine the appearance of rule of law—for strategic judges recognize that the long-term viability of their status depends on preserving that appearance. This implies that, as a circumventing device, unpublished opinions are effective only as they remain rare.

The upshot is that unpublished opinions are unlikely to be used or useful systematically to avoid making bad law in hard cases. They might, however, be effective if used rarely and judiciously in low-profile cases. Take, for example, a motion to suppress in a routine criminal case that implicates a difficult Fourth Amendment issue. The court in such a case may successfully sweep the rule-disposition tradeoff under the rug by issuing an unpublished opinion or ruling from the bench to deny the motion, especially if defense counsel is not sufficiently sophisticated to grasp the nuance or import of the Fourth Amendment issue and is mechanically filing a motion to suppress in every case.

Finding examples of the use of unpublished opinions as a circumventing device is difficult because the success of this tactic depends on its going undetected. But here is one

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your Sister Court: Unpublished Memorandums, No-Citation Rules, and the Superior Court of Pennsylvania, 122 DICK. L. REV. 741 (2018).

148 *See, e.g.*, Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1441 (2004) (dubbing the extensive use of unpublished opinions "private judging" and arguing that it "imperil[s] the legitimacy of the judicial system and thus the rule of law"); Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 217 (2006) (arguing that the prevalence of unpublished opinions in one doctrinal area has eroded predictability, "creat[ed] an obstacle to settlement," and "undermined the critical appellate functions of ensuring that like cases are treated alike [and] that judicial decisions are not arbitrary").

apparent example of the technique being used unsuccessfully because later found out. A group of white and Hispanic firefighters sued the City of New Haven, claiming that it unlawfully discriminated against them by throwing out the results of a firefighter promotion exam when it transpired that white candidates had outperformed minority candidates.[149] The district court, in a long and thorough opinion, held that there was no violation.[150] A panel of the Second Circuit affirmed in a per curiam summary order containing no meaningful legal analysis.[151] But the order received publicity, and a call for en banc review, when another Second Circuit judge came across a reference to it in a newspaper.[152] Having learned of the case, the Supreme Court granted certiorari and reversed.[153] The Second Circuit panel's alleged "hiding" of the case[154] received great attention during the confirmation process of Justice Sotomayor, who had sat on the panel as a circuit judge.[155] It is impossible for an outsider to know the judges' true motivations, but the episode seems like a plausible example of the use of unpublished opinions to avoid the hard cases logic.

2. *Limiting Precedent to Its Facts*

Whereas the first circumventing technique is a way of not creating precedent, the second and third are ways of dealing with precedent once it has been created. One way to do this is for courts to ignore an inconvenient precedent or, in judicial parlance, "limit it to its facts."[156] This technique is not limited

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149 *See* Ricci v. DeStefano, 557 U.S. 557 (2009).

150 Ricci v. DeStefano, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd* 530 F.3d 87 (2d Cir. 2008), *rev'd and remanded,* 557 U.S. 557 (2009).

151 Ricci v. DeStefano, 264 F. App'x 106 (2d Cir.), *opinion* withdrawn and superseded, 530 F.3d 87 (2d Cir. 2008), *rev'd and remanded,* 557 U.S. 557 (2009).

152 *See* Adam Liptak, *New Scrutiny of Judge's Most Controversial Case*, N.Y. TIMES (June 5, 2009), https://www.nytimes.com/2009/06/06/us/politics/06ricci.html [https://perma.cc/PS3V-PLVU]; Melissa Bailey, *Sotomayor: I Didn't "Hide" Ricci Case*, NEW HAVEN INDEP. (July 15, 2009), https://www.newhavenindependent.org/index.php/archives/entry/sotomayor_i_didnt_hide_ricci_case [https://perma.cc/K45M-G3J2].

153 *Ricci*, 557 U.S. at 557, 560.

154 Apparently in response to hostile publicity, the panel later withdrew its summary order and replaced it with a published opinion, though one that simply adopted the district court's opinion and said nothing of substance beyond the original summary order. *See* Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008), *rev'd and remanded,* 557 U.S. 557 (2009).

155 *See, e.g.*, Liptak, *supra* note 152; Bailey, *supra* note 152

156 Ignoring a precedent and limiting a precedent to its facts can be seen as two different techniques. But, given the wide availability of caselaw in the present

to situations where the precedent was a hard case that made bad law, but it is used in such situations as well. Note that, strictly speaking, a precedent that is limited to its facts is no precedent at all. The very idea of law presupposes some generality; a precedent that is limited to its facts embodies a disposition but not a rule in any practically meaningful sense.[157]

Bush v. Gore, which served as an illustration of rule distortion, serves equally well as an illustration of this technique to evade the maxim's force. The decision has been practically ignored in subsequent jurisprudence. Despite its prominence, it does not seem to have played much role in the development of Equal Protection doctrine.[158] More than two decades later, it is yet to be cited in a single Supreme Court majority opinion.[159] Remarkably, the process of consigning this decision to oblivion by limiting it to its facts started not in subsequent opinions but in the opinion itself. The Justices were apparently so aware of their questionable doctrinal work that they announced, "Our consideration is limited to the present circumstances . . . ."[160]

3. *Developing Dubious Distinctions*

A closely related technique is to distinguish precedent on dubious grounds. This third technique takes precedent more seriously than the second technique in that it recognizes an

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era, it's hard to think of circumstances where outright ignoring is feasible, so I think of the "limiting to its facts" technique as the chief way of consigning a precedent to oblivion without overruling it.

157 This is reflected in the way rules and dispositions were modeled above. *See supra* notes 79–89 and accompanying text.

158 *See, e.g.*, Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 3–4 (2007) ("*Bush v. Gore* is dead."); Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV. 1865, 1899 (2013) ("In the rest of the country [other than the Sixth Circuit], *Bush v. Gore* is still basically dead."). *But see* Daniel Tokaji & Owen Wolfe, Baker, Bush*, and Ballot Boards: The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 969, 971 (2012) (describing *Bush v. Gore* as a "big case" that "set the stage for federal lower court judges to play a much more active role in policing the administration of elections"); Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 233 (2020) ("[D]espite the Supreme Court's attempt to cabin its ruling in *Bush v. Gore*, as well as the reticence of some lower courts, *Bush*'s Uniformity Principle has evolved into a fully enforceable, generally applicable election-law doctrine.").

159 A Westlaw search as of April 19, 2025 reveals only six citing references in the Supreme Court. Only one of these is in a majority opinion, and even there the Court simply mentioned the differing approaches taken in the majority, concurring, and dissenting opinions in *Bush v. Gore* without adopting any of them. *See* Moore v. Harper, 600 U.S. 1, 35–36 (2023).

160 Bush v. Gore, 531 U.S. 98, 109 (2000).

obligation, whether on principled or practical grounds, to acknowledge that the precedent applies beyond its own facts (which, again, is to acknowledge that it embodies law at all). It is no longer sufficient to say that the precedent is limited to *its own* facts; the court must redefine the *category* of facts to which it applies. Alternatively, the second and third techniques may be viewed as being on a continuum in limiting the generality of the facts to which the precedent applies.

Like the second technique, the third technique is not limited to situations where the precedent was a hard case that made bad law, but it applies to those situations as well. The illustrations I will provide are intended to show the technique's operation in dealing with unwanted precedent, not necessarily limited to precedents that are unwanted because they were hard cases that made bad law.

