Faculty Research Working Papers Series

Do Cases Make Bad Law?

Frederick Schauer

February 2005

RWP05-013

Draft – 02/11/2005

DO CASES MAKE BAD LAW?

Frederick Schauer[1]

"It is the merit of the common law," Oliver Wendell Holmes observed, "that it decides the case first and determines the principle afterwards."[2] That the decision of a particular case

---

[1]Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University. Earlier versions of this Article were presented as a Faculty Enrichment Lecture at the Rogers College of Law at the University of Arizona on November 18, 2004, and at the Harvard Law School Seminar on Law and Economics on February 8, 2005. I am grateful for the comments of Elizabeth Chorvat, Richard Fallon, Louis Kaplow, Matthew Stephenson, Steven Shavell, Peter Strauss, Mark Tushnet, Adrian Vermeule, Lloyd Weinreb, and Ernest Young, for valuable research suggestions from Iris Bohnet, Alan Ferrell, Jack Goldsmith, and Christine Jolls, and for the generous research support of the Joan Shorenstein Center on the Press, Politics and Public Policy.

[2]Oliver Wendell Holmes, Jr., quoted in Louis Menand, The Metaphysical Club 338 (2001).

holds pride of place in common law methodology is largely uncontroversial. And indeed so too is the view that this feature of the common law is properly described as a "merit." Treating the resolution of concrete disputes as the preferred context in which to make law – and making law is what Holmes meant in referring to "determin[ing] the principle" – is the hallmark of common law method.[3] It is true that the common law's methods and theory were developed at a time when most common judges understood themselves to be discovering the law rather than making it, but Holmes knew better. He fully appreciated that common law judges made law in the process of deciding cases, and nowadays few think otherwise. Common law method is not simply the discovery of immanent law, but rather an approach in which the decision of live disputes in concrete contexts guides the law-making function. Moreover, so it is said, making law in the context of deciding particular cases produces law-making superior to that taking place without the presence of real litigants exemplifying the issues the law must resolve. Indeed, this belief in the virtue of a crystallized dispute between specific parties as the platform for creating legal rules is so strong that it is reflected not only in the faith still placed in the common law as a desirable method of law-making, but also in the Constitution's "case or controversy"

---

[3]"In short, as Professor Eisenberg has reminded us in his book on the common law, courts are legitimately in two businesses: deciding individual disputes and enriching our body of legal norms." Todd D. Rakoff, The Implied Terms of Contracts: Of 'Default Rules' and 'Situation Sense,' in Good Faith and Fault in Contract Law 191, 195 (Jack Beatson & Daniel Friedmann, eds., 1995), quoting Melvin A. Eisenberg, The Nature of the Common Law 4-7 (1988).

requirement,[4] which in its modern guise embodies a preference that law be made in the context of a concrete dispute between genuine adversaries, rather than on the basis of "abstract" speculation.[5]

Yet although both the common law and the Constitution manifest a preference for having a genuine case before the law-maker, this preference may rest on a fundamentally mistaken premise. If in fact concrete cases are more often distorting than illuminating, then having a genuine dispute before the law-maker may produce inferior law whenever the concrete case is non-representative of the full array of events that the ensuing rule or principle will encompass. Such distortion may rarely be seen or appreciated by the common law judge, who focuses, as she must, on the this-ness of this case. But the distortion of the immediate case may systematically condemn common law law-making not only to suboptimal results, but also to results predictably worse than those that would be reached by making law in a less dispute-driven fashion. If this is so, then the entire "merit" of law-making in common law fashion may need to be reconsidered, and my goal here is to prompt just such wholesale reconsideration of the virtues of the common law method as a desirable way to create the rules and principles that constitute so much of our law.

---

[4]U.S. Const., Art. III, §2.

[5]See Raines v. Byrd, 521 U.S. 811, 839 (1997) (Breyer. J., dissenting); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979); Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting).

The tension I explore here becomes even more apparent when we consider another of Holmes's famous statements, the view that "[g]reat cases, like hard cases, make bad law."[6] Holmes did not believe that identifying the problematics of great cases and hard cases was inconsistent with his view about the merits of case-based law-making, because for Holmes both great cases and hard cases presented vivid factual settings whose very vividness made proper resolution of the particular case especially salient even when that proper resolution would have negative effects on future and different cases. But such scenarios were aberrational, Holmes believed, and he saw no reason why the distorting effects of great or hard cases would be present for the mine run of ordinary common law litigation.

Yet in supposing a dichotomy between the attention-grabbing and the more ordinary cases, Holmes may have ignored to extent to which even ordinary cases impress their facts on the judges who have to decide them, and scarcely less than great cases or hard cases appear to demand proper resolution purely by virtue of their very presence in the foreground of judicial phenomenology. To the extent that this is so, then it is not just great cases and hard cases that make bad law, but simply the decision of cases that makes bad law. Or at least that is the disturbing possibility that I examine here.

---

[6]Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

I. The Common Law Judge as Lawmaker

At the time when Holmes wrote about the merits of the common law method, it was often (albeit not universally[7]) believed that judges neither do nor should make law.[8] Common law decision-making was widely understood as the process of discovering the rules and principles immanent in the existing law, such discovery being assisted by logical deduction from earlier cases as well as the less deductive but no less constrained application of that mysterious array of

---

[7] See, e.g., John Austin, II Lectures on Jurisprudence 634 (5th ed., R. Campbell, ed., 1885) (noting "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges"). See also Allen v. Jackson, [1875] 1 Ch. D. 399, 405 (Mellish, L.J.) (concluding that "[t]he whole of the rules of equity and nine-tenths of the common law have in fact been made by judges"); John Chipman Gray, The Nature and Sources of Law 84 (2d ed., 1948) (referring to law being "made by the judges").

[8] "The orthodox Blackstonian view, however, is that judges do not make law, but only declare what has always been the law." R.W.M. Dias, Jurisprudence 151 (5th ed., 1985). See also Willis v. Baddeley [1892] 2 Q.B. 324, 326 (Esher, L.J.) ("There is in fact no such thing as judge-made law, for the judges do not make the law though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."); Re Hallett's Estate, [1880] 13 Ch. D. 696, 710 (Jessel, L.J.) (announcing that "the rules of courts of equity are not, like the rules of common law, supposed to have been established from time immemorial").

skills then and now known as "legal reasoning."[9] To the paradigmatic nineteenth century judge, and perhaps even at times to Holmes himself, the move from the decision of a particular case to the announcement of the principle that had determined the outcome of that case was substantially bounded and significantly backward looking. The common law judge was engaged, in the eyes of many, in locating and articulating a pre-existing principle, no less pre-existing for never before having been formally articulated. The approach was thus one of principle-finding rather than principle-making -- of discovery rather than creation. Making law was rarely thought to be part of the process.[10]

Even the nineteenth century, however, saw numerous dissenters from this Blackstonian picture of what the common law judge was doing in announcing broad legal principles in the context of deciding concrete controversies. Jeremy Bentham was the earliest and shrillest of these dissenters,[11] and Holmes himself, although later and less shrill than Bentham, presaged the

---

[9]Anyone who thinks the statement in the text to be an inaccurate caricature would be well advised to examine Eugene Wambaugh, The Study if Cases (2d ed. 1894). To the same effect is John M. Zane, German Legal Philosophy, 16 Mich. L. Rev. 287, 338 (1918).

[10]See John Baker, The Law's Two Bodies: Evidentiary Problems in English Legal History (2001); Gerald J. Postema, Classical Common Law Jurisprudence (Part 1), 2 Oxford Univ. Comm. L.J. 155 (2003).

[11]See Jeremy Bentham, Of Laws in General 166-68, 184-95 (H.L.A. Hart, ed., 1970);

Realists by pressing against a picture of the common law as discovery and quasi-logical legal reasoning.[12] Now, having for generations bathed in the teachings of Holmes and the Realists, we heed their lessons. We no longer deny the creative and forward-looking aspect of common-law decision, and we routinely brand those who do as "formalists"[13]

Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 24 (E.H. Burns & H.L.A. Hart, eds., 1970). See generally Gerald J. Postema, Bentham and the Common Law Tradition (1986); Nancy L. Rosenblum, Bentham's Theory of the Modern State 94-98 (1978); James Steintrager, Bentham 20-43 (1977).

[12]This is the best understanding of Holmes's claim that "[t]he life of the law has not been logic; it has been experience." Oliver Wendell Holmes, The Common Law 5 (Mark DeWolfe Howe ed. 1963). See also William Twining, Karl Llewellyn and the Realist Movement 16 (1973) ("[Holmes] recognized that judges can and do make law").

[13]Thus, the word "formalism," when not serving simply as a catchall term of jurisprudential abuse, may denote a belief, and a highly plausible one at that, in the possibility and/or desirability of rule-based constraint. Alternatively, "formalism" may be the vice of denying the extent of judicial choice or discretion when that choice or discretion actually exists. See Frederick Schauer, Formalism, 87 Yale L.J. 509 (1987). It is this latter version of formalism, formalism as the denial of choice, that I discuss in the text.

It is thus no longer especially controversial to insist that common law judges make law.[14] Sometimes this law-making occurs when judges create new doctrines in traditional common law areas such as contract, tort, and choice of law. Few would dispute that the New York Court of Appeals made law in McPherson v. Buick Motor Co.[15] when it held that a consumer of even a product that was not inherently dangerous could recover against a manufacturer for negligent manufacture despite the absence of privity between the consumer and the manufacturer of the defective part, and that the House of Lords did much the same when it reached more or less the identical outcome in Donoghue v. Stevenson.[16] So too when the venue for law-making is not

---

[14]"The theory of the older writers was that judges did not legislate at all. A pre-existing rule was there, imbedded, if concealed, in the body of customary law. All that the judges did was to throw off the wrappings, and expose the statue to our view. Since the days of Bentham and Austin, no one, it is believed, has accepted this theory without deduction or reserve, . . ." Benjamin N. Cardozo, The Nature of the Judicial Process 124-25 (1921).

