Judges as Rulemakers

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In *Do Cases Make Bad Law?*, Frederick Schauer raises some serious questions about the process of judicial lawmaking.[1] Schauer takes issue with the widely held assumption that judge-made law benefits from the court's focus on a particular real-world dispute.[2] Writing with characteristic eloquence, Schauer argues that the need to resolve a concrete dispute does not enhance the ability of judges to craft sound rules, but instead generates cognitive biases that distort judicial development of legal rules.

Schauer's observations about the risks of rulemaking in an adjudicatory setting are very persuasive. Yet his overall assessment of the common law process may be too severe. In this Essay, I shall suggest that common law decisionmaking, at least in its more traditional forms, has features that can counteract the biases that worry Schauer and provide at least some protection from the errors his theory predicts. Specifically, the common judicial practices of consulting precedent decisions and seeking analogies in the facts of prior cases broaden the perspective of judges and allow them to better assess the consequences of proposed rules. This is so even if following precedent and reasoning by analogy are not otherwise defensible.

I. SCHAUER'S CASE AGAINST COMMON LAW RULEMAKING

Schauer begins with the premise that judges do in fact make law.[3] Prior to the twentieth century, jurists often characterized their task as discovery of rules embedded in legal tradition and common practice.[4]

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1 See generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 U Chi L Rev 883 (2006).

2 As an example, Schauer cites Holmes, who said, "[i]t is the merit of the common law that it decides the case first and determines the principle afterwards." Schauer, 73 U Chi L Rev at 883 (cited in note 1), quoting Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 Am L Rev 1, 1 (1870), reprinted in Sheldon M. Novick, ed, 1 *The Collected Works of Justice Holmes* 212 (Chicago 1995).

3 See Schauer, 73 U Chi L Rev at 886 (cited in note 1) ("We no longer deny the creative and forward-looking aspect of common law decisionmaking.").

4 See, for example, Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 Oxford U Commonwealth L J 155, 166–67 (2002) (explaining that according to classical understandings, the common law was not posited by judges but found in "reasonable usage—usage observed and confirmed in a public process of reasoning") (emphasis and internal quotation marks omitted). For modern descriptions of legal decisionmaking that come close to the classic

In contrast, modern judges admit frankly that in the course of explaining their decisions, they create law for future cases. Sometimes they announce rules in canonical form; sometimes they state principles or reasons from which future outcomes can and will be deduced. Either way, they are establishing general, prospective rules.[5]

Schauer then assesses the situation of judges as rulemakers.[6] Research in the area of behavioral decision theory suggests that a judge faced with the task of resolving a concrete dispute is susceptible to several forms of cognitive bias. Biases of this kind result from decisional "heuristics," or mental shortcuts, that are generally useful to human reasoners but also result in predictable types of error.[7] The "availability" heuristic leads decisionmakers to focus on facts that come readily to mind at the expense of less-salient but equally important background probabilities.[8] The "anchoring" heuristic comes into play when decisionmakers refer to particular facts as baselines for calculation, and then fail to make adequate adjustments.[9] "Issue framing" leads decisionmakers to characterize problems in terms of a salient

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understanding, see Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* 146–52 (Cambridge 2005) (associating the rule of law with the idea that courts "are not to decide for themselves what the law is but are to seek it out, to discover and apply it as it is," but also maintaining that the process of declaring law entails judgment as well as reason); A.W.B. Simpson, *The Common Law and Legal Theory*, in A.W.B. Simpson, ed, *Oxford Essays in Jurisprudence (Second Series)* 77, 84–86 (Clarendon 1973) (resisting the suggestion that common law is posited by judges, because "to express an authoritative opinion is not the same thing as to legislate").

5 See Melvin Aron Eisenberg, *The Nature of the Common Law* 4–7 (Harvard 1988) (explaining that courts inevitably make law, not only as a by-product of adjudication but also to enrich the body of legal rules). See also Frederick Schauer, *Prescriptions in Three Dimensions*, 82 Iowa L Rev 911, 921–22 (1997) (arguing that the term "legal principle," often used in contrast to the term "legal rule," is "radically ambiguous, referring at various times to the poles of" three logically distinct dimensions: specificity, canonicity, and weight).