The Supreme Court's Fourth Amendment jurisprudence provides a nice illustration of the third technique—and the attraction of using it instead of the second technique despite the greater residue of life that it preserves in unwanted precedent. The criminal procedure "revolution" of the Warren Court was succeeded by a "counterrevolution" of the Burger Court.[161] These counterrevolutionaries were undoubtedly keen to roll back some of the constitutional protections granted to criminal defendants by the Warren Court; Chief Justice Burger had said as much in earlier dissents and extrajudicial pronouncements.[162] Once in control of a majority, however, the

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161 For a review and appraisal, see, for example, Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977); Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62 (Vincent Blasi ed., 1983); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

162 *See* Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 23 (1964) (severely criticizing the exclusionary rule and wondering "whether any community is entitled to call itself an 'organized society' if it can find no way to solve this problem [of police misconduct] except by suppression of truth in the search for truth"); Warren E. Burger, *What to Do about Crime in U.S.: A Federal Judge Speaks*, U.S. NEWS & WORLD REP., Aug. 7, 1967, at 70 (deploring the high crime rate and the criminal justice system's excessive protections for criminal defendants); Frazier v. United States, 419 F.2d 1161, 1176 (D.C. Cir. 1969) (Burger, J., concurring in part and dissenting in part) (lamenting the "seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances" and warning that "[g]uilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules poorly conceived and often impossible of application"); Fred Barbash, *Burger Says Legal System Is Too Easy on Criminals*, WASH. POST, Feb. 9, 1981. *See generally* Charles M. Lamb, *The Making of a Chief Justice: Warren Burger on Criminal Procedure 1956–1969*, 60

counterrevolutionaries did not simply ignore inconvenient precedent or abolish it by meaningless distinctions.[163] Rather, they used legally colorable arguments to incrementally reverse or limit defendant-friendly laws by seizing on openings and ambiguities in the Warren Court's opinions. For example, the Court did not jettison the Fourth Amendment exclusionary rule but riddled it with numerous context-specific exceptions, based mainly on the Warren Court-era rationale that the rule's purpose is deterrence and so it should not apply when its deterrent effect is questionable.[164]

Overall, then, the third technique is more attractive than the second for institutional reasons though less effectual in fully ridding the court of bad precedent. Both are essentially damage-limitation measures. For one thing, like unpublished opinions, limiting and misdistinguishing precedent are effective strategies only if used sparingly because their broader use would undermine the entire system. The common law process is based on case-by-case accumulation of precedent, and if judges were to simply disregard inconvenient caselaw then the precedent system would break down. Such a breakdown would be equally unfortunate for the judges who ignored or misrepresented other judges' opinions. So the use of the circumventing

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CORNELL L. REV. 743 (1975); Yale Kamisar, *The Rise, Decline and Fall(?) of* Miranda, 87 WASH. L. REV. 965, 975–78 (2012).

163 Some have argued, however, that *Miranda v. Arizona*, 384 U.S. 436 (1966), a landmark of the Warren Court's criminal procedure jurisprudence, befell such a fate at the hand of subsequent Courts, which never explicitly overruled it but mischaracterized its holding and hollowed it out to the point of "stealth overruling." Alan M. Dershowitz & John Hart Ely, Harris v. New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1 (2010).

164 *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974) (holding that a grand jury witness may not refuse to answer questions on the ground that they were based on evidence obtained by a Fourth Amendment violation); Stone v. Powell, 428 U.S. 465 (1976) (holding that a state prisoner afforded a full and fair opportunity to litigate a Fourth Amendment claim at trial may not obtain federal habeas corpus relief on the ground that unlawfully obtained evidence was introduced at his state trial); United States v. Havens, 446 U.S. 620 (1980) (holding that the exclusionary rule does not apply to use of evidence in cross-examination to impeach credibility); Nix v. Williams, 467 U.S. 431 (1984) (holding that the exclusionary rule does not apply if the government can show that in the absence of a Fourth Amendment violation, the evidence would ultimately have been discovered by lawful means); United States v. Leon, 468 U.S. 897 (1984) (holding that the exclusionary rule does not apply to evidence obtained by officers acting in reasonable reliance on a search warrant that is ultimately found to be invalid); Segura v. United States, 468 U.S. 796 (1984) (holding that the exclusionary rule does not apply if the challenged evidence has an independent source unconnected to the Fourth Amendment violation).

techniques comes at a steep cost, and the prevailing equilibrium seems to be characterized by reasonably solid adherence to precedent.

Moreover, creating dubious distinctions is costly because it limits the reach of existing bad law only by introducing new bad law. For a distinction that has no basis in principle or policy makes doctrine incoherent and difficult to apply.[165] Consider an illustration from trademark law. In *Two Pesos v. Taco Cabana*, the Supreme Court held that "trade dress" (i.e., the "total image" of a product or business) can be "inherently distinctive," meaning it can receive trademark protection by virtue of its distinctive appearance and without requiring any proof that consumers associate the trade dress with a particular source of products.[166] Soon thereafter the Court apparently decided that it had made a mistake. It revisited the issue in *Wal-Mart Stores v. Samara Brothers*, this time holding that the trade dress at issue could be protected only upon a showing that consumers associated the trade dress with a particular source.[167] But the Court was reluctant to overrule a recent decision on the same issue, so it distinguished *Two Pesos* by reference to the *kind* of trade dress at issue in that case. The Court held that the trade dress in *Two Pesos* was "product packaging" (or something "akin to product packaging") whereas the trade dress in *Wal-Mart* was "product design," which can never be inherently distinctive.[168] *Wal-Mart* corrected some of the problems created by *Two Pesos*, which had given short shrift to legitimate concerns that protecting trade dress as inherently distinctive might inhibit competition by allowing the trademarking of functional product features.[169] But *Wal-Mart* created its own problems by requiring courts in future cases to draw the evanescent line between product design and product packaging. The bad law in *Two Pesos* could not be costlessly averted—spawning dubious doctrinal distinctions is itself a cost of bad laws.

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165 *See, e.g.*, Friedman, *supra* note 163, at 46–50 (explaining that the Supreme Court's disingenuous treatment of the *Miranda* precedent has bred doctrinal confusion in lower courts).

166 505 U.S. 763, 776 (1992).

167 529 U.S. 205, 216 (2000).

168 *Id.* at 214–15.

169 *Compare Two Pesos*, 505 U.S. at 775–76 (dismissing functionality concerns), *with Wal-Mart*, 529 U.S. at 212–13 (discussing why functionality is of greater concern in trade dress than in word marks).

4. *Liberal Construction*

Some cases of special hardship leave one with the impression that the put-upon party could have avoided the rule-disposition tradeoff if only she had chosen the appropriate legal claim (or defense or argument). *Garcia* is one of those cases.[170] The problem there was not so much that Garcia had no claim but that she had no *copyright* claim. As the Ninth Circuit sitting en banc put it, Garcia had "a legitimate and serious beef, though not one that can be vindicated under the rubric of copyright."[171] The court went out of its way to emphasize that its adverse ruling on the copyright claim (which ensured that this hard case did not make bad law) did not bar Garcia from pursuing relief on other grounds, and even suggested some such grounds.[172]

This discussion points up the possibility of another judicial technique for avoiding the hard cases logic. Namely, to the extent a rule-disposition tradeoff results from a party's wrong choice of legal rubric (e.g., a claim sounding in copyright instead of fraud), the court may avoid the tradeoff by liberally construing the party's submissions to pick a better rubric. The case thus recast may align the right rule with the right disposition.

In its modest form, this kind of liberal construction is not merely a sometime-used judicial technique but a pervasive feature of the modern system of adjudication. The entire edifice of modern civil procedure is designed to minimize the influence of litigants' choice of legal rubric. The move from common law and code pleading to notice pleading, exemplified by the Federal Rules of Civil Procedure, reflects a concern that legal outcomes should be determined by the underlying merits and not the technical choices of lawyers.[173] As obsession with precise compliance with technical requirements gave way to a focus on merits, the form of action and the choice of legal pigeonhole came to assume less importance.[174]

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170 *See supra* notes 1–8 and accompanying text.

171 Garcia v. Google, Inc., 786 F.3d 733, 741 n.6 (9th Cir. 2015) (en banc).

172 *See id.* at 740–41, 741 n.5, 745 (suggesting the right of publicity, defamation, contract, and privacy law as alternatives to a copyright claim).