[15]111 N.E. 1050 (N.Y. 1916 (Cardozo, J.). For discussion and elaboration, see Eisenberg, supra note 3, at 58-61, 132-35.

[16][1932] A.C. 562, 1932 S.C. (H.L.) 31. For an analysis of Donoghue v. Stevenson and other cases as decisions choosing among alternative legally justifiable outcomes, and thus making law, see Neil MacCormick, Legal Reasoning and Legal Theory 69, 235, 246-58 (1978). As is well-known, the most prominent contemporary defender of the view that judges find law and not make it is Ronald Dworkin, especially in Ronald Dworkin, Law's Empire (1986), and

simply the creation or re-creation of common law rules, but rather the judicial construction of doctrine against the background of a largely indeterminate authorizing statute. The Sherman Act's prohibition of "[e]very contract, combination . . . conspiracy, in restraint of trade or commerce"[17] is the canonical but hardly unique example, and when the Supreme Court interprets that Act as prohibiting price-fixing[18] and tying arrangements[19] its law-making role is scarcely less than that of a common law court simply because the Court is making law against the background of open-ended legislation. So too when at other times the context for judicial law-making is constitutional interpretation, where the judicial development of constitutional doctrine against the background of vague phrases such as "[c]ommerce among the several states,"[20]

Ronald Dworkin, Taking Rights Seriously (1978). But although Dworkin wishes to understand as "finding" or "interpreting" what others would call "making," those differences have little pertinence to the themes of this Article. Even if we understand Dworkin to be correct and his opponents mistaken, my central point about the distorting dominance of the particular case before the judge would be no less applicable.

[17]15 U.S.C. §1 (2002).

[18]E.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[19]E.g., United States v. United Shoe Machinery Co., 247 U.S. 32 (1918).

[20]U.S. Const. art. I, §8.

"freedom of speech,"[21] "establishment of religion,"[22] "due process of law,"[23] "equal protection of the laws,"[24] "unreasonable searches and seizures,"[25] and "cruel and unusual punishments"[26] is largely untethered by the text.[27] But whether in the context of pure common law decision-making or instead in the context of the supposed "interpretation" of capacious language in statutes or in the Constitution, it is far too late in the day to deny that judges are often (some

---

[21]U.S. Const. amend. I.

[22]U.S. Const. amend. I.

[23]U.S. Const. amend. V; U.S. Const. amend. XIV, §1.

[24]U.S. Const. amend. XIV, §1.

[25]U.S. Const. amend. IV.

[26]U.S. Const. amend. VIII.

[27]See David A. Strauss, Freedom of Speech and the Common-Law Constitution, in Eternally Vigilant: Free Speech in the Modern Era 32 (Lee C. Bollinger & Geoffrey R. Stone, eds., 2002); David Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996). See also Adrian Vermeule, Constitutional Amendments and the Constitutional Common Law (Harvard Law School Faculty Workshop Paper, November 22, 2004) (discussing "judge-made constitutional law").

would say "always"[28]) engaged in the process of making law. Moreover, as Holmes stressed, judges make law in conjunction with their decision of actual controversies before the law-making court. Aside from whether that procedure is a merit or a demerit, there can no longer be much doubt that using the decision of a single case as the platform for making law is one of the characteristic features of common law method.

II. Law as Rule and Principle

Although Holmes referred to "determin[ing] the principle," nothing here turns on any alleged difference between determining a principle and making law. It is certainly true that at times a court will announce a crisp and carefully defined rule -- as in the Supreme Court's decision in Miranda v. Arizona[29] and the Court's creation of various per se antitrust rules[30] -- and that at other times it will only announce a broad and less determinate principle.[31] In language

---

[28]See Duncan Kennedy, Legal Formality, 2 J. Legal Stud. 351 (1973) (arguing that judges necessarily exercise choice in every decision, even when it appears they are simply following the law).

[29]384 U.S. 436, 467-74 (1966) (providing virtually the exact language that police were to use in alerting suspects of their Fifth Amendment rights).

[30]See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price-fixing); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (tying arrangements).

[31]See Michael C. Dorf, Courts, Reasons, and Rules, in Rules and Reasoning: Essays in

more familiar these days, sometimes a court makes law by setting forth a rule and at other times by announcing a standard.[32] But whether what a court offers is a rule or a standard, the court's

---

Honour of Fred Schauer 129 (1999).

[32]See, e.g., Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Russell B. Korobkin, Behavioral Analysis and Legal Form: Rules vs. Standards Revisited, 79 Or. L. Rev. 23(2000); Kathleen M. Sullivan, The Supreme Court, 1991 Term -- Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22 91992). Ronald Dworkin has fostered a not inconsiderable amount of confusion by distinguishing rules from principles, Ronald Dworkin, Taking Rights Seriously (1978), and then defining rules as precise and absolute and principles as vague and overridable. Dworkin's error lies in part in assuming that the dimensions of precision and of weight operate in tandem, when in fact they appear to be largely independent of each other. There are precise but overridable rules, and there are vague but highly stringent (or even absolute, as with Kant's vague but non-overridable categorical imperative) standards, and even if we assume equivalence between what Dworkin means by "principles" and others mean by "standards," it is still not the case that the precision of rules is a marker of their stringency or that the vagueness of standards is a marker of their overridability. Joseph Raz has observed, challenging Dworkin's distinction, that "we do not normally use the rule/principle distinction to mark the difference between prima facie and conclusive reasons or between the standards which establish them," Joseph Raz, Legal Principles and the Limits of Law, in Ronald Dworkin and Contemporary Jurisprudence 73, 82 (Marshall Cohen, ed., 1983),

and Raz seems plainly correct. See also Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 13-14 (1991); Frederick Schauer, The Convergence of Rules and Standards, [2003] New Zealand Law Review 303.

announcement still serves as the presumptively governing norm for future cases. Consequently, for all but the most vacuous of norms – "Do the right thing," for example[33] – a norm set forth by the deciding court will operate as constraining law for future cases. The argument offered here is stronger insofar as the announced norm is precise – a rule and not a standard – and highly stringent – having great precedential force and significant weight against countervailing interests[34] – but the basic argument is dependent on neither precision nor a high degree of stringency. As long as the announced norm exerts at least some constraint in and for future cases, the argument presented here still holds.

To go even further, the argument holds even if the decision-making court is understood to be doing no more than giving a reason for its decision. Because a reason is necessarily more

---

[33]The slightly more common version is "all things considered" decision-making, see Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1680 (1988) (referring to "all-things-considered intuitive weighing" as lying at the heart of pragmatism), and some would put open-ended "balancing" into the same category. See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987); Stephen E. Gottlieb, The Paradox of Balancing Significant Interests, 45 Hastings L.J. 825 (1994).

[34]On these questions of strength as opposed to scope, see Frederick Schauer, A Comment on the Structure of Rights, 27 Ga. L. Rev. 415 (1993).

general than the decision that the reason is a reason for,[35] any reason (or any statement of a reason) that has precedential force in future cases operates in largely rule-like fashion. Once a court announces a reason for its decision, and once that stated reason is something that future or lower courts are expected to take seriously as a reason,[36] then the troubling question still arises as to whether the general statement that is the reason is better or worse by virtue of it having been initially announced in the context of a concrete dispute in which a court is expected to reach a conclusion.

III. The Problem in a Static Model

The basic argument is best grasped initially through consideration of a static and thus

---

[35]See Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633 (1995).

[36]The alternative view -- that announced reasons have virtually no normative weight in subsequent litigation, see Edward A. Hartnett, A Matter of Judgment, Not a Matter of Opinion, 74 N.Y.U. L. Rev. 123 (1999) -- is stunningly at odds with the realities of actual legal practice. For the three-month period from October 1, 2004, through December 31, 2004, for example, 213 briefs were filed in the Supreme Court of the United States, and every one of those briefs quoted from a previous Supreme Court decision (LEXIS Supreme Court Briefs database, search conducted on February 9, 2005). This would be an odd practice indeed unless the writers of those briefs had reason to believe that what the Court had said in previous cases might make a decisional difference in subsequent ones.

highly artificial model of common law decision-making.[37] We start with the premise, as explained in the previous section, that law-making is rule-making. And we proceed from this to the fact that rules are, of necessity, general and not particular. What makes a rule a rule, and what distinguishes a rule from a particularized command, is precisely the way in which a rule builds on a generalization and prescribes for all of the acts or events encompassed by the generalization.[38] When a law-maker makes law, she is thus setting forth a rule that controls, even if only presumptively, and even if not precisely, a multiplicity of future instances.[39] The law-maker, whether judge or legislature or agency, is deciding presumptively how not one but a

---

[37]The static model is artificial if we are considering the essentially continuous nature of the common law itself. But the static model begins to resemble reality whenever we consider the numerous contexts – rule-making in families, private associations, and often in administrative agencies, for example – in which, realistically, a single discrete event or decision prompts the process of rule-creation.

[38]This account of rule-based decision-making is developed at length in Frederick Schauer, Playing By the Rules, supra note 29.

[39]I put aside the interesting phenomenon of person-specific "special" legislation. Special laws, typically granting some privilege or exemption to (or prohibition on) an identified individual or entity, and commonly prohibited by state constitutions although not by the Constitution of the United States, are not general and are not rules. See 2 Norman J. Singer, Sutherland, Statutory Construction §40.01 (5th ed. 1993).

class of future events or controversies ought to be determined or regulated.