6 See Schauer, 73 U Chi L Rev at 885–88 (cited in note 1).

7 See generally Amos Tversky and Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in Daniel Kahneman, Paul Slovic, and Amos Tversky, eds, *Judgment under Uncertainty: Heuristics and Biases* 3 (Cambridge 1982) (providing an overview of the different types of heuristics).

8 Schauer, 73 U Chi L Rev at 895 (cited in note 1) ("[W]hen decisionmakers are in the thrall of a highly salient event, that event will so dominate their thinking that they will make aggregate decisions that are overdependent on the particular event and that overestimate the representativeness of that event within some larger array of events."). See also Tversky and Kahneman, *Judgment under Uncertainty* at 11 (cited in note 7) (noting that while the availability heuristic may help to assess the frequency or probability of an event, it is affected by other irrelevant factors, leading to cognitive bias); Michael Ross and Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, in Kahneman, Slovic, and Tversky, eds, *Judgment under Uncertainty* 179, 183–85 (cited in note 7) (describing an experiment in which spouses overstated their personal contributions to domestic chores, at least in part because each was more familiar with his or her own efforts).

9 Schauer, 73 U Chi L Rev at 896–97 (cited in note 1) (observing that "anchoring is particularly resistant to a range of awareness-based debiasing techniques"). Anchoring primarily affects numerical estimates. See Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L Rev 777, 787–94 (2001).

subset of considerations and consequently to overlook other relevant concerns.[10]

In ordinary life, these cognitive shortcuts may be helpful and even necessary to effective decisionmaking. In the context of judicial rulemaking, however, they tend to make the facts of a particular case—the case the judge is called on to decide—appear more representative than they are of the larger array of future cases that will be governed by the rule.[11] Moreover, the distorting effects of one case's facts will be enhanced by the judge's natural desire to resolve the case in a way that appears just to those immediately concerned.[12] As a result, the judge may craft rules or state reasons that produce a satisfying result in the case at hand but less than optimal results in the longer run.

Schauer next considers the effects of adjudication on the dynamic aspects of common law rulemaking—the development and application of judicial rules over time.[13] The first such effect is that judges may modify or overrule existing rules too frequently.[14] Because rules are general—they apply uniformly over a field of potential cases—they frequently are overinclusive. In other words, a rule that produces better results overall than decisionmakers would produce through unconstrained judgment may nevertheless prescribe the wrong result in

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[10] See Schauer, 73 U Chi L Rev at 897–98 (cited in note 1), citing James N. Druckman, *Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects*, 98 Am Polit Sci Rev 671, 672 (2004) (explaining that individuals' political preferences are at least partly determined by how current events are "framed" in the public dialogue).

Another possible source of bias discussed by Tversky and Kahneman, related to those mentioned by Schauer, is the "representativeness" heuristic, which leads decisionmakers to make assumptions about individuals or events because they display traits that are representative of a larger category. See Tversky and Kahneman, *Judgment under Uncertainty* at 4–9 (cited in note 7). For two behavioral studies evaluating the "representativeness" heuristic in action, see generally Maya Bar-Hillel, *Studies of Representativeness*, in Kahneman, Slovic, and Tversky, eds, *Judgment under Uncertainty* 69 (cited in note 7); Amos Tversky and Daniel Kahneman, *Judgments of and by Representativeness*, in Kahneman, Slovic, and Tversky, eds, *Judgment under Uncertainty* 84 (cited in note 7).

[11] Schauer, 73 U Chi L Rev at 899 (cited in note 1) (concluding that "the effects of a particular case are likely, on balance and not just as one potentially outweighed flaw, to distort the case-based rulemaker's ability accurately to assess the field of future events that any prospective rule would encompass").

[12] Id at 900–01 ("[T]he power of the particular is a power with distorting emanations, with courts often announcing the decision rule that will most directly produce the correct result in the particular case even though that rule will produce erroneous outcomes in future cases.").

[13] See id at 906 (noting that the dynamic model of decisionmaking is a more realistic way to view the law).