173 The basics of the transition are covered in any standard casebook on civil procedure. *See, e.g.*, THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE 11–15 (5th ed. 2020). For a more detailed history see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

174 *See, e.g.*, FED R. CIV. P. 1 ("These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."); *id.* 2 ("There is one

The principle of liberal construction finds its most forceful application to pleadings drafted by *pro se* litigants, which are held to "less stringent standards than formal pleadings drafted by lawyers."[175] Courts' justification for more generous treatment of *pro se* pleadings[176] is that unrepresented parties are more likely to be tripped up by legal technicalities and should not be punished for their lack of sophistication.[177]

The liberality of notice pleading, applied with an extra dose to *pro se* litigants, thus softens the punch of hard cases. But this limiting technique has its limits. For one thing, liberal construction can circumvent the rule-disposition tradeoff only when it is the result of an easy-to-fix legal misstep. Otherwise—that is, when finding the legal theory that would alleviate the rule-disposition tradeoff is not straightforward or when the tradeoff results from an inherent limitation of doctrine rather than a lawyering misstep—liberal construction is powerless.

Moreover, when taken to limits, the principle of liberal construction is in tension with a fundamental premise of the American system of adjudication—that the court should not act as one party's advocate.[178] Judicial approval of liberal construction is thus often accompanied by the warning that indulgence should not shade into advocacy.[179] So, for example, a

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form of action—the civil action."); *id.* 8(e) ("Pleadings must be construed so as to do justice.").

175 Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam); *accord* Estelle v. Gamble, 429 U.S. 97, 106 (1976); Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam); Sause v. Bauer, 585 U.S. 957, 960 (2018) (per curiam).

176 The extent to which the principle of liberal construction applies to *pro se* litigants' court filings other than pleadings, or to their other procedural mistakes, differs based on jurisdiction. *See* Michael Correll, *Finding the Limits of Equitable Liberality: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 863 (2011).

177 *See, e.g.*, Hughes v. Rowe, 449 U.S. 5, 15 (1980) ("An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims."); Jourdan v. Jabe, 951 F.2d 108, 110 (6th Cir. 1991) ("The drafting of a formal pleading presupposes some degree of legal training or, at least, familiarity with applicable legal principles, and *pro se* litigants should not be precluded from resorting to the courts merely for want of sophistication."); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) ("This court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements.").

178 *See* Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 44 (2009) (recognizing the tension and arguing that the proper way to mediate it is to limit liberal construction to "learn[ing] the pleader's intent").

179 *E.g.*, United States v. Pinson, 584 F.3d 972, 975 (10th Cir. 2009); Donald v. Cook Cnty. Sheriff's Dep't, 95 F.3d 548, 555 (7th Cir. 1996); Weller v. Dep't of Soc. Servs., 901 F.2d 387, 391 (4th Cir. 1990).

court may generously grant leave to amend a complaint when a claim is not artfully pleaded[180] or perhaps even suggest that a party proceed under a different legal theory,[181] but a court cannot rewrite a plaintiff's complaint to plead a different claim or rewrite a brief to introduce an issue never contemplated by the party. The system of litigation, no matter how flexible, is still a technical system. The choices made by parties and their lawyers as to what claims to bring and what defenses or arguments to raise matter a great deal. There is only so much that a court under our adversarial system can do to mitigate rule-disposition tradeoffs by liberal construction.

Finally, note that my analysis of liberal construction puts a new spin on the benefits of moving away from an obsession with technical requirements. The traditional justification for notice pleading emphasizes the injustice to *litigants* that would result from subordinating merits to technicalities, but the "hard cases" account shows the resulting distortionary pressure on *the law*. Suppose, for example, that the plaintiff has a winning tort claim but has improperly called her claim a contract claim, and that contract law properly interpreted affords her no relief. The traditional account says that holding the plaintiff to the precise form of action would be unfair because it would make a meritorious party lose.[182] My account, by contrast, alerts us to the possibility that if the court lacks the power to remedy the technical defect and construe the claim as a tort claim, it would distort contract law in order to not let a meritorious party lose. Whereas the traditional account worries that inflexible procedure would stick it to a meritorious party, the hard cases account worries that inflexible procedure would lead the court to distort the law to protect the meritorious party. The latter danger is graver in that it affects not just one party but the entire legal system—and by extension many future parties

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180 *E.g.*, Foman v. Davis, 371 U.S. 178, 182 (1962); *Donald*, 95 F.3d at 562; *Balistreri*, 901 F.2d at 702; *see generally* FED. R. CIV. P. 15(a)(2).

181 *See, e.g.*, Garcia v. Google, Inc., 786 F.3d 733, 740–41, 741 n.5, 745 (9th Cir. 2015) (en banc) (holding that copyright affords Garcia no relief but suggesting the right of publicity, defamation, contract, and privacy law as alternatives).

182 This concern can be seen in early Supreme Court decisions interpreting the then-new Federal Rules of Civil Procedure. *See, e.g.*, Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."), *abrogated on other grounds by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); *Foman*, 371 U.S. at 181 (excusing a potential technical defect in a notice of appeal and stating that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities").

and primary actors. This point is closely related to my reinterpretation of the virtues of equity and will be revisited in that context below.[183]

5. *Deciding Not to Decide*

The last circumventing technique is for courts to avoid the prospect of a hard case making bad law by refusing to decide the case or by deciding it on procedural grounds that escape the thorny substantive issue. These devices were famously praised in Alexander Bickel's discussion of the "passive virtues."[184] Their longstanding appeal and importance for apex courts is encapsulated in Justice Brandeis's quip that "the most important thing we do is not doing."[185] There is a lot to be said about the strategy of deciding not to decide, and the voluminous political science literature on the subject does say a lot.[186] I will limit myself to four remarks tailored to the particular context of not hearing a hard case because it might make bad law.

First, and most obviously, the general power to not take a case is limited to courts that have a discretionary docket. In its unconditional form, it is a power enjoyed by the U.S. Supreme Court and most (though not all) state supreme courts—but not by trial courts nor even state or federal intermediate appellate courts, which do the greatest share of common-law-style lawmaking.[187]

Some non-apex courts do, however, have a more limited power of case avoidance. In certain circumstances, a court that has jurisdiction over a case may decline to exercise it.

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183 *See infra* Part IV.A.

184 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–98 (1962).

185 *Quoted in* Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 313 (1985).

186 *See, e.g.*, H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988); Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Strategic Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999); Jonathan P. Kastellec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 5 J. EMPIRICAL LEGAL STUD. 407 (2008); Mehdi Shadmehr, Sepehr Shahshahani & Charles Cameron, *Coordination and Innovation in Judiciaries: Correct Law vs. Consistent Law*, 17 Q.J. POL. SCI. 61 (2022).

187 For a critique of the Supreme Court's practice of selecting questions for review, see Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022).

This is true, for example, of federal courts' supplemental jurisdiction.[188] In an important midcentury case, the Supreme Court separated the question of whether supplemental jurisdiction existed from the question of whether it was properly exercised.[189] "That power [to hear the case] need not be exercised in every case in which it is found to exist," said the Court, affirming that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."[190] The discretionary character of supplemental jurisdiction has been preserved after the doctrine's codification. The statute first sets forth the conditions for the existence of supplemental jurisdiction[191] and then enumerates when a federal court may decline to exercise it.[192] Related in spirit (though not in doctrinal detail) are various abstention doctrines that urge federal courts not to exercise jurisdiction over a case when doing so would conflict with a state's administration of its affairs.[193] Similarly, state courts can sometimes refrain from ruling on a case that implicates the interests of multiple states by deferring to another state.[194]

These powers of case selection are more limited than the power conferred by a discretionary docket. They do not say that the court may refuse to exercise jurisdiction whenever it wants but rather establish conditions to guide the decision.[195] This limitation significantly affects the utility of this circumventing device because it makes the very decision whether to hear a case a precedent on that issue. To not exercise jurisdiction over a case merely because it's hard and might make bad

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188 Supplemental jurisdiction refers to the federal courts' subject-matter jurisdiction over claims that may not come under the courts' jurisdiction standing alone but are sufficiently related to claims over which the federal courts do have original jurisdiction. *See generally* 28 U.S.C. § 1367.