Our question is then one of comparing the law-maker who sets forth a rule for a multiplicity of future particulars in the context of deciding one concrete dispute right now with the law-maker who also makes a rule for a multiplicity of future particulars, but who does so in the abstract, divorced from the obligation to resolve a dispute between real parties. Plainly the case-based rule-maker, paradigmatically the common law judge, will perceive her task in terms of determining both how this case and also other cases of this kind ought to be decided, while the non-case-based rule-maker will also have to decide how cases of some kind – some set of future cases – ought to be decided, but unencumbered (or unguided) by the necessity of deciding one of those cases right now. Put differently, the common law judge has before her a concrete token of the type of case for which she is making a rule, while other rule-makers make their rules without having before them in the same immediate way a particular token of the case-type that the rule will encompass. One way of understanding the issue, therefore, is in terms of comparing these two different approaches to and methods of law-making.

The contrast between the two types of law-making is often presented as a contrast between common law and statute law,[40] or between common law and civil law,[41] or between

---

[40]See, e.g., Richard A. Posner, Common Law versus Statute Law, in The Problems of Jurisprudence 247 (1990); Paul Rubin, Common Law and Statute Law, 11 J. Legal Stud. 205 (1982).

common law and codification,[42] and there is no cause here to resist those characterizations. But however we characterize the difference, I mean to pose a skeptical challenge to one pervasive argument for the common law and against its alternatives.[43] And that argument is that one reason (and not necessarily the only reason, and not necessarily the best reason) to prefer the common law is that rule-making and law-making is better done when the rule-maker has before her a live controversy, a controversy that enables her to see all of the real world implications of making one rule rather than another. When there is no actual dispute, so the argument goes,

---

[41]See, e.g., Katharina Pistor and Chenggang Xu, Incomplete Law, 35 N.Y.U. J. Int'l L. & Pol. 931, 946-47 (2003); Thomas Lundmark, Book Review, 46 Am. J. Comp. L. 211, 214-15 (1998).

[42]See, e.g., Charles M. Cook, The American Codification Movement: A Story of Antebellum Legal Reform (1981); Problems of Codification (S.J. Stoljar, ed. 1977); Robert W. Gordon, Book Review, 36 Vand. L. Rev. 431 (1983).

[43]It is worth emphasizing that I am concerned (at least in this Article) largely with the soundness (or not) of a particular argument for case-based rule-making. There are other arguments for it, and there are arguments against it other than the one I offer here. In that sense, my claim, even if sound, cannot be considered a conclusive or all-things-considered argument against case-based rule-making. Still, if I am right one of the most prominent arguments for the case-based approach will be significantly weakened, and the overall argument for that approach will be weakened pro tanto.

everything is speculation, and speculation that is not rooted to real world events is especially likely to be misguided.[44] But when there is a real case, the rule-maker can see in a concrete context how the rule will play out in real life, and in actual controversies.[45] It is precisely this perception of at least one actual controversy, the conventional common law wisdom supposes, that systematically produces better rules. That is the claim that supports the statement from Holmes with which I opened this Article,[46] and that is the claim that pervades the classic explanations and celebrations of common law method.[47]

---

[44]"[L]itigants, after all, are the ones who actually experience the effects of legal rules." Steven Shavell, The Appeals Process as a Means of Error Correction, 24 J. Legal Stud. 379, 417 (1995).

[45]The claim is frequently part of a larger appeal for context and on the importance of seeing particular litigants as a way to understand the context. See, e.g., Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11, 107 n.577 (1994) (individual litigants as providing "concrete context"); Martha Minow, The Supreme Court 1996 Term, Foreword: Justice Engendered, 101 Harv. . rev. 10, 89 (1987) (arguing that courts should avoid "insulating themselves in abstractions").

[46]See note 2 supra.

[47]See Guido Calabresi, A Common Law for the Age of Statutes (1982); Eisenberg, supra note 3; Edward H. Levi, An Introduction to Legal Reasoning (1948). See also Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999).

This argument for the virtues of dispute-guided rule-making is not only part of the standard defense of the common law in general, but is also embodied in the "case or controversy" requirement of Article III of the Constitution. By requiring that constitutional rules be made only in the context of actual cases and controversies, and not on the basis of abstract speculation, judges are presumed to be able to make better rules than they would in the absence of that case-generated context.[48] So although there might be strong arguments for the "case or controversy" requirement that emerge out of any number of other values -- separation of powers, democratic theory, the role of the courts, and the presumption against judicial review, for example -- those arguments are not my focus here. Rather, my concern is with law-making quality and not with law-making authority, and thus only with the argument that one virtue of the "case or controversy" requirement is that adhering strictly to that requirement will produce better (rather than more legitimate) rules precisely because the court as rule-maker will have the

---

[48]See, e.g., Flast v. Cohen, 392 U.S. 83, 100 (1968). As the Supreme Court put it in Baker v. Carr, 369 U.S. 186 (1962), concreteness "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 369 U.S. at 204. And in Valley Forge Christian College v. Americans United for Church and State, Inc., 454 U.S. 464 (1982), the Court observed that a concrete factual context is likely to produce "a realistic appreciation of the consequences of judicial action." 454 U.S. at 472. See generally William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221 (1988). See also Susan Bandes, The Idea of a Case, 42 Stan. L. Rev. 227 (1990).

opportunity to perceive a genuine dispute before it.[49]

A. (Mis-)Surveying the Field

Once we understand rule-making as the process of setting forth a prescription couched in general terms and covering a multiplicity of future instances, we can see that rule-making also necessarily involves assessing what those future instances are likely to be and then determining (at least presumptively, but not necessarily conclusively) how those future instances ought to be resolved. Any rule-maker, be it a court or a legislature or an administrative agency or a parent or a dean, is explicitly or implicitly engaged in a process of surveying the future and imagining the array of decisions that will be governed by the putative rule. This can be done well or poorly, but a necessary component of any rule-making is the process of trying to get a sense – and it can never be much more than this – of what the future will look like, and of what future acts, events, disputes, and decision-making occasions will look like as well.

In thus surveying the future and attempting to gauge the distribution of future events that will be encompassed by the putative rule, however, there is a risk that the common law rule-

[49]I want to make clear that my challenge is to the very requirement of a concrete controversy, and not to the interesting question of whether the standing requirement fosters concreteness. As to the latter, see the important argument in David M. Driesen, Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication, 89 Cornell L. Rev. 808 (2004).

maker will be unduly influenced by the particular case before her. More specifically, there is a risk that the rule-maker, seeing a concrete case before her, will believe that this case is representative of the larger array. If it is in fact representative then there is not a problem. But if it is not representative, it may still be mistakenly thought to be representative, a mistake generated precisely by the fact that this case is before the decision-maker while other cases within the class are not.

Thinking rationally, of course, we can understand that the case that happens to be before a court or other case-based rule-maker is not exactly the same in all respects, and not even in all relevant respects, as others that might be members of the same larger and generally-described class that includes this case. And rationally we can understand as well that some of the relevant differences between this case and other members of its class might be such that the right decision for this case might not be the right decision for some, many, or even almost all of the other members of the class. A judge acting rationally, therefore, would assess as systematically and as objectively as she could the extent to which the case before her in all or at least most of its relevant particulars was representative of the larger class of which it is a member. The rational judge creating a rule would create a rule based on an assessment of the nature and preferred resolution of the full set of actual acts and events encompassed by that rule, and would consequently create the rule producing the best aggregate outcomes for the entire class. The process would thus necessarily involve determining the extent to which the larger class did or did not resemble the particular class member whose immediate presence before the decision-maker prompted making the rule.

The problem, however, is that decision-makers often act with less than perfect rationality in making just this kind of assessment. They often believe that the most proximate member of a class is representative of the class, and they make this (mis-)assessment not on the basis of a rational survey of the class, and not on the basis of systematic empirical examination, but instead largely on the basis of the usually irrelevant factor of proximity or ease of recall. This phenomenon of being over-influenced by proximate examples is commonly called, in the heuristics and biases literature, the "availability heuristic.[50] Less often it goes by the names "salience heuristic" or "vividness heuristic,"[51] but the basic idea is the same: When decision-makers are in the thrall of a highly salient event, that event will so dominate their thinking that

---

[50]The original insight is in Amos Tversky and Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Science 1124 (1974), and there is now a voluminous literature, some of the key items being contained in Judgments Under Uncertainty: Heuristics and Biases (Daniel Kahneman, Paul Slovic, and Amos Tversky, eds., 1982), and Heuristics and Biases: The Psychology of Intuitive Judgment 19-119 (Thomas Gilovich, Dale Griffin, and Daniel Kahneman, eds., 2002).

[51]See Scott Plous, The Psychology of Judgment and Decision Making 125-26, 178-80 (1993). See also Robert M. Reyes, William C. Thomson, and Gordon H. Bower, Judgmental Biases Resulting from Different Availabilities of Arguments, 39 J. Personality & Soc. Psychol. 2, 5-12 (1980) (concrete and vivid information has greater effect on decision-making than abstract information).

they will make aggregate decisions that are over-dependent on the particular event and that over-estimate the representativeness of that event within some larger array of events.[52] So if when buying insurance I am making a probabilistic decision about the likelihood of, say, a hurricane over the next ten years, I will make a different decision had there been a hurricane last week than I would otherwise have made. Although the presence of a hurricane last week ought not

---

[52]There is a dispute in the literature between those who take availability as an often reliable indicator of class characteristics, see Gary Klein, The Fiction of Optimization, in Bounded Rationality: The Adaptive Toolbox 103, 114 (Gerd Gigerenzer & Reinhard Selten, eds., 2002), as opposed to the view that availability is often a biased indicator of an actual frequency distribution. See Amos Tversky and Daniel Kahneman, Extensional versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment, in Heuristics and Biases, supra note 42, at 19, 20-21. Some of the dispute can be disaggregated by understanding availability solely in terms of ease of recall, independent of the extent to which people may recall on the basis of reliability and not ease. But there is some evidence that when we control for the content of the recall, ease of recall itself is often a determinant of judgment. Norbert Schwarz and Leigh Ann Vaughn, The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information, in Heuristics and Biases, supra note 42, at 103. Understood as ease of recall itself, availability is especially likely to be biased. As shall become clear, there is reason to believe not only that the availability of the immediate case is not a reliable indicator of the array of disputes of that type, but also that, given litigation incentives, it may in fact be an especially unreliable indicator.

rationally to make a difference in predicting the probability of a hurricane over the next ten years,[53] in practice the very "availability" of the hurricane by virtue of its occurrence last week will lead people to overestimate the probability of a hurricane in the future. For the same reason, people overestimate the probability of their contracting illnesses that their friends happen to have, and similarly overestimate the unreliability of automobiles whose failings have been personally described to them.[54] In all of these examples, we see the "human tendency to make judgments based on attention to only a subset of available information, to overweight that information, and to underweight unattended information."[55]

---

[53]This may or may not be true, but I assume that for certain weather events, like for many disasters, the occurrence of such an event at Time1 is causally unrelated to the probability of a similar event at Time 2.