[14] Id at 907 ("A rule that gets it right 99 percent of the time may well be a very good rule, but a process that focuses only on the remaining 1 percent may be a process influenced to believe that some of these very good rules are in need of modification.").

some of the cases that fall within its terms.[15] When one of these outlying cases comes to court, a judge under the influence of situational biases may assume too readily that the case before him or her is representative. Accordingly, the judge may assume, incorrectly, that the existing rule is faulty *as a rule*, and make a change that decreases the overall effectiveness of the rule. Moreover, cases in which rules are overinclusive are particularly likely to be the cases in which one party is sufficiently dissatisfied to file a suit.[16]

Schauer also suggests that the errors of judicial rules will be exacerbated by the doctrine of precedent and the associated path dependency of common law decisionmaking.[17] Bias may lead some courts to modify sound rules that are better left alone. Other courts may be more respectful of precedent and feel constrained to follow improvident rules that are the products of case-centered myopia. Courts may also expand the scope of improvident rules by the process of analogy.

Another troubling dynamic feature of common law decisionmaking is the selection effect.[18] Decision theory predicts that parties are most likely to go to trial (rather than settle) when the outcome of legal rules is uncertain.[19] Conversely, when a case lies at the core of a rule, the costs of litigation will motivate the parties to settle and the rule will escape scrutiny. This phenomenon increases the chance that an improvident rule, shaped by case-oriented bias, will endure over time.

Although the deficiencies that Schauer identifies with common law rulemaking are serious, he is careful to avoid dramatic conclusions. He proposes a more lenient application of the various justiciability rules that limit judicial decisionmaking to live disputes.[20] He suggests that courts should delay the announcement of canonical rules until they have reviewed enough cases to have a sense of the field of

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15 See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 31–34, 47–52 (Clarendon 1991) (explaining that rules, by necessity, rely on probabilistic factual generalizations that misfire in some cases).

16 See Schauer, 73 U Chi L Rev at 910 (cited in note 1) (explaining that the parties have an incentive to go to trial only in difficult cases, and consequently, "the cases that a previous decision renders moderately clear, even if wrongly clear, are systematically less likely to go to trial and appeal").

17 Id at 909 (noting that because of the path dependency of case-based rulemaking, mistakes may "be systematically more powerful than any later attempts to correct [them]").

18 See id at 910 (explaining that the likelihood of appellate review for any dispute is "a function of the existence of two parties . . . each believing that they have a realistic possibility of prevailing").

19 See George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1, 6–30 (1984) (proposing an economic model that explains the selection effect in pretrial decisionmaking).

20 Schauer, 73 U Chi L Rev at 913–15 (cited in note 1) (contending that the "case or controversy" requirement relies on the suspect premise that the quality of judicial opinions is improved when the judge must decide concrete cases and not legal questions in the abstract).

situations to which the rules will apply, and that courts should decide cases on narrow rather than expansive grounds.[21] More generally, he appears to recommend that courts adopt an attitude of reticence toward lawmaking.[22]

At the same time, Schauer recognizes that legislative rulemaking has difficulties of its own. Legislators, too, may act in response to salient events that distract their attention from unseen consequences and background probabilities; and in any event they are subject to various pathologies of representative politics.[23] Therefore, Schauer cautions that without a systematic empirical comparison of the defects of legislative and adjudicative rulemaking, his observations do not support the conclusion that legislative rulemaking should predominate, or that civil law systems are superior to the common law.[24]

II. CORRECTIVES TO COMMON LAW RULEMAKING

I agree with Schauer's observations about the susceptibility of case-based lawmaking to cognitive distortion and, consequently, to error.[25] I also agree with his prescriptions. Judges should avoid broad-brush rulemaking and opt for narrow grounds of decision that minimize the harmful consequences of erroneous rules.[26] They should treat common law rules as tentative and modifiable until the rules have proven sound in a significant number of cases. Conversely, they should hesitate before modifying well-established rules to accommodate the "equities" of particular cases.

At the same time, I believe Schauer may have overlooked some of the nuances and corrective mechanisms of traditional common law decisionmaking, which I will outline below. My observations, like Schauer's, are analytical; I have no data and do not intend to mount a

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21 Id at 916 ("[K]nowledge of the biases produced by concrete cases might militate in favor of deciding the first case narrowly and delaying rulemaking until the court's experiential base was considerably larger.").

22 See id (positing that "case-deciding bodies may not be well situated to engage in the large-number, systematic, and empirical inquiry that effective rulemaking requires").