189 *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966).

190 *Id.* at 726.

191 28 U.S.C. § 1367(a)–(b).

192 28 U.S.C. § 1367(c).

193 *See, e.g.*, R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941); Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942); Burford v. Sun Oil Co., 319 U.S. 315 (1943); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Younger v. Harris, 401 U.S. 37 (1971); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); 28 U.S.C. § 1334(c).

194 *See* Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware and the Strategic Use of Comity*, 58 EMORY L.J. 713, 715, 756 (2009) (showing that, by staying an action challenging the Bear Stearns-J.P. Morgan merger and allowing New York courts to decide the case, the Delaware Chancery Court avoided the dilemma of having to either distort Delaware corporate law or render a disastrous decision).

195 *See, e.g.*, 28 U.S.C. § 1367(c) (enumerating four conditions under which the district courts may decline to exercise supplemental jurisdiction).

law (rather than because of the federalism-related concerns that undergird abstention and related doctrines) may thus make bad law on the issue of the conditions justifying the non-exercise of jurisdiction.[196] The same is even more emphatically true of twisting jurisdiction doctrine to avoid a substantive issue for lack of jurisdiction. All the same, these procedural doctrines give federal courts some tools to avoid having hard cases make bad law—albeit only in limited circumstances, and only by kicking the problem over to state courts.[197]

Finally, the power of not taking a case, even in the unconditional form enjoyed by apex courts, is subject to the practical limitation that some cases are too important not to take. Thinking back to two hard cases that arguably made bad law—*Northern Securities* and *Bush v. Gore*—it is almost inconceivable given the stakes that the Supreme Court could have avoided taking them.[198] This is true not only of politically charged cases like these two but also of other important cases, for example intellectual property cases determining the fate of important new technologies such as cable,[199] VCR,[200] peer-to-peer filesharing,[201] and online streaming,[202] all of which were decided by the Supreme Court.[203] When a case is greatly important, the natural expectation is for the apex court to decide it, and upsetting this expectation would have reputational consequences. What is more, the same nearsightedness that makes the court sacrifice the rule to the disposition may make

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196 This problem may not be as damning as it appears because some of the conditions for declining a case have a hard cases flavor. For example, in the supplemental jurisdiction context, a federal court may refuse to hear a claim if it "raises a novel or complex issue of State law." 28 U.S.C. § 1367(c)(1). This is not quite a blanket license to avoid a rule-disposition tradeoff, but it does speak to the third sense of hard. Overall, though, the focus of § 1367(c) is the allocation of federal-state decision making rather than improving the quality of law by avoiding hard cases.

197 The foregoing discussion of jurisdiction is related to the discussion of standing (and justiciability more broadly) in Part IV.C below. In both contexts, procedural doctrines shape substantive law by controlling the flow of cases that courts may decide. As I shall argue, standing doctrine is largely insensitive to this effect.

198 *See supra* notes 57–61, 103–08 and accompanying text.

199 *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974).

200 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

201 *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

202 *See* ABC, Inc. v. Aereo, Inc., 573 U.S. 431 (2014).

203 *See* Sepehr Shahshahani, *The Role of Courts in Technology Policy*, 61 J.L. & ECON. 37 (2018) (analyzing the strategic interplay of the Supreme Court, interest groups, and Congress in these important technology cases).

the court esteem the privilege of deciding an important case more highly than the imperative of avoiding bad law by avoiding the case. The fact that important cases are less likely to be passed over, combined with the finding that important cases are more likely to make bad law (Proposition 1.2), underscores a key limitation of this final evasive technique.

To sum up, investigation of judicial techniques to soften the punch of hard cases leaves one sensible of their utility if used sparingly but conscious of their limits as permanent safeguards. Here or there a hard case may be dodged or a bad law limited in its scope, but there is no reliable way of systematically avoiding rule-disposition tradeoffs, especially in important cases where those tradeoffs are most likely to bite. Ultimately, a functioning common law system cannot avoid lawmaking through deciding cases. And law once made is really sticky. Reality is not as stark as the model, but it comes pretty close.

D. Hard Cases Make Good Law?

In my model, doctrine is incapable of incorporating certain kinds of facts, and cases raising salient but extra-doctrinal factual issues (a "special hardship") create distractions that might divert judges from the path of true law. But imagine instead that cases with salient extra-doctrinal facts raise important issues that doctrine can and should address but currently does not. Then the doctrinal variations caused by cases posing a special hardship are not always distortions; they might be appropriate concessions to previously unheeded realities.

Along similar lines, the view that "cases in which the moral indignation of the judge is aroused frequently make bad law"[204] is challenged by scholars who embrace empathy and compassion in judging.[205] So perhaps hard cases promote better lawmaking by plucking judges' empathetic strings. In the model's terms, empathy in cases of special hardship improves lawmaking by opening judges' eyes to new dimensions.

Consider *Winterbottom* in this new light.[206] A modern reader of the opinion is not likely to commend the court for

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204 WILLIAMS, *supra* note 52, at 105.

205 *See, e.g.*, Robin West, *The Anti-Empathic Turn*, *in* NOMOS LIII: PASSIONS AND EMOTIONS 243 (James E. Fleming ed., 2013); Maksymilian Del Mar, *Imagining by Feeling: A Case for Compassion in Legal Reasoning*, 13 INT'L J.L. CONTEXT 143 (2017); Susan A. Bandes, *Compassion and the Rule of Law*, 13 INT'L J.L. CONTEXT 184 (2017).

206 (1842) 152 Eng. Rep. 402, 10 M. & W. 109.

upholding the privity-of-contract rule in the face of the coach driver's unfortunate injury, but would more likely fault the court for sticking to this silly rule. Indeed, that is how courts eventually came to view the matter. The privity-of-contract rule was repudiated in the United States by Judge Cardozo's celebrated opinion[207] in *MacPherson v. Buick Motor Company*[208] and in England by *Donoghue v. Stevenson*.[209] A plausible interpretation is that confrontation with doctrinally unaccounted-for facts in cases like *Winterbottom* served in time to tip off judges to the shortcomings of existing doctrine, causing them to revise and improve outdated laws.[210] In this interpretation, hard cases make good law by forcing the consideration of important but previously unconsidered issues.

Of course, it is neither realistic nor theoretically interesting to conceptualize hard cases as having only this enlightening quality. A more promising approach would be to recognize that hard cases can distract judges from good lawmaking *or* alert judges to new issues. And instead of assuming that the dimensionality of doctrine is inherently limited, one can assume that expanding the dimensionality comes at a cost. The desirability of expansion would then depend on the distribution of case facts along the accounted- and unaccounted-for dimensions.[211] In such a learning model, courts first update their prior beliefs about the distribution of global case facts by seeing new cases, and then make law. It would be particularly interesting in such a setting to investigate the role of strategic litigators who aim to change the law.[212] A strategic litigator may help the court by providing accurate information about

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207 On the opinion's impact see Kyle Graham, *The Diffusion of Doctrinal Innovations in Tort Law*, 99 MARQ. L. REV. 75, 94–95, 117–18 (2015); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990). For a critique of standard interpretations see John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* Macpherson, 146 U. PA. L. REV. 1733 (1998).

208 111 N.E. 1050 (N.Y. 1916).

209 [1932] AC 562 (HL) (appeal taken from Scot.).