[54]See Richard E. Nisbett, Eugene Borgida, Rick Crandall, and Harvey Reed, Popular Induction: Information is Not Always Informative, in Cognition and Social Behavior 113 (John S. Carroll & Hohn W. Payne, eds., 1976).

[55]Dolly Chugh and Max Bazerman, Bounded Awareness: What You Fail to See Can Hurt You, available at http://www.people.hbs.edu/mbazerman/Papers/Bounded%20Awareness.pdf (last accessed February 9, 2005). See also Max H. Bazerman and Dolly Chugh, Bounded Awareness: Focusing Failures in Negotiation, in Frontiers of Social Psychology: Negotiations (L. Thompson, ed., forthcoming 2005). The phenomenon is referred to as "focalism" or the "focusing illusion" in D.A. Schkade and D. Kahneman, Does Living in California Make People

Further examples of the availability phenomenon are legion, all involving decision-makers required to make decisions that require either a probabilistic assessment or an assessment that encompasses a multiplicity of future instances.[56] And in all of the examples the decision-makers turn out to be highly prone to exaggerate the representativeness of a particular instance that happens to be easily recallable because of its temporal or physical or mental proximity[57] – the word "vividness" captures the idea. And because, as we have seen, judges (and other rule-makers) in their law-making and rule-making capacity are necessarily engaged in a process of mapping a large array of future events that will be governed by the rules they make, the risk is that judges who have a particular case to decide before them will systematically overestimate the extent to which those future events will resemble the one that they are now most immediately confronting.

Happy? A Focusing Illusion in Judgments of Life Satisfaction, 9 Psychological Science 340 (1998).

[56]See John S. Carroll, The Effect of Imagining an Event on Expectations for the Event: An Interpretation in Terms of the Availability Heuristic, 14 J. Experimental Social Psych. 88 (1978).

[57]See Abbigail J. Chiodo, Massimo Guidolin, Michael T. Owyang, and Makoto Shimoji, Subjective Probabilities: Psychological Evidence and Economic Applications, 86 Fed. Res. Bk. of St. Louis Rev. 33 (2004).

This misunderstanding of the nature of the field may also be exacerbated by the phenomenon of anchoring, in which the properties of the first event considered (or even an irrelevant event) influence the estimation of the properties of subsequent events.[58] This phenomenon is well-known to sellers of carpets and automobiles, all of whom (or at least the successful ones) understand the anchoring importance of setting the initial price. And the phenomenon of anchoring suggests that even the judge who is aware of the pitfalls of availability may be hindered in her ability to overcome them,[59] especially because there is some evidence that the phenomenon of anchoring is particularly resistant to a range of awareness-based debiasing techniques.[60] So even if the law-making common law judge or some other case-based

---

[58]See Scott Plous, supra note 43, at 144-52; Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, Inside the Judicial Mind, 86 Cornell L. Rev. 777, 787-94 (2001); Fritz Strack and Thomas Mussweiler, Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility, 73 J. Personality & Soc. Psychol. 437 (1997); Tversky and Kahneman, supra note 42, at 1128-30.

[59]See Francisco Farina, Ramón Arce, and Mercedes Novo, Anchoring in Judicial Decision-Making, 7 Psych. In Spain 56 (2003) (finding anchoring effects in judicial determinations of guilt and judicial imposition of sentences in criminal cases).

[60]See Gretchen B. Chapman and Eric J. Johnson, Incorporating the Irrelevant: Anchors in Judgments of Belief and Value, in The Psychology of Judgment, supra note 50, at 147; George A. Quattrone, at al., Explorations in Anchoring: The Effects of Prior Range, Anchor extremity,

rule-maker recognizes that future events may differ from this case, the instant case may still serve as an anchor and influence the way in which the future field of disputes is assessed. Even if the instant case is unrepresentative, therefore, its anchoring effect may cause judges and other rule-makers, including careful ones who are cognizant of the possibility of bias by availability and even cognizant of the nature of anchoring effects, to imagine a field that is more similar to the anchor case than the underlying reality would justify.

Related to the availability and anchoring effects produced by the case looming in front of the judge is the phenomenon of issue framing. Unlike "equivalency framing," in which alternative characterizations of identical acts or events influences how those acts or events are assessed,[61] "[i]ssue framing effects refer to situations where, by emphasizing a subset of potentially relevant considerations, a speaker leads individuals to focus on these considerations

---

and Suggestive Hints, 98 Psych. Bull. 141 (1981); Timothy D. Wilson, et al., A New Look at Anchoring Effects: Basic Anchoring and its Antecedents, 4 J. Experiment. Psych: General 387 (1996).

[61]See Scott Plous, supra note 43, at 794-99; Daniel Kahneman and Amos Tversky, Choive, Values, and Frames, 39 Am. Psychologist 341 (1984); Amos Tversky and Daniel Kahnamen, Rational Choice and the Framing of Decisions, 59 J. Bus. S251 (1986); Amos Tversky and Daniel Kahneman, The Framing of Decisions and the Psychology of Choice, 211 Science 453 (1981).

when constructing their opinions."[62] If in the previous quotation we substitute "case" for "speaker" and "judges" for "individuals," we can understand the relevance of the large literature[63] suggesting that, as with anchoring, the case awaiting decision will provide the frame by which the features of subsequent disputes or events will be imagined, potentially in a highly misleading way. If the case that has prompted the rule-making exercise has a some number of particularly salient features, even the judge consciously surveying a larger field of real and predicted cases in order to make a rule will likely focus disproportionately on those cases containing the salient features of the first case, even if those salient features are in fact present in a somewhat smaller percentage of the cases in the larger field.

Availability, anchoring, and issue framing are characteristics of actual and not ideally rational human decision-making, and all reinforce each other to produce the same problem – the capacity of vivid and nearby events to distort rather than to enrich decisions that have the same "multiplicity of instances" character. We take that which is first or looms closest as being representative of some larger class of which it might be a member, and we tend to do so even when the looming event is highly unrepresentative. In the context of common-law decision-making, it is the case at hand that is the looming event, and much that we might learn from the modern social science literature suggests that the presence of a concrete dispute before the judge

---

[62]James N. Druckman, Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects, 98 Am. Pol. Sci. Rev. 671, 672 (2004).

[63]Much of it cited in Druckman, supra note 51, at 685-86.

is likely to distort any law-making that occurs in that case. That this distortion occurs, of course, is not inconsistent with the concrete dispute also providing genuine information and thus also enriching the ability to assess the larger field of future cases and events. But such potentially informationally advantageous features of the particular case also exist in the numerous experiments that have produced what we now know about availability, anchoring, and issue framing. Last week's hurricane does provide some information about hurricanes and the possibility of their existence. That my neighbor has had problems with her particular Volvo does provide some information about the reliability of Volvos. Nevertheless, the possibly countervailing informational advantages of specific cases and events are already incorporated in the existing research, and so, if that research is to be believed, the effects under consideration are properly understood as net effects. As a result, it is fair to conclude that the effects of a particular case are likely, on balance and not just as one potentially outweighed flaw, to distort the case-based rule-maker's ability accurately to assess the field of future events that the prospective rule would encompass.

B. The Burdens of Decision

All of the foregoing is about the simple salience of a proximate event, and the effect of that salience on the capacity of people to perceive the properties of a larger class of which that proximate event is but one member. Thus, the biases of availability, anchoring, and issue framing suggest that courts and others making prospective rules in the context of seeing a particular dispute would likely take that dispute as more representative of the array of future events than is in fact the case. But there is more to the matter. There is also good reason to

suspect that the phenomenon of taking the unrepresentative as representative is increased to the extent that a decision-maker is compelled to resolve and not just to observe the proximate event. An additional second source of concern, therefore, is one inspired less by Kahneman and Tversky and more by Frank and Llewellyn. As is well-known, Jerome Frank, especially in Law and the Modern Mind,[64] maintained that judges were incapable of ignoring the immediate equities of the case before them,[65] and insisted further that it was perfectly acceptable, precisely because of its inevitability, for them to behave in this way.[66] For present purposes I am less concerned with the latter than the former -- the important claim is that it is extremely difficult (far more plausible than a claim of impossibility) for judges to avoid making what to them appears to be the correct decision with respect to the particular facts at issue and the particular parties standing before them. Karl Llewellyn, in frequently talking about the "fireside equities" or the "power of the particular," echoed a similar theme, believing that the psychological force of a particular series of events had a strong hold on the judicial mind.[67] What Frank and Llewellyn

---

[64]Jerome Frank, Law and the Modern Mind 102-04 (1930).

[65]To the same effect, see Joseph Hutcheson, The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 Cornell L.Q. 274 (1929);Herman Oliphant, A Return to Stare Decisis, 14 A.B.A.J. 71, 75 (1928).

[66]See Brian Leiter, American Legal Realism, in Blackwell Guide to the Philosophy of Law and legal Theory 50, 58-59 (Martin P. Golding & William A. Edmundson, eds., 2005).