23 See id at 912.

24 Id ("[W]e could not compare the net advantages and disadvantages of common law rulemaking 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.").

25 See Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* 132–33 (Duke 2001) (noting the problem of cognitive bias); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U Chi L Rev 1179, 1190–92 (1999) (noting that the availability of the facts of cases may lead judges to undervalue reliance on rules).

26 Schauer notes that a legal system must be concerned with institutional legitimacy and separation of powers as well as cognitive error. Schauer, 73 U Chi L Rev at 899–901 (cited in note 1). My primary focus in this Essay, however, is on the problem of cognitive bias in rulemaking.

comprehensive defense of judicial rulemaking. My object is only to mention several positive resources of the common law and to suggest that some seemingly irrational common law traditions may serve useful purposes.

A. Constraint by Precedent

One possible check on the cognitive biases that result from judicial preoccupation with a particular dispute is the practice of following precedent.[27] By following precedent, I mean conforming current decisions to rules established in prior cases. Precedent rules are sometimes explicit in judicial opinions.[28] Because opinions are designed primarily for explanation and justification of decisions rather than for prospective lawmaking, precedent rules more often are implicit in the combination of explanatory statements and background facts offered by the deciding court.[29] Either way, however, precedent rules are general pre-

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[27] On the subject of precedent, see generally Larry Alexander, *Constrained by Precedent*, 63 S Cal L Rev 1 (1989) (advocating a rule model of precedent). See also generally John F. Horty, *The Result Model of Precedent*, 10 Legal Theory 19 (2004) (arguing for the coherence of a system where precedent only controls future cases when those cases are at least as compelling for the winning side as the case that set the precedent); Alexander and Sherwin, *The Rule of Rules* at 136–56 (cited in note 25) (evaluating natural, rule, and result models of precedent); Barbara Baum Levenbook, *The Meaning of a Precedent*, 6 Legal Theory 185, 233–38 (2000) (discussing coherence theories of precedent meaning); Robert S. Summers, *Precedent in the United States (New York State)*, in D. Neil MacCormick and Robert S. Summers, eds, *Interpreting Precedents: A Comparative Study* 355, 378–94, 401–04 (Ashgate 1997) (introducing a case study of the role of precedent in New York state); Schauer, *Playing by the Rules* at 181–87 (cited in note 15) (analyzing the relationship between reasoning from rules and reasoning from precedent); Eisenberg, *The Nature of the Common Law* at 50–76 (cited in note 5) (analyzing the ways courts determine the meaning of precedent and what it means to be bound by precedent); Ronald Dworkin, *Law's Empire* 240–50, 254–58 (Belknap 1986) (proposing a theory of precedent consistent with the interpretive ideal of integrity); Joseph Raz, *The Authority of Law* 183–89 (Clarendon 1979) (describing the practice of "distinguishing" precedent); Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 64–69 (Oceana 1960) (discussing the "two-headed" nature of precedent); Benjamin N. Cardozo, *The Nature of the Judicial Process* 30–31 (Yale 1921) (evaluating the role of "philosophy," "evolution," "tradition," and "sociology" in judicial decisionmaking).

[28] Larry Alexander and I have endorsed what we refer to as a "rule model" of precedent. See Alexander and Sherwin, *The Rule of Rules* at 140–42, 145–48 (cited in note 25) (adopting a model that "instruct[s] the present judge to discover and conform to the intentions of past judges, who occupy for this purpose the position of Lex"); Alexander, 63 S Cal L Rev at 25–27 (cited in note 27) (endorsing this rule model over a "natural model" of precedent because rules provide more effective guidance to lower courts than do particular constraining decisions). See also Schauer, *Playing by the Rules* at 185–87 (cited in note 15) (adopting a rule model of precedent); Eisenberg, *The Nature of the Common Law* at 52–55, 62–76 (cited in note 5) (favoring a rule model of precedent coupled with broad overruling powers). Others, such as Dworkin, reject this model. See Dworkin, *Law's Empire* at 230–32, 254–58 (cited in note 27) (developing a model of precedent based on "legal principles").