210 For a theoretical account of doctrinal innovation in the face of uncertainty about the world and about other judges' views, see Shadmehr, Shahshahani & Cameron, *supra* note186.

211 For example, suppose that tort doctrine concerning certain kinds of accidents currently considers the weather and road conditions, and courts are considering whether doctrine should begin to incorporate a separate factor related to visibility. Whether such expansion would be worth the additional costs in administration and erroneous judgments would depend on the extent to which visibility plays a role in these kinds of accidents.

212 The role of strategic impact litigators is explored in Shahshahani, *supra* note 68.

the distribution of case facts or mislead the court in order to move the law closer to her own liking, so the court may not update or may update skeptically. These issues of strategic information transmission are common to signaling models in game theory,[213] and I have analyzed analogous issues in the context of the interaction between trial and appellate courts.[214] In this Article, my aim has been to unveil the maxim's manifold attractions even if we entertain its basic assumptions; the "good law" extension, which departs from these core assumptions, is thus beyond my present scope but can be profitably pursued in future work.

IV
IMPLICATIONS OF THE THEORY

Having developed a theoretical account of the maxim, and having surveyed some of its real-world applications and limitations, I turn in this Part to some evaluative and normative implications.

A. Equity Preserves Law

The model provokes us to see equity in a new light. The traditional justification for equitable doctrines is to prevent the hardship to a party resulting from strict application of law.[215] That is the classic conception of the historical role of equity in English law.[216] It is also how the noted American scholar Roscoe Pound saw it when he spoke of equity as "a needed safety valve in the working of our legal system."[217] And it is the vision

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213 For surveys of the literature see Paul Milgrom, *What the Seller Won't Tell You: Persuasion and Disclosure in Markets*, 22 J. ECON. PERSPS. 115 (2008); Joel Sobel, *Signaling Games*, *in* ENCYCLOPEDIA OF COMPLEXITY AND SYSTEMS SCIENCE (Robert A. Meyers ed., 2009).

214 *See* Shahshahani, *supra* note 80.

215 As Black's Law Dictionary puts it, equity allows "the judicial prevention of hardship that would otherwise ensue from the literal interpretation of a legal instrument as applied to an extreme case." *Equity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

216 *See, e.g.*, 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW 1767–1773, at 228–31 (Thomas M. Curley ed., 1986) ("[C]ombinations [of different circumstances], being indefinitely variable . . . , could never be all foreseen by any legislator, and therefore cannot have been all comprehended in any law. It will therefore sometimes happen that those rules which were made to secure right would if they were closely observed establish wrong, because they would operate in a manner not foreseen when they were made. Upon these occasions the aid of equity is solicited, not properly to control or supersede the law, but so to regulate its operation that it may produce the effect which the law always intends.").

217 ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 132–33 (1922).

Henry Smith offers in his "reconstruction of the traditional approach to equity," which sees equity as frustrating sophisticated parties' "opportunism" in taking unfair advantage of the rigid structures of common law.[218]

My analysis offers a different justification—to preserve sound law. In this view, equity affords an outlet to a court that would otherwise distort the law in order to achieve justice or fairness in a hard case. So the prime virtue of equity is not to save a particular party from hardship but to save society at large from the court's bending the law to save that party from hardship.

To see the difference, consider laches and equitable estoppel, which disallow a claim as untimely even if technically within the statute of limitations.[219] The traditional view would say that these doctrines protect the sympathetic defendant who has taken steps in reliance on the reasonable expectation that the claimant will not sue.[220] The "hard cases" view would say that the doctrines protect us all from the court's protecting the sympathetic defendant by distorting the applicable substantive or procedural law (e.g., the definition of when a claim accrues).

The difference in viewpoints comes down to a difference in assumptions about what the court would do in the absence of an equitable escape hatch. The traditional view assumes that the court would apply the law to harm a party whereas my view recognizes that the court might damage the law to protect

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218 Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 903 (2012). The vision is formalized in Kenneth Ayotte, Ezra Friedman & Henry E. Smith, *A Safety Valve Model of Equity as Anti-Opportunism* (2013), https://ssrn.com/abstract=2245098 [https://perma.cc/ETM4-MNSY].

219 Laches and equitable estoppel are different in that the former only concerns unreasonable delay whereas the latter also requires misleading representations by the claimant. Accordingly, courts often hold that laches is not applicable within a congressionally prescribed statute of limitations, but equitable estoppel may be. *See* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 684–85 (2014); *see also, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946); SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 959 (2017).

220 *See, e.g.*, Galliher v. Cadwell, 145 U.S. 368, 372 (1892) ("The cases . . . proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the changing condition or relations during this period of delay it would be an injustice to the latter to permit him to now assert them."); *accord* City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 217–19 (2005). *See also* WILLIAM F. WALSH, A TREATISE ON EQUITY 472 (1930) ("The doctrine of laches . . . is an instance of the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust.").

the party. Instead of assuming a farsighted court that would let the party in suit suffer a hardship rather than alter generally sound law, I allow that the court might be nearsighted and swayed by the party's plight to distort the law. Of course we don't know the precise distribution of farsighted and nearsighted judges, but the alternative view has purchase to the extent that "hard cases make bad law" has purchase.

Note well that for this view to hold water, equity must be relatively soft; it cannot be too law-like. If an equitable doctrine has definite preconditions for application, then there is no meaningful difference (analytically, in terms of the model) between equity and law.[221] Sometimes the law is initially harsh and subsequently evolves to incorporate equitable considerations,[222] but such situations are more usefully conceptualized in the dynamic terms of the "hard cases make good law" discussion.[223] By contrast, the idea of equity elaborated here is that the law *cannot* systematically incorporate certain considerations, so it allows for an external escape valve to keep doctrine pure. In this view, then, the lawlessness of equity is not a bug but an essential feature of its law-preserving function. The famous "Chancellor's foot" criticism of equity[224] should be reinterpreted as praise.

That is not to say that equity is necessarily superior. The benefits of flexibility must be weighed against the costs of misapplication—both unintentional (because the boundaries of doctrine are unclear) and strategic (e.g., by a lower court with outlying preferences). The tradeoff is well-understood in similar contexts like rules versus standards.[225] It may be viewed as

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221 Though, of course, there is a historical difference.

222 *See* William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 483 (1938) ("[Equity] may fairly be regarded as the spiritual and reforming influence of the law, correcting deficiencies in the law where legal relief is inadequate, and leading the way to reforms in the law."); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1072, 1108–09 (2021) (noting that, after equity has "tamed a problem," the equitable intervention can "become crystallized into law," as when equity presaged joinder and class action in civil procedure).

223 *Supra* Part III.D.

224 "Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower soe is equity[.] Tis all one as if they should make the Standard for the measure wee call A foot, to be the Chancellors foot; what an uncertain measure would this be; One Chancellor has a long foot another a short foot a third an indifferent foot; tis the same thing in a Chancellors Conscience." JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43 (1927, originally published 1689).

225 *See, e.g.*, Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 329 (2007); Jeffrey R. Lax, *Political Constraints*

one manifestation of the fundamental initiative-control tradeoff in principal-agent theory.[226] All the same, the point here is that the "safety valve" function of equity is not simply to attain justice in particular cases but, perhaps more importantly, to prevent the law from being distorted in order to attain justice in particular cases.

It is important to pinpoint how my perspective contrasts with other assessments of equity. The insight that equity can improve law is not new. Aristotle observed early on that equity is "a rectification of law where law falls short by reason of its universality."[227] Other commentators throughout the ages have emphasized this law-improving function.[228] Of recent commentators, perhaps no one has probed equity more frequently and thoroughly than Henry Smith.[229] In his latest work on the subject, Smith envisions equity as a "meta" mode working alongside the regular mode of law and argues that this two-track system works better than a unified system because it "allows law to be more general and certain than it otherwise

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on Legal Doctrine: How Hierarchy Shapes the Law, 74 J. POL. 765, 770–75 (2012); Sepehr Shahshahani, *The Nirvana Fallacy in Fair Use Reform*, 16 MINN. J.L. SCI. & TECH. 273, 284 (2015).