[67]Karl Llewellyn, The Common Law Tradition: Deciding Appeals 121 (1960). See

celebrated,[68] however, is from a law-making perspective more problematic. If judges indeed have a hard time avoiding what they see as the right result for the particular case in all of its contextual richness, and if they are at the same time making law for future cases, then the combination of the salience of the particular case and the pull to decide it correctly may produce a rule that is unrepresentative of the full range of future cases that can be expected to be decided under it. In theory this need not be so, of course. A court could, after all, reach the wrong result in the case before it in order to announce the right rule for future controversies.[69] Or courts could

---

generally William Twining, Karl Llewellyn and the Realist Movement (1973).

[68]Llewellyn's celebration was far less frequent and far more qualified than Frank's, for Llewellyn was most concerned with urging judges to base their decisions on situation types rather than case-specific litigant characteristics. See Leiter, supra note 66, at 55.

[69]Reaching the wrong result in order to announce the right rule is, arguably, the best understanding of what Herbert Wechsler was getting at in urging decision according to "neutral principles." Herbert Wechsler, Toward Neutral Principles in Constitutional Law, 73 Harv. L. Rev. 1 (1959). The word "neutral" is unnecessary and distracting, see Frederick Schauer, Neutrality and Judicial Review, 23 L. & Phil. 217 (2003), but the basic idea is that a rule announced in the first case should be one a court is willing to follow in subsequent cases. M.P.Golding, Principled Decision-Making and the Supreme Court, 63 Colum. L. Rev. 35 (1963); Kent Greenawalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982 (1978). The implication is that if a court is not willing to follow in future cases the rule necessary to decide the first case properly, then deciding the first case improperly would be

recognize the non-representativeness of the case before them and then either make less law than they would otherwise be inclined to do,[70] or announce a rule narrower than or different from what would appear to flow out of the outcome in the particular case.[71] More commonly, however, the power of the particular is a power with distorting emanations, such that courts often use the decision rule that would most directly produce the correct result in the particular case as the announced decision rule for future cases, cases in which the preferred outcome for that case might turn out to be very different.

The tendency of the obligation to decide the immediate case to distort a rule-maker's perception of the class of cases to be covered by a putative rule is again compatible with recent work in the social sciences. As with airline pilots who fail to see other airplanes because they are focusing on operating the controls,[72] people often ignore that which is plainly "visible and available" to them because their ability to perceive the readily available is "competing with a

---

preferable to having a bad rule, a rule which precisely because it is a bad rule will decide some number of subsequent cases improperly.

[70]As, for example, with a court that goes out of its way to emphasize the uniqueness of a unique case, with Bush v. Gore, 531 U.S. 98 (2000), as the most prominent recent example.

[71]See Cass R. Sunstein, One Case at a Time: Judicial Minimalism in the Supreme Court (1999).

[72]Arien Mack, Inattentional Blindness: Looking Without Seeing, 12 Current Directions in Psych. Sci. 180 (2003). See also Arien Mack and Irvin Rock, Inattentional Blindness (1998).

task requiring other attentional resources."[73] So when people have a particular task that requires doing, the focus on the task may increase even further any tendency to fail to perceive or to misperceive even that which is in theory available.[74] For the typical judge, deciding this case may be just that kind of task, and thus the obligation to decide may well increase even further the proclivity to be unduly influenced by the facts of the immediate case.

C. Some Examples

Consider, for example, New York Times Co. v. Sullivan.[75] Other than to say that libel was not even covered by the First Amendment,[76] the Supreme Court had never before even considered a defamation case. Yet despite the Court's lack of experience with the topic, in Sullivan it was compelled to make a decision in the context of a case in which protection of the civil rights movement against crippling civil judgments was seen to be important, in which the plaintiff was a powerful public official using civil litigation as a way of wielding official power, and in which the verdicts embodied little other than the jury's (and Alabama's) desire to punish

---

[73]Chugh and Bazerman, Bounded Awareness, supra note 55, at 5.

[74]See Ulric Neisser, The Concept of Intelligence, 3 Intelligence 217 (1979); Daniel J. Simons and Christopher F. Chabris, Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events, 28 Perception 1059 (1999).

[75]376 U.S. 254 (1964).

[76]Beauharnais v. Illinois, 343 U.S. 250 (1952).

what were perceived to be so-called Northern Agitators. These dimensions of the actual litigation were at forefront of the Court's thinking,[77] and thus it is useful to ask whether, if none of these idiosyncratic features had existed, the extraordinarily press-protective and plaintiff-restrictive "actual malice" rule, a rule endorsed by no country in the world in the ensuing forty years,[78] would have been adopted.[79]

---

[77]See Harry Kalven, Jr., The Negro and the First Amendment (1965); Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1992).

[78]See Michael Chesterman, Freedom of Speech in Australian Law: A Delicate Plant 79-152 (2000); Ian Loveland, Political Libels: A Comparative Study (2000); Importing the First Amendment: Freedom of Speech and expression in Britain, Europe and the USA (Ian Loveland, ed., 1998); Frederick Schauer, The Exceptional First Amendment, in American Exceptionalism and Human Rights (Michael Ignatieff, ed., forthcoming 2005).

[79]I do not mean here to make the claim that Sullivan was wrongly decided, nor the claim that the Sullivan actual malice rule was the wrong rule. Both of those might be true, see Richard Epstein, Was New York Times v. Sullivan Wrong?, 53 U. Chi. L. Rev. 782 (1986), but the point here is only that the particular facts of the case produced a rule almost certainly different from what the same Justices of the same Court would otherwise have done were they asked simply to make a public figure libel rule, and different from what every other open liberal democracy in the world has subsequently decided to do. Sullivan may perhaps be a fortuitously distorted decision, but the distortion seems nevertheless plain.

This characterization of Sullivan bears a close affinity with the concern expressed by Justice White in his dissenting opinion in Immigration and Naturalization Service v. Chadha.[80] In chastising the Court for invalidating "an entire class of statutes based on . . . a somewhat atypical and more-readily indictable exemplar of the class,"[81] Justice White made clear that he thought that the unrepresentative nature of the particular facts before the Court had produced the wrong result for the larger class almost accidentally encompassing these facts. So too, perhaps, with Katzenbach v. McClung[82] and Brown v. Louisiana,[83] both cases in which, like Sullivan, the pressing nature of the desegregation concerns presented in the particular case may well have helped produce doctrinal extensions with respect to the reach of the Commerce Clause and free speech rights in government buildings, respectively, that very likely would not otherwise have come to pass.

Similarly, and outside of the constitutional context, consider the Supreme Court's 1999

---

[80]462 U.S. 919 (1983).

[81]462 U.S. at 974 (White, J., dissenting).

[82]379 U.S. 294 (1964) (upholding Civil Rights Act of 1964 as valid congressional exercise of the Commerce Power even as applied to largely local entities).

[83]383 U.S. 131 (1966) (upholding First Amendment right to protest in public library)..

decision in Kumho Tires, Ltd. v. Carmichael.[84] The Court in Kumho Tire was faced with the task of elaborating what kind of scientific and other expert testimony should be allowed into evidence under Rule 703 of the Federal Rules of Evidence, a line of inquiry that had commenced six years earlier in Daubert v. Dow-Merrill Pharmaceuticals, Inc.[85] Yet although the issue of what counts as expertise is a broad and important one, the Court in Kumho Tire faced it in the context of an expert who, testifying in a products liability case against the manufacturer of a tire which had been driven until bald and poorly repaired on multiple occasions, offered as his expert opinion that it was neither the tire's baldness nor its serial poor repair that had caused the tire failure, but rather a defect in the tire's design and manufacture. And it is not surprising that in announcing a rule in the context of a case involving such a flimsy case of expertise, the Supreme Court fashioned a rule plainly tailored to the case of the bogus expert, without having any serious data on the extent to which bogus experts dominated the array of future cases that would be governed by the new rule.

The foregoing cases all come from the Supreme Court of the United States, and that is partly because one might expect Supreme Court cases to be the ones in which the distortion of the immediate case would be least present. The Court decides by full opinion after oral

---

[84]526 U.S. 137 (1999).

[85]509 U.S. 579 (1993).

argument slightly over one percent of the cases presented to it,[86] and it would be expected that the process by which it screens[87] and selects the cases it wishes to hear would generate special resistance to the distorting tendencies of particular parties and particular issues in the particular case. If the problem exists even in the Supreme Court, then it is reasonable to suppose that it exists, a fortiori, to an even greater extent when the special dynamics of Supreme Court case selection are not present.

Thus there are, as might be expected, numerous examples of the case-driven distortion in judicial rule-making outside of the Supreme Court. The particularly botched use of statistical evidence in People v. Collins[88] may have led the California Supreme Court, and other courts

---

[86]To be exact, 83 out of 7781 in the Supreme Court's October 2003 Term. The Supreme Court, 2003 Term: The Statistics, 118 Harv. L. Rev. 497, 504-05 (2004).

[87]See Shavell, supra note 37, at 416-17, noting that appellate courts that screen their own caseload may be able to engage in law-making with less attention to the error-correction process.

[88] 68 Cal. 2d 319, 438 P.2d 433, 66 Cal. Rptr. 497 (1968) (disallowing testimony of statistician in criminal case where there had been no foundational evidence of the probabilities and no evidence that the several probabilities were statistically independent). That the use of statistics in Collins was particularly inept is shared both by those sympathetic and hostile to the use of statistical evidence generally. Compare Michael O. Finkelstein and William B. Fairley, A Bayesian Approach to Identification Evidence, 83 Harv. L. Rev. 489 (1970)(criticizing Collins

dealing with the issue after Collins,[89] to express a principle of skepticism about statistical evidence that would be justified were Collins representative of all statistical evidence cases, but much less so if the case were an aberration. Similarly, the purest and ultimately diluted[90] versions of so-called interest analysis in conflicts of law[91] may have been based on the belief that the seeming irrationality of the traditional rules when applied to a small number of unusual guest statute scenarios was typical of choice of law issues.[92] And to the same effect there is some

---

but expressing sympathy to statistical evidence), with Laurence H. Tribe, Trial By Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329 (1971) (criticizing use of statistical evidence in general).