226 Simply put, the tradeoff is that giving more authority to the agent helps the principal by incentivizing the agent to work harder but hurts the principal by loosening the principal's control. *See, e.g.*, David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 709–15 (1994); Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1, 3, 10–11 (1997); Wouter Dessein, *Authority and Communication in Organizations*, 69 REV. ECON. STUD. 811, 811, 815–19 (2002).

227 ARISTOTLE, NICOMACHEAN ETHICS 1137b, at 142 (Martin Ostwald trans., 1999).

228 *See, e.g.*, 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA §§ 17–18, at 18–19 (Bos., Hilliard, Gray & Co. 1836) ("Now Equity . . . qualifies, moderates, and reforms the rigor, hardness, and edge of the law . . . . It does also assist the law, where it is defective and weak in the constitution, (which is the life of the law) and defends the law from crafty evasions, delusions, and mere subtilties, invented and contrived to evade and elude the Common Law, whereby such as have undoubted right, are made remediless. And thus is the office of Equity to protect and support the Common Law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it.").

229 *See generally* Smith, *supra* note 218; Ayotte, Friedman & Smith, *supra* note 218; Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 J. INST. & THEORETICAL ECON. 137 (2014); Henry E. Smith, *Fusing the Equitable Function in Private Law*, *in* PRIVATE LAW IN THE 21ST CENTURY 173 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2017); John C. P. Goldberg & Henry E. Smith, *Wrongful Fusion: Equity and Tort*, *in* EQUITY AND LAW: FUSION AND FISSION 309 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019); Smith, *supra* note 222.

could be."[230] These accounts are consistent with my missing-dimension model where a law that works well in general may fail in particular cases because it cannot incorporate certain kinds of facts, in which case equity serves as a corrective.[231]

But my account differs in its conception of the counterfactual. In all the foregoing accounts, the comparison is between law as it stands[232] (or, in Smith's account, law augmented by multifactor balancing tests)[233] on the one hand and law as tempered by equity on the other hand. My account, by contrast, is attentive to a third option—distorted law. So my account, unlike existing accounts, shows how equity can save the law even when the law has no room for improvement.

Again, the difference comes down to different conceptions of what would happen without equity's intervention: existing accounts assume that courts would apply the law whereas my model considers that courts might distort the law to avoid a hardship. These different counterfactuals may lead to different answers to the law-equity tradeoff. As discussed, operating through equity has its costs.[234] If the only countervailing benefit is to temper the law, as existing accounts suggest, then the costs may not be worth it when existing law does a good enough job over the run of cases; by contrast, if the benefit is to prevent the law from being distorted, as my account suggests, then the costs are worth bearing in a wider range of contexts. Moreover, as discussed, my model shows why equity's intervention may be beneficial even when equitable standards are not capable of law-like articulation and equity remains a wildcard.[235]

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230 Smith, *supra* note 222, at 1056. Smith's account thus challenges the dominant school that considers the fusion of law and equity to be an unqualified improvement. *See, e.g.*, *id.* at 1058, 1062–67, 1104–05.

231 As the Lord Chancellor put it in a foundational equity case, "[t]he Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances." The Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 486, 1 Ch 1, 6.

232 *See supra* notes 216, 222, and 228.

233 Smith, *supra* note 222, at 1071, 1075, 1091, 1101.

234 *See supra* notes 225–26 and accompanying text. For an argument that equity tempers the costs of destabilizing the law by allowing only limited remedies, see Mark P. Gergen, *Equity's System of Open-Ended Wrongs and Limited Remedies*, 11 TEX. A&M L. REV. 541, 542–43 (2024).

235 *See supra* notes 221–24 and accompanying text.

B. Strict Remedies Make Law Distortion More Likely

Simply put, the tragic logic of hard cases is that the court may sacrifice good law to prevent a bad disposition. It follows that the consequences of the bad disposition matter to the court's calculus of whether to sacrifice the law. If the party afflicted by a special hardship may lose but still preserve some measure of protection against the hardship, the court would feel less compelled to distort law to prevent that party from losing; on the other hand, if the design of doctrine is such that the losing party will bear the full brunt of the hardship, the court would feel a greater need to distort law to avoid the hardship. In other words, by calibrating the hardship, the remedy affects how courts construe the right in hard cases. A remedy that tends to make the hardship acutely felt creates greater pressure to distort the underlying right than a remedy that does not inevitably attach whenever the right is infringed and can be tailored to the facts.[236]

A somewhat perverse implication of this observation is that asking more of the law may end up giving you less. It is natural for advocates of a right to push for a remedy that deals swiftly and strictly with violators of that right because such a remedy better deters violations. But the danger is that by making it hard for the court to wriggle out of punishing the violations it does not want to punish, such a remedy leaves the court little choice but to shortchange the very right championed by the advocate.[237] Asking for stricter remedies may thus be counterproductive to the advocate's cause.

This, I think, is what has happened with many privacy advocates' championing of the Fourth Amendment exclusionary rule.[238] The idea behind the exclusionary rule was that nothing less than the prospect of suppressing the evidence of crime would be enough to deter police wrongdoing in gathering

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236 *Cf.* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 608 (2000) (arguing that legal efforts to change entrenched social norms are more effective when legal condemnation is less severe because less severe sanctions are more likely to be enforced).

237 *Cf.* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999) (discussing the idea of "remedial deterrence" whereby "the threat of undesirable remedial consequences motivat[es] courts to construct the right in such a way as to avoid those consequences").

238 Recall that the exclusionary rule provides that evidence obtained by violating the Fourth Amendment is not admissible in criminal prosecutions. *See supra* notes 129–30 and accompanying text.

evidence.[239] But in reality, this prospect proved so unappetizing to judges that they preferred to see no wrongdoing. Judges, who in a criminal trial see their function as facilitators of truthfinding, have consistently preferred narrowing the Fourth Amendment right to finding a Fourth Amendment violation and having to suppress evidence of crime.[240] As Judge Guido Calabresi has put it,

> Judges . . . are not in the business of letting people out on technicalities. . . . Regardless of who appointed her, the judge facing a clearly guilty murderer or rapist who makes a Fourth Amendment or other constitutional claim will do her best to protect the fundamental right *and* still keep the defendant in jail. . . . [T]he judge will do so simply because she does not like the idea of dangerous criminals being released into society. This means that in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable. That case then becomes the precedent for the next case.[241]

Thus, by sharpening the rule-disposition tradeoff, the exclusionary rule has contributed to the distortion of Fourth Amendment law.[242] It's not obvious how best to replace the exclusionary remedy.[243] Still, the discussion suggests at least a recalibration of privacy advocates' focus. Narrow readings of the substantive Fourth Amendment right should continue to be challenged, but blanket denunciation of the Burger, Rehnquist, and Roberts Courts' curtailment of the exclusionary rule[244] may

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239 For an informative account of how the Supreme Court came to be persuaded by this rationale, see Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

240 *See supra* notes 131–32 and accompanying text.

241 Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003).

242 *See supra* notes 129–47 and accompanying text.

243 *Compare* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 31–45 (1997) (suggesting tort suits with damage multipliers), *and* Slobogin, *supra* note 132, at 366 (proposing monetary penalties on police officers and police departments), *with* Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 59–65 (1994) (arguing that "tort actions, internal police proceedings, criminal sanctions and civilian review boards are ineffective alternatives to the exclusionary rule"), *and* Calabresi, *supra* note 241, at 114–16 (expressing reservations about the effectiveness of tort suits and suggesting sentencing adjustments).

244 *See, e.g.*, Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an 'Empirical Proposition'?*, 16 CREIGHTON L. REV. 565 (1983); Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85 (1984); Yale Kamisar,

be counterproductive to privacy advocates' cause. If anything, judges will be *more* willing to find that the Fourth Amendment has been violated if suppression of evidence is not the automatic consequence of such a finding. Severing this remedy from the right would create space for judges to fashion stronger Fourth Amendment protections, much needed in this age of surveillance.

The Fourth Amendment exclusionary rule thus illustrates the principle that a strict remedy makes rule distortion more likely.[245] The obverse—that a flexible remedy makes rule distortion less likely—is illustrated by the chestnut *Regina v. Dudley & Stephens*.[246] My intent in revisiting that famous case is not to reopen the jurisprudential can of worms it presents to offer a new normative theory but rather to suggest through my positive theory a reading that connects the rule-disposition tradeoff to remedies.[247]

The dramatic facts will be familiar to many readers: Four men were shipwrecked and starving at sea with no visible prospect of rescue.[248] They endured many days but, when one of

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In Defense of the Search and Seizure Exclusionary Rule, 26 HARV. J.L. & PUB. POL'Y 119 (2003); Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

245 There are plenty of other illustrations as well. Daryl Levinson points out several of them in constitutional law. *See, e.g.*, Levinson, *supra* note 237, at 890–93 (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Paul v. Davis*, 424 U.S. 693 (1976)). In antitrust law, scholars have warned that courts' reluctance to impose mandatory treble damages has led to narrow construction of the scope of liability under Section 2 of the Sherman Act. *See, e.g.*, William E. Kovacic, *Private Participation in the Enforcement of Public Competition Laws*, *in* 2 CURRENT COMPETITION LAW 167, 173–74 (Mads Andenas, Michael Hutchings & Philip Marsden eds., 2004); Mark S. Popofsky, *The Section 2 Debate: Should Lenity Play A Role?*, 7 RUTGERS BUS. L.J. 1, 10 (2010); Edward D. Cavanagh, *Detrebling Antitrust Damages in Monopolization Cases*, 76 ANTITRUST L.J. 97, 99 (2009). And in international human rights law, Sonja Starr has shown how "strong remedial rules can undermine effective judicial enforcement of rights." Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 695 (2008).

246 (1884) 14 QBD 273.

247 For jurisprudential arguments for and against different approaches in thorny cases of this sort, see Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949); Anthony D'Amato, *The Speluncean Explorers—Further Proceedings*, 32 STAN. L. REV. 467 (1980); William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731 (1993); Naomi R. Cahn et al., *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754 (1993); David L. Shapiro, *A Cave Drawing for the Ages*, *in* THE CASE OF THE SPELUNCEAN EXPLORERS: A FIFTIETH ANNIVERSARY SYMPOSIUM, 112 HARV. L. REV. 1834 (1999).

248 Dudley & Stephens 14 Q.B.D. at 273.

them fell sick, two of the others decided to kill him for food.[249] The slain man's meat and blood sustained the others for a few more days until they were rescued by a passing ship.[250] At their murder trial, the seamen argued that their actions were justified because they would have died if they had not killed the comatose man and he was destined to die before them of natural causes.[251] The court rejected the argument, holding that necessity is not a defense to murder.[252] Specifically, the killing of another person may be justified if done in self-defense, or in defense of a third person, but not if done to prevent probable starvation.[253]

The holding establishes what the court (reasonably) considered a good law. The contrary rule would have risked encouraging too ready a resort to murder and cannibalism in expectation of acquittal on grounds of necessity.[254] And the court's rule does not deter doing what one must to survive in

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249 *Id.* at 274. The court's opinion says the third man "dissented," though accounts differ on this point, but there is no question that he had no qualms about eating the deceased after the deed. In any event, he was not charged and became the prosecution's chief witness at trial. *See* A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE (1984).

250 Dudley & Stephens 14 Q.B.D. at 274.

251 *Id.* at 275.

252 (1884) 14 QBD 273, 276.

253 *Id.* at 276, 287–88.

254 *See id.* at 287–88 ("Though law and morality are not the same . . . yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. . . . It is not needful to point out the awful danger of admitting the principle which has been contended for [i.e., that necessity is a defense to murder]. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. . . . [I]t is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime."). A contemporary newspaper editorial fleshed out the point: "The English law . . . is averse from entertaining the notion that peril from starvation is an excuse for homicide; and . . . [i]t would be dangerous to affirm the contrary, and to tell seafaring men that they may freely eat others in extreme circumstances, and that the cabin boy may always be consumed if provisions run short. Would the three men have waited so many days and endured the agony which they bore so long if they had been well aware that killing by hungry men was not murder, and if they had not grown up with the belief that killing a human being was all but universally criminal? Where is the doctrine of necessity in this loose sense to lead if once it is enshrined as law?" TIMES (LONDON), Nov. 7, 1884, at 10, col. 2.

cases of true necessity because the probability of future capital punishment is better than certain death now.[255]

Establishing this good law required the court to distance itself from the defendants' plight in this particular case—an ability to not let the hard case make bad law. What allowed such distancing was the prospect of a flexible remedy. The court sentenced the defendants to death but recommended mercy, and the Crown commuted the sentence to six months' imprisonment.[256] The judges knew that they could rely on the Crown's mercy, so they did not need to distort the law to prevent the special hardship.[257] The opinion is explicit on this point:

> There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.[258]

Or, as the trial judge instructed the grand jury, in terminology strikingly similar to that of this Article,

> if there is any such [necessity] doctrine . . . the prisoners will have the benefit of it. If there is not, [they may], under the peculiar circumstances of this melancholy case, . . . appeal to the mercy of the Crown, in which, by the Constitution of this country . . . is vested the power of pardoning particular objects of compassion and softening the law in cases of peculiar hardship.[259]

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255 Of course, one could also argue that allowing the necessity defense would be good law. See the sources cited in note 247 for various perspectives.

256 *Dudley & Stephens* 14 Q.B.D. at 288 n.2; TIMES (LONDON), Dec. 10, 1884, at 3, col. 5 (quoting the sentence passed by the court). The trial judge had also made several references to royal reprieve.

257 The prosecutor and the defense also knew this, and the prosecutor actually recommended clemency. *See* SIMPSON, *supra* note 249, at 205–06. As one commentator has written, "Dudley and Stephens were tried in order that a precedent might be obtained which strictly limited the defense of necessity. It was, however, clearly understood at the time, both by the judiciary and the public, that the law thus obtained would not be applied to the defendants." Michael G. Mallin, *In Warm Blood: Some Historical and Procedural Aspects of* Regina v. Dudley and Stephens, 34 U. CHI. L. REV. 387, 387 (1967).

258 Dudley & Stephens (1884) 14 QBD 273, 288.

259 Mallin, *supra* note 257, at 393. Mallin goes on to say that "Victorian juries customarily convicted in hardship cases, confident of royal reprieve." *Id.* at 396. Reviewing the historical mechanism of royal reprieve, he concludes that it was "certain that both [the trial judge] and his juries knew that whatever they might do, the lives of [the defendants] were not at stake." *Id.*

Just as the strict exclusionary remedy has made courts more willing to distort the underlying Fourth Amendment right, a flexible remedy allowed the court in *Dudley & Stephens* to establish good law without imposing the ultimate hardship of death on the sympathetic defendants.[260] The remedy is key to softening or sharpening the rule-disposition tradeoff.[261]

C. Standing Shapes Law by Determining Which Cases Make Law

One of the main lessons of the analysis is that the facts of the case that makes law affect the law that is made. This underlines the importance of justiciability doctrines like standing.[262] These doctrines are gatekeepers: they determine what kinds of cases courts may hear. As such, they affect what kind of law courts will make. And the effect is greater than is commonly supposed. The most immediate effect of a denial of standing is that a particular plaintiff's case is not heard; moreover, if a particular kind of plaintiff does not have standing to sue, then the problems faced by that kind of plaintiff may go judicially unredressed. But the effect is broader than that. It's

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260 *See id.* at 405–06 ("By removing the genuineness of threat to [the defendants] through the royal prerogative system, the judges left themselves freer than they might otherwise have been to decide the case on abstract rather than human—or even realistic—considerations. . . . [H]ad [the defendants'] lives really been in the balance, adjudication might have produced quite different results. . . . The judges were permitted—indeed invited—by the system to establish the precedent without anyone having to pay the cost.").