[89]See Christopher B. Mueller and Laird C. Kirkpatrick, Evidence 667 (3d ed., 2003); Neil B. Cohen, The Costs of Acceptability: Blue Buses, Agent Orange, and Aversion to Statistical Evidence, 66 B.U.L. Rev. 563 (1986).

[90]Cooney v. Osgood Machinery, Inc., 595 N.Y.S.2d 919, 612 N.E.2d 277 (1993).

[91]See Babcock v. Jackson, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963), applying an approach largely attributable to Brainerd Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227 (1958).

[92]See Tooker v. Lopez, 301 N.Y.S. 2d 519, 249 N.E.2d 394, 408 (1969)(Breitel, J., dissenting)(criticizing New York Court of Appeals for adopting an unworkable rule because of the influence of a "wholly adventitious" set of facts in the case in which the rule was created). See also David P. Currie, Herma Hill Kay, and Larry Kramer, Conflicts of Laws: Cases –

indication that larger principles of criminal intent were distorted by a series of nineteenth century decisions in which the judges' views about the issues of sexual morality involved in statutory rape cases led them to say things about mens rea that they would not have said in other types of cases.[93]

I emphasize again that all of these cases may be unrepresentative of the full array of case-based rule-making decisions, and thus provide only skewed support for what I suspect is a pervasive pathology. I cannot of course deny that the very same biases I argue may exist for judges and other case-based rule-makers exist for me as I attempt to identify the very phenomenon I am discussing. Thus, these cases are presented as an existence theorem and not with any claim that they are necessarily representative.[94] Still, this collection of cases supports

---

Comments – Questions 155-62 (6th ed. 2001)(commenting on the "New York Mess" spawned by Babcock v. Jackson); R. Lea Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Mich. L. Rev. 392 (1980) (questioning the need for pure interest analysis); Joseph W. Singer, Facing Real Conflicts, 24 Cornell Int'l L.J. 197 (1991) (same).

[93]See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, in Harmful Thoughts: Essays on Law, Self, and Morality 37, 58-62 (2002).

[94]Insofar as the cases arriving in an appellate court are systematically heterogeneous with respect to the classes of which they are members, see Gillian K. Hadfield, Bias in the Evolution of Legal Rules, 80 Geo. L.J. 583 (1992), the phenomenon identified here would be amplified. But even if outliers arrive in appellate courts in their proper proportion, the tendency of decision-

the proposition that the phenomenon of rule-making distortion because of the salience and decisional pressures of the immediate case is both possible and frequent. Thus these cases serve to illustrate the nature and possibility of the claim – that making law in the context of a particular concrete controversy may well produce law that, although aimed at resolving a range of future controversies, does so with a distorted view of the nature of those controversies and the proper resolution of them.[95] Now of course a legislature or agency might at times be subject to the same phenomenon,[96] and there can be little doubt that legislation made in the wake of a highly salient disaster, or made in the wake of legislative hearings featuring sympathetic victims, is subject to the same distortion. Megan's Law, after all, was largely the consequence of Megan.[97] But even if we concede this possibility of parallel legislative distortion, we can still ask the question

---

makers to see the outliers as non-outlying exemplars would itself create a substantial problem.

[95]As should be apparent, all of this also applies to the original perception of a court that an existing rule needs to be changed. A rule that gets it right ninety-nine percent of the time is, usually, a pretty good rule, but if only the one percent gets litigated then courts are likely to believe that the existing rule is far worse than it in fact is. I discuss this issue at greater length in Section IV.A, infra.

[96]I return to these comparative issues in Section V, infra.

[97]See Daniel M. Filler, Making the Case for Megan's Law: A Study in Legislative Rhetoric, 76 Ind. L.J. 315 (2001). See generally Symposium on Megan's Law, 6 B.U. Pub. Int. L.J. 29 (1996).

whether, without a impetus to distortion that is common but not necessary in legislative action or administrative rule-making but which is a virtually necessary component of common law rule-making, law that is made with the goal of imagining an array of future cases without a particular case in the foreground is systematically likely to be less distorted than law that is made with a focus on one particular situation under circumstances in which that situation needs to be successfully resolved. And at least in the static model, there seems to be some reason to believe that this is exactly what is often likely to transpire.

IV. From a Static to a Dynamic Conception of the Common Law

A. Changing the Rules at All the Wrong Times

The common law is of course not the static model embodied in the previous discussion, but is rather a much more dynamic process. More concretely, one of the arguments for case-based law-making has always been the allegedly self-correcting character of the common law, a phenomenon that often rides under the banner, in the words of Lord Mansfield made famous by Lon Fuller, of the common law "working itself pure."[98] In more modern times, many of those who have most strongly touted evolutionary models of common law change[99] have also relied

---

[98]Omychund v. Barker, 26 Eng. Rep. 15, 33 (1744) (Mansfield, J.). See Lon L. Fuller, The Law in Quest of Itself 140 (1940).

[99]The literature, sometimes more or sometimes less supportive of evolutionary explanations, includes John C. Goodman, An Economic Theory of the Evolution of the Common Law, 7 J. Legal Stud. 393 (1978); Herbert Hovenkamp, Evolutionary Models in

heavily on the way in which common law changes are systematically even if not universally for the better. The question then is whether, when we move from an unrealistic static model of case-based decision-making to a more realistic dynamic model, the flaws that were featured in the previous section can systematically be expected to evaporate.

Yet although a dynamic case-based rule-making system possesses the capacity for change, it is not clear that those changes take place at the right time or that those changes are necessarily or even systematically for the better. Initially, a significant issue is the extent to which rules may be changed with excess frequency just because the cases that prompt change are thought, for the very reasons we are considering here, to be more representative than they in fact are. Because rules are necessarily actually or potentially both under- and over-inclusive,[100] even the best rules will in their normal operation on occasion produce the wrong results. Precise speed limits will sometimes over-constrain good drivers under perfect conditions, just as they

---

Jurisprudence, 64 Texas L. Rev. 645 (1985); William M. Landes and Richard A. Posner, Adjudication as a Private Good, 18 J. Legal Stud. 235 (1979); Paul H. Rubin, Why is the Common Law Efficient?, 6 J. Legal Stud. 51 (1977); R. Peter Terrebonne, A Strictly Evolutionary Model of Common Law, 10 J. Legal Stud. 397 (1981); Douglas Glen Whitman, Evolution of the Common Law and the Emergence of Compromise, 29 J. Legal Stud. 753 (2000); Todd J. Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply Side Analysis, 97 Nw. U. L. Rev. 1551 (2003).

[100]See Schauer, Playing By the Rules, supra note 32, at 17-111.

may unduly empower poor drivers in bad conditions. The rule prohibiting vehicles in the park may keep out benign ceremonial vehicles and also fail to exclude noisy or dangerous instrumentalities that are not vehicles.[101] And precise rules such as Section 16(b) of the Securities Exchange Act of 1934[102] may fail to reach inside-trading owners of 9.99% of the stock of a registered company while at the same time the rule constrains the owner of 10.01% of the stock who seeks to sell within six months of buying even though she possesses no inside information whatsoever.

Yet although this under- and over-inclusion is a necessary feature of rules, a process that focuses disproportionately on the instances of under- or (especially) over-inclusion may be inclined to take every such instance as an occasion for changing a rule. A rule that gets it right ninety-nine percent of the time may well be a very good rule, but a process that focuses only on the remaining one percent may be a process influenced to believe that some of these very good rules are in need of modification. In a variation on the common phenomenon of hindsight

---

[101]The example, of course, comes from H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607 (1958), and H.L.A. Hart, The Concept of Law 123 (2d ed. 1994). The supposed counter-example comes from Lon L. Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, 71 Harv. L. Rev. 630, 663 (1958).

[102]15 U.S.C. §78p(b) (2002).

bias,[103] therefore, an ex post examination of a rule may lead decision-makers to believe, erroneously, that the instances in which the rule produced the wrong result are both more frequent than they are. And rule-makers who thus exaggerate the phenomenon of the rule-generated wrong result – who mistake the edges of a rule for its center – will have cause to believe, erroneously, that a better rule would, ex ante, have taken account of such instances. By focusing on the imperfect applications of even the best rules, therefore, a common law process, rather than being designed to make rules better, is in fact inadvertently designed to encourage continuous tinkering with rules, even under circumstances in which the tinkering, from the perspective of just why we have rules in the first place, is likely to make things worse.