261 My take on *Dudley & Stephens* is related to Meir Dan-Cohen's notion of "acoustic separation" whereby the criminal law sends one message to the general public and another message to officials in charge of enforcing the law. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984). And Dan-Cohen mentions the case in a footnote. *Id.* at 640 n.35. As a historical matter, it seems that in this case there was no separation between the messages that law enforcement officials and everyone else heard—the judges, the prosecutor, the defendants, the jury, and the general public all seem to have understood that the defendants were not to be severely punished. *See supra* notes 254, 256–57. Nevertheless, from the perspective of designing incentives to govern future cases of the kind, the genius of the right-remedy balance in *Dudley & Stephens* is that a flexible remedy allowed a strict message about the (lack of the) right to be communicated to future primary actors.

262 The "justiciability" label is broad, typically construed to cover ripeness, mootness, standing, and the political question doctrine. *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD FREER, FEDERAL PRACTICE AND PROCEDURE § 3529, at 630 (3d ed. 1982). Viewed more broadly, it is akin to jurisdiction, though using "justiciability" to include "jurisdiction" is not standard. The discussion here will focus on standing, but much of it also applies to other aspects of justiciability.

not just that the law will not address a certain kind of case; it's that this kind of case will not be in the mix of cases that the court uses to make law in this field—so the court may in the end make law that addresses this kind of case too, but it will make that law using other kinds of cases. The resulting law may be dramatically different if justiciable and nonjusticiable cases are systematically different along the three dimensions of hardness.

A useful illustration comes, again, from the Fourth Amendment context. The field distortion created by the fact that Fourth Amendment cases often involve unsympathetic criminal defendants and compounded by the drastic exclusionary remedy is further exacerbated by standing doctrines that prevent courts from hearing cases that would permit the adjudication and elaboration of privacy rights in a sober context. For example, the Supreme Court held in *Clapper v. Amnesty International* that a group of lawyers, human rights advocates, and media organizations did not have standing to challenge the 2008 amendments to the Foreign Intelligence Surveillance Act.[263] Even though the plaintiffs had alleged that they regularly communicated with foreign persons whom the FISA amendments authorized the government to surveil (e.g., families of Guantánamo Bay detainees or targets of the CIA's extraordinary renditions), the Court held that the prospect of surveillance was too "speculative" to confer Article III standing.[264]

An unfortunate consequence of the Court's holding is that surveillance could go on for a long time without its constitutionality being examined by an Article III court.[265] What is more (and that is the insight here), Fourth Amendment law, including law that bears on the constitutionality of FISA amendments, will continue to be made in *other* cases—hard cases, cases involving accused criminals or terrorists seeking to suppress evidence of wrongdoing, where the immediate consequences of finding a Fourth Amendment violation will be felt much differently than when the target of the alleged violation is a human rights advocate seeking to uncover torture or abuse. As a result, constitutional protections will be much less robust.

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263 Clapper v. Amnesty Int'l, 568 U.S. 398, 402 (2013).

264 *Id.* at 401, 410–14.

265 *See* Barry Friedman & Danielle Keats Citron, *Indiscriminate Data Surveillance*, 110 VA. L. REV. 1351, 1360 (2024) (criticizing courts' decision to "turn a blind eye" to mass surveillance in *Clapper* and similar cases and stating that courts take a non-merits way out of these cases because the contours of the data-collection programs are unknown).

The broader implication of this discussion is that the law of standing (and justiciability generally) has a large blind spot. Standing doctrine incorporates two policy considerations: a desire not to overstep the judicial function by wading into a generalized weighing of the public interest[266] and the idea that only a person with a concrete, redressable injury has enough skin in the game to mount the kind of strong advocacy on which our adversarial system of justice depends.[267] These are important considerations. But an equally important consideration is missing: this gatekeeping doctrine does not consider how the characteristics of the cases that the gates keep out or let in affect the resulting law. Because the quality of law depends on the distribution of cases used to make law, standing doctrine does not do well to ignore its effects on the distribution of justiciable case facts.

Note, too, that the concern about usurping the functions of coequal branches applies with less force when the question is not *whether* courts will decide an issue but *what kind of case* they will use to decide it. As discussed, the effect of the justiciability determination is often not to insulate an issue from judicial lawmaking but to change the context in which judicial lawmaking occurs. The question is not, for example, whether courts will ultimately decide whether mass surveillance complies with the Fourth Amendment; the question is whether they will do so in a case involving a human rights advocate seeking to enjoin the government's obstruction of her efforts to uncover torture or in a case involving a terrorist seeking to suppress the evidence of his murders. The distinction makes an enormous difference to the privacy rights we will have; it's not clear that it makes a difference to the separation of powers.

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266 *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 489 (1923) (rejecting taxpayer standing on the grounds that entertaining such a suit "would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess"); Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) for the proposition that "[t]he province of the court . . . is, solely, to decide on the rights of individuals," and proclaiming that "[v]indicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive").

267 *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.").

In sum, standing doctrine is missing a key mechanism for assessing the impact of its gatekeeping function on substantive law. The law of standing would improve, and would improve substantive law, if it considered whether a denial of standing would deprive the courts of an opportunity to consider important factual contexts in which the legal issue being decided would frequently arise. In particular, courts should be cautious not to deny standing when doing so would make it more likely that substantive law will be determined in hard cases.

CONCLUSION

This Article has used the aphorism "hard cases make bad law" as a lens to explore the terrain of common law rulemaking. Keying in on the fundamental linkage of courts' lawmaking and dispute-settling functions, I have shown how a particular case can influence general law, especially in bad ways. The analysis helps explain patterns of caselaw in a variety of fields and stimulates a renewed appreciation for the uses, and limits, of judicial techniques to limit the damage of hard cases.

The analysis also helps achieve a deeper understanding of how to evaluate and design three trans-substantive legal institutions: equity, remedies, and standing. In all three contexts, the core insight of my theory, grounded in the aphorism, is to see beyond familiar tradeoffs. Conventional wisdom conceptualizes the law-equity comparison as a tradeoff between a disciplined system that is generally wise but occasionally harsh and a more flexible system that is more forgiving but less predictable. Strong remedies are similarly conceptualized as achieving greater deterrence at the expense of inflexibility and occasional harshness. And strict standing doctrine supposedly sacrifices the interest of particular parties in having a day in court to the greater good of preserving sharp adversarial contestation and restraining the judiciary from generalized policymaking.

But the hard cases logic shows that in all three contexts the realistic alternative to the flexible wildcard is not a strict-but-good system; it may well be a strict-and-bad system. Instead of strictly applying good law at the cost of hardship to a party, a court without an equitable escape hatch may distort the law to prevent the hardship. Instead of administering a strong remedy to align incentives, albeit at the expense of a hard-done-by party, a court without remedial discretion may shortchange the right for fear of having to apply the remedy. And instead of insulating certain supposedly nonjusticiable controversies from judicial lawmaking, a denial of standing

may subject those controversies to ill-fitting judge-made laws fashioned in the context of other controversies. None of this is to deny that the "softer" alternatives—law tempered by equity, greater discretion in remedies, and more flexible standing doctrine—come with real costs. But the justification for the impulse to soften the law's application is not only to achieve fairness in particular cases; it is, perhaps more importantly, to preserve the global edifice of law against distortion.