B. The Entrenchment of Mistakes

Although a dynamic understanding of case-based law-making processes recognizes the

---

[103]See Baruch Fischhoff, Learning from Experience: Coping with Hindsight Bias and Ambiguity, in Principles of Forecasting (J.S. Armstrong ed., 2001); Baruch Fischhoff, Hindsight Does Not Equal Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty, 1 J. Experimen. Psych.: Human Perception & Performance 288 (1975); Paul Slovic and Baruch Fischhoff, On the Psychology of Experimental Surprises, 3 J. Experimen. Psych: Human Perception & Performance 544 (1977). For the view that hindsight bias is adaptive and not irrational, see Ulrich Hoffrage, Ralph Hertwig, and Gerd Gigerenzer, Hindsight Bias: A By-Product of Knowledge Updating?, 26 J. Experiment. Psych.: Learning, Memory and Cognition 532 (2000).

theoretical capacity of the common law for self-correction, the question still needs to be framed in comparative terms. Case-based lawmakers can and do counteract mistakes, but the issue is determining whether the common law process is more inclined towards improvement - the common law "working itself pure" – than the alternative. So the question is again a process one, and can be framed in terms of whether a method systematically making its decisions in the context of live disputes has a greater capacity for self-correction than its more abstract alternatives. And once we frame the question in this way the answer is not quite so clear. Indeed, the literature even includes those who have argued that the alleged efficiency of the common law, assuming that it in fact exists, is a function of historical coincidence and various other method-independent factors more than anything intrinsic in the common-law method of making decisions.[104]

In addition to the problem of being systematically unwilling to leave well enough alone -- an alternative way of characterizing the common law's tendency to fix rules that are in no need of repair – another reason for supposing that shifting from a static to a dynamic model of the common law will not cure the availability, anchoring, and issue framing problems discussed

---

[104]See, e.g., Richard A. Epstein, The Static Conception of the Common Law, 9 J. Legal Stud. 253, 275 (1980) ("The simple dichotomy between common law and statutory rules explains nothing."); Paul H, Rubin, Common Law and Statute Law, 11 J. Legal Stud. 205 (1982)(arguing that the increased efficiency of the common law may be more historical correlation than methodological causation).

above is that precedential constraint is as much a part of the common law as is the capacity for change.[105] As long as precedent matters – as long as the rule made in the previous case actually has an influence on the resolution of a subsequent case independent of the wisdom of the rule made in the previous case[106] – there is the omnipresent possibility that any mistake will be systematically more powerful than any later attempts to correct it. Part of this power derives from the basic idea of precedent itself. And part of the power of a precedent is the related but quite different phenomenon of path-dependence, such that cases are likely to have doctrinal

---

[105]See generally Larry Alexander, Constrained By Precedent, 63 S. Cal. L. Rev. 1 (1989); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571 (1987). For an economic analysis of why the common law might have incorporated a strong system of precedent, see Ronald A. Heiner, Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules, 15 J. Legal Stud. 227 (1986).

[106]The requirement that the constraint be independent of the wisdom of the constraining case is a necessary feature of any non-trivial account of precedent. See Alexander, supra note 105; Schauer, supra note 105. Precedents that exert decisional force only when they are perceived to be correct have no weight qua precedents. Only if the essence of precedential constraint is understood to be content-independent, and thus only if precedents constrain (even if only presumptively) even when they are perceived as mistaken by the subsequently deciding court, does the force of precedent have genuine bite.

emanations independent of their precedential effect in the strict sense.[107] So even if there were no barrier of precedent to the correction of previous mistakes, earlier mistakes might still not be fully correctable precisely because some of their harm may already have leaked beyond the power of correction.

C. The (Wrong) Occasions for Correction

Even apart from questions of precedent and path-dependence, however, some of the inability of the common law to correct itself is a function of the operation of the selection effect.[108] As a result of the selection effect, the likelihood that any dispute will wind up in an

---

[107]See Mark Roe, Chaos and Evolution in Law and Economics, 109 Harv. L. Rev. 641 (1996).

[108]The literature is vast and growing. Seminal work on the basic phenomenon includes Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases, 77 Geo.L.J. 1567 (1989); George L. Priest, Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes, 14 J. Legal Stud. 215 (1985); George Priest and Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984); George L. Priest, Selective Characteristics of Litigation, 9 J. Legal Stud. 399 (1980); George L. Priest, The Common Law Process ane the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977). Subsequent discussion, analysis, and empirical work includes Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. Legal Stud. 337 (1990); Keith Hylton, Asymmetric Information and the Selection of Disputes for Litigation, 22 J. Legal Stud. 187

appellate court is significantly a function of the existence of two parties holding mutually exclusive positions each believing that they have a realistic possibility of prevailing. In such cases – we call them hard, or indeterminate – the likelihood of litigation and appeal is higher than the likelihood of litigation and appeal when only one side has a plausible possibility of prevailing. On the strong view of the selection effect it is only the cases balanced on the knife edge of existing doctrine – the 50-50 cases, if you will – that go to trial and appeal, but, even on a weaker view, the cases that a previous decision renders moderately clear, even if wrongly clear, are systematically less likely to go to trial and appeal. And as long as this is so, then the bulk of cases presenting an opportunity to modify an erroneous rule will never arise in the first instance, or if they arise will settle before judgment at trial, or if they do not settle before judgment will settle after judgment but before the appeal that might modify the erroneous rule. Correcting an erroneous rule made at Time 1 requires a case at Time 2, but if the cases at Time 2 are less likely even to reach judgment precisely because of the rule made at Time 1, then the common law's ability to correct its own mistakes will be systematically less than its ability to make them in the

---

(1993); Daniel Kessler, Thomas Meites, and Geoffrey Miller, Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 J. Legal Stud. 233 (1996); Robert E. Thomas, The Trial Selection Hypothesis Without the 50 Percent Rule: Some Experimental Evidence, 24 J. Legal Stud. 209 (1995). For an excellent analysis of the issues and a more comprehensive survey of the literature, see Leandra Lederman, Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle, 49 Case West. Res. L. Rev. 315 (1999).

first instance.

From this vantage point, then, we can see that the possibility of correcting in a subsequent case the law-making error in a previous case will be in part a function of the willingness of a party on the wrong side of a case made easy by the previous ruling to litigate and appeal notwithstanding the existence of the unfavorable rule. The rule made in the first case will of course have unclear applications, and we can expect those unclear applications to be litigated -- and appealed. And we can even expect courts in those cases to use their ability to resolve cases at the edges of the previous rule to move the rule away from the mistake generated at the outset. But the rule made in the first case can also be expected to produce at least some moderately clearly erroneous results, not erroneous from the perspective of that rule, but erroneous from the perspective of what the rule would have been had it not been formulated mistakenly in the first place. Repeat players will have an incentive to litigate against even clear applications of a rule that disadvantages them, but again it can be expected that the opportunities for correction and the burdens imposed on correction will systematically be weaker than the force of the rule that is in need of correction.

As a result of this phenomenon, therefore, there is reason to believe that even in a dynamic setting the selection effect will always cause correction to lag behind an original mistake, and so on for every subsequent iteration. Indeed, the lag is not only because of the selection effect, but also because each iteration of the correction process will be one in which the correcting case will have the ability to correct, but will also potentially introduce a new mistake

because the occasion for correction will also be a single case that may distort the need for correction in much the same way that the original case had the potential for distorting the original rule. When we see case-based lawmaking from a dynamic perspective, we do see that mistakes in the first case will not necessarily be permanent, but we see as well that the same availability, anchoring, representativeness, and issue framing problems that plague any original decision will also plague the common law's attempts to correct it.[109]

V Implications

I want to avoid the common problem of comparing on the one hand a realistic model with an idealized one on the other. So I want to avoid comparing a model of case-based law-making that recognizes its flaws and limitations with an idealized model of codification, statute-making, or rule-making that refuses to recognize the limitations of that process. Thus, the implications of what I argue here may well be smallest if we think solely in terms of a contrast between case-

---

[109]Relatedly, consider Judge Calabresi's famous argument advocating that common law courts either already have or, if not, be given the authority to update clear but obsolete statutes. Guido Calabresi, A Common Law for the Age of Statutes (1982). Without coming to a final conclusion on the matter, we would at least want to inquire into the possibility that common law courts considering updating statutes would update statutes (and not just find particular exceptions for particular cases) somewhat more than necessary or desirable because of a proclivity to take aberrational but litigated cases as more indicative of a deeper statutory problem than was in fact the case.

based law-making and actual legislation. And the major reason for this is that the legislative process is itself hardly devoid of its own pathologies. Some of these pathologies are similar to the ones we have just been discussing, for legislation is often prompted by highly salient and potentially unrepresentative events. That we increasingly label legislation in terms of a particular event – Megan's Law,[110] or the Brady Law,[111] for example – provides highly visible evidence of this phenomenon, and in addition there can be little doubt that lobbyists are usually engaged in a process of offering to legislators vivid examples that the lobbyist believes will prompt (or, occasionally, forestall) legislative action. Moreover, we cannot ignore the entire category of somewhat different pathologies infecting the legislative process just because legislation is a product of a multi-member, elected, and often-captured legislature.[112] So without going into all of these, it is still safe to say that we could not compare the net advantages and

---

[110]See note 97, supra.

[111]Brady Handgun Violence Protection Act, 18 U.S.C. §922 (2004).

[112]See Douglas R. Arnold, The Logic of Congressional Action (1990); Gary W. Cox and Mathew M. McCubbins, Legislative Leviathan: Party Government in the House (1993); Morris P. Fiorina, Congress: Keystone of the Washington Establishment (2d ed. 1989); Keith Krehbiel, Pivotal Politics: A Theory of U.S. Lawmaking (1998); James Q. Wilson, The Politics of Regulation (1980); Jeffrey S. Banks and John Duggan, A Bargaining Model of Collective Choice, 94 Am. Pol. Sci. Rev. 73 (2000); David Baron and John Ferejohn, Bargaining in Legislatures, 83 Am. Pol. Sci. Rev. 1181 (1989)

disadvantages of common-law rule-making with the net advantages and disadvantages of legislation without going much further into the full range of pathologies that infect each, and the full array of benefits they allegedly bring.

Moreover, even outside of formal legislation there can be cognitive deficiencies arising out of any attempt to imagine an array of future acts and events, but without the (mis)guidance of a single salient controversy. And here we can include not only the obvious pathology of ignorance, but also the pathology of the imagined example. When there is no real example, as there is in the case-based law-making scenario, the attempt by the law-maker to imagine an array of cases is likely to be distorted by the excess availability in the law-maker's mind of examples that come from prior experience or other similar sources. In other words, the same pathologies of excess preoccupation with a single distorting example that can plague case-based law-making can also plague non-case-based law-making whenever there is an example in the law-maker's mind that has the same features of availability and unrepresentativeness.

Yet although it is undoubtedly true that non-deciding rule-makers can fall victim to the availability heuristic and related irrationalities, the fact that such a salient example need not be actually resolved, as is the case when a court must reach a decision with respect to the actual parties before it, gives some reason to believe that the negative effects of the imagined bad example in non-case-based rule-making will be systematically less than the negative effects of the non-imagined and real but nevertheless bad example in case-based rule-making. And even without the necessity of actually resolving the question whether real examples are more salient

and more distorting than imagined ones, there may – and I offer this only as a testable[113] hypothesis – be some reason to believe that all of the trappings of actual parties and actual litigation and actual facts will make the real single case, ceteris paribus, more salient than the imagined single case. Holding unrepresentativeness constant, therefore, there may be reason to believe that the real unrepresentative case will be more distorting than the imagined or recalled unrepresentative case. Insofar as this is true, there may then be reason to believe that the distortions of case-based law-making are, ceteris paribus, sufficiently problematic that we can conceive of actual implications even putting aside the possibility of substituting formal legislation for common law law-making.

A. Questions of Justiciability

As I noted at the outset of this Article, the alleged informational advantages of having a single concrete case before a court have often been thought to provide a reason for vigorous enforcement of the existing requirements for standing,[114] and, by extension, for ripeness[115] as

---

[113]But not by me.

[114]See notes 48-49 and accompanying text, supra.

[115]See Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) (ripeness doctrine based on importance of having "factual components fleshed out"); Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967) (holding that ripeness doctrine prevents courts from resolving abstract disagreements). See generally Gene R. Nichol, Jr., Ripeness and the Constitution, 54 U.

well. With respect to such doctrines of justiciability, the prevailing wisdom has been that the concrete case provides information that is of great help to a court deciding the issue surrounding that case and making law for future cases as well. But if, as argued here, those informational advantages are illusory, then at least one set of arguments for strengthening the standing and ripeness has become weaker. There are other arguments, to be sure, most involving questions of decisional legitimacy and not decisional quality,[116] but the collapse of one might suggest at the very least a marginal relaxation of the existing requirements.

A related issue is the question of the advisory opinion. As is well-known, the federal courts will not issue advisory opinions,[117] although they are a common feature of many state court systems,[118] and commonly used by constitutional courts in other countries.[119] Traditionally

---

Chi. L. Rev. 153 (1987).

[116]United Public Workers v. Mitchell, 330 U.S. 75 (1947) (constitutional basis of ripeness doctrine); Raines v. Byrd, 521 U.S. 811 (1997) (separation of powers arguments for a strict standing requirement).

[117]Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Felix Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002 (1924); Abner Mikva, Why Judges Should Not Be Advice-givers, 50 Stan. L. Rev. 1825 (1998).

[118]See Mass Const. Art. LXXXV (2004); Mich. Const. Art. 3, §8.

the aversion to advisory opinions is, again, based at least in part on the informational advantages of the concrete case. But once we see that those informational advantages are not all that they seem, then the argument for the aversion to advisory opinions is commensurately weakened. This might suggest, as with standing and ripeness, that there be some relaxation in the existing requirements, and might suggest as well that, as a matter of institutional design in those jurisdictions in which the issue is still open, the sympathy to advisory opinions might be somewhat greater.

The same considerations play out in legal doctrine as well, even after the justiciability hurdles have been cleared. Courts determining whether to entertain facial (as opposed to as-applied) challenges are engaged in a process by which they must imagine the array of events that will be encompassed by the allegedly unconstitutional law.[120] If a court's assessment of that array is likely skewed by the particular case before it, however, the arguments for entertaining a facial challenge become weaker, and the arguments for dealing with unconstitutionality on a

---

[119]See Wolfgang Ziedler, The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms, 62 Notre Dame L. Rev. 504, 505-07 (1987).

[120]See Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321 (2000).

case-by-case as-applied basis become stronger. So too with overbreadth.[121] If the basis for determining that a statute is unconstitutionally overbroad is based, in large part, on a judicial prediction of its likely applications,[122] then, again, some reason to believe that such predictions will be systematically distorted would be one reason for encouraging reluctance to rely too heavily on overbreadth.

B. The Timing of Rule-Making

If we look beyond these various particular doctrines, larger implications emerge. One would be the possibility of delaying the very process of rule-making until enough cases arose such that the rule-making body could have the benefit of having seen multiple examples of some larger problem. When jurisdiction is discretionary, as with the Supreme Court's certiorari practice, this delay might come from taking very seriously a practice of delaying the decision on an issue until there was a fair amount of lower court experience. A conscientious reviewing court could then take a case based on a better sense of its representativeness, because the court would know from having seen an array of cases whether the case it was taking was or was not representative of the larger problem. And, having taken a case, the court would then know about exemplars of the problem beyond the case at hand, thus likely reducing the distorting effect of

---

[121]See Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853 (1991); Henry P. Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1.

[122]See New York v. Ferber, 458 U.S. 747 (1982); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

that case.

This process of delaying can even take place when jurisdiction is not discretionary. A court deciding a case might decide the case without any opinion at all, as is the common practice in the federal courts of appeals, or if it decided a case with opinion it could make a choice to decide narrowly rather than broadly, and in adjudicative mode much more than rule-making mode. Virtually any decision can be more or less narrowly justified, and in that sense genuine common-law rule-making is in some respects itself discretionary. To the extent that a court was inclined to make a rule, therefore, knowledge of the biases produced by concrete cases might militate in favor of deciding the first case narrowly and delaying rule-making until the court's experiential base was considerably larger.[123] And this applies to the practice of giving reasons as well. As noted above,[124] the very practice of giving reasons has a rule-making aspect, and thus a court deciding to delay its rule-making can do this not only by not deciding, but also by giving no reasons for its decision, or giving narrower rather than broader reasons. The arguments here are all ones that, ceteris paribus, will counsel delay in judicial rule-making, but the devics of delay turn out in fact to be quite numerous.

---

[123]There remains the risk, however, that subsequent cases will still be seen through the lens of the first case because of anchoring and framing effects, and to the extent that this was so then no amount of delay in rule-making would totally eliminate the distortion of seeing all cases after the first through the lens of the first case. See Matthew Rabin and Joel L. Schrag, First Impressions Matter: A Model of Confirmatory Bias, 114 Quart. J. Econ. 37 (1999).

[124]See note 35 and accompanying text, supra.

C. The Largest Questions

The largest implications of what I have argued here, however, are those that go to questions of institutional design. Although delay can often be useful, and so too with narrower rather than broader decisions, the true implications of what I have offered here are that case-deciding bodies may not be well-situated to engage in the large-number, systematic, and empirical inquiry that effective rule-making requires. If we want to know the full reach and import of a particular speed limit, we do not want to rely solely on instances in which drivers caught speeding challenge their citations, and so too with almost any rule-making process. So if the implications of case-based distortion are to be heeded, the larger implications relate to the comparative desirability of simply making rules in processes less liable to the distortion and more suited to engage in the "large n" empirical assessment that effective rule-making would require. This would then constitute an argument, for example, albeit not the only argument and not necessarily a conclusive argument, for administrative agencies making rules in the context of formal rule-making rather than as an adjunct to adjudication.[125] For the same reasons it would constitute an argument for institutions such as the Federal Rules of Evidence and the Federal Rules of Civil Procedure as opposed to letting the rules develop over time in common-law fashion. And it might even counsel congressional hesitance when it considered, as it did in

---

[125] See the prescient (from my perspective) analysis in David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965).

enacting the Sherman Act, for example, relying on a common law process to develop and entire area of law as opposed to charging an expert agency with the job, or perhaps, for allof its own pathologies, even doing it itself.

VI Conclusion

My aims here are modest. The purpose of this Article is not to claim that civil law legal regimes are better than common law ones, that statute law is better than common law, that codification is better than case-by-case decision-making, that the "case or controversy" requirement is fundamentally confused, or that it is generally better to make decisions under a "veil of ignorance."[126] All of these things may well be true, but a true comparison between common law method and its alternatives would require a full consideration of all of the virtues and pathologies of the common law as a process and all of the virtues and pathologies of all of its alternatives, and would need to do so in a multiplicity of institutional contexts. It may well be, after all, that these various virtues and pathologies would appear in different ways and with different consequences depending on various other institutional features. All of these considerations, therefore, and more, make the full comparison between common law method and any of a number of alternatives far more than can possibly be tackled by one person, or in any one article.

---

[126]John Rawls, A Theory of Justice passim (1971). See also John Harsanyi, Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking, 61 J. Pol. Econ. 434 (1953).

Nevertheless, however, we live in an era of glorification of the particular and celebration of the immediate factual context.[127] Part of that glorification comes from the common premise that we make better decisions when we see real events, real parties, real controversies, and real consequences. And this common premise, as noted in the Introduction, provides a widely adopted argument for the virtues of case-by-case decision-making and the rule-making that comes out of it. Indeed, even those otherwise less sympathetic to case-based rule-making do not deny what they see as the informational benefits of the concrete case.[128] Yet when we combine some of the lessons of at least one strand of Legal Realism with some of the lessons of modern social science, we see as well that real events, real parties, real controversies, and real consequences may have distorting effects as well as illuminating ones.[129] And insofar as this is true, then at least one of the traditional arguments for common-law law-making becomes less sound, and one of the arguments for the "case or controversy" requirement becomes less sound as well. Holmes was in one sense right. Great cases and hard cases often do make bad law. But

---

[127]There are, of course, dissenters. See Frederick Schauer, Profiles, Probabilities, and Stereotypes (2003).

[128]See Landes and Posner, supra note 88.

[129]One such distortion, and one I have not dealt with directly here, is the way in which the common law may simply see too narrow a range of policy options and policy problems, a failing neatly captured in the complain that the common law "feeds too much upon itself." James McCauley Landis, Statutes and the Sources of Law, in Harvard Legal Essays 214, 214 (1934).

if the distorting effects produced by greatness and hardness are present in non-great and non-hard cases as well just because of the very immediacy of those cases, then Holmes's insight about great cases and hard cases is not only broader than he thought, but extends as well to the proposition that cases simpliciter make bad law. And if that is so, then it may turn out to be more of a demerit than a merit that the common law decides the case first and determines the principle thereafter.