[29] See Schauer, 82 Iowa L Rev at 916–18 (cited in note 5) (suggesting that rules need not be canonical in order to be determinate); Schauer, *Playing by the Rules* at 185–87 (cited in note 15) (discussing precedent rules implicit in judicial opinions).

scriptions laid down by prior courts and applied deductively in subsequent cases within the rules' scope. The task of later courts is to survey prior opinions, determine the rules intended by the precedent court, and—if their own case falls within the predicate of an established rule—to decide as the rule requires.

Whether courts are in fact constrained by precedent rules is a subject of much debate.[30] This is not, however, a debate I need to resolve. What matters for my purpose is that courts generally view themselves as bound to follow precedents and, consequently, that they regularly study prior opinions in search of applicable rules.

The practice of following precedent, at least if it entails real constraint, has drawbacks. When courts announce improvident rules—rules that will produce too many erroneous outcomes over the range of cases to which they apply—strict adherence to precedent will entrench the errors of the rules.[31] Loyalty to precedent may also prevent courts from adjusting rules to meet new conditions.

These are serious problems. Yet the doctrine of precedent can be refined in ways that minimize the harm done by poorly conceived or obsolete rules. Courts can wait until a precedent rule has been endorsed in a significant number of cases before giving the rule exclusory effect,[32] and they can overrule rules that have a long history but appear to produce more errors than they prevent under modern conditions.[33] No doubt these mechanisms, employed by human decision-

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30 Most notably, Legal Realists are known for their skepticism about the ability of rules to constrain decisionmaking. See, for example, Llewellyn, *The Bramble Bush* at 66–69 (cited in note 27) (discussing the malleability of precedent rules). See also Brian Leiter, *American Legal Realism*, in Martin P. Golding and William A. Edmundson, eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory* 50, 51–53 (Blackwell 2004) (identifying Legal Realism with skepticism about the constraint of rules). For counterarguments in favor of the capacity of rules to carry determinate meaning, see Jules L. Coleman and Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U Pa L Rev 549, 568–70, 607–21 (1993) (defending certain qualified understandings of the objectivity of law); Schauer, *Playing by the Rules* 53–62 (cited in note 15) (defending a theory of semantic autonomy).

31 See Schauer, 73 U Chi L Rev at 908–909 (cited in note 1) (discussing the "entrenchment" of rules, including erroneous ones); Alexander and Sherwin, *The Rule of Rules* at 145 (cited in note 25) (conceding that both a rules model and a results model of precedent commit courts to following erroneous precedents).

32 See Schauer, 73 U Chi L Rev at 915–16 (cited in note 1) (explaining that delaying the formulation of legal rules can reduce the costs of error). Compare Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 Oxford U Commonwealth L J 1, 13, 17 (2003) (observing that in seventeenth century jurisprudence, decisions gained authority only when they were "taken up in the deliberation and argument of the legal community").

33 For discussion of the overruling of precedent, see Alexander and Sherwin, *The Rule of Rules* at 151–56 (cited in note 25) (explaining that judges should overrule precedent when the net harms of following the precedent exceed the instability costs of changing the rule); Eisenberg, *The Nature of the Common Law* at 71–74, 104–45 (cited in note 5) (discussing the phenomena of conventional overruling, prospective overruling, transformation, overriding, and the drawing of

makers, are subject to the same biases that affect judicial rulemaking generally. Yet they provide a way out when the errors of prior rulemaking are evident.

On the positive side, an effective doctrine of precedent has the advantages associated with rules of law generally. Precedent rules, when followed, settle controversy and enable individuals to coordinate their actions.[34] And, of course, a regular practice of following precedent rules helps to curb one of the tendencies Schauer predicts—the tendency of courts to modify sound precedent rules in response to particular recalcitrant facts.

These possible direct advantages of a doctrine of precedent, however, are not my concern here. My point is that attention to precedent serves secondary, indirect functions that can help correct bias at the time judges first consider and announce rules. A judge who believes he or she must take precedent into account will feel obliged to review prior opinions with care before deciding a case and preparing an explanatory opinion. This exercise, in itself, has several effects, whether or not the judge ultimately feels bound to conform to a precedent rule.

First, a review of past decisions will expose the judge to a wider array of facts and thereby dissuade the judge from modifying existing rules in response to an unrepresentative set of facts. Suppose prior courts have announced a rule that is generally sound but points to an undesirable outcome in the case before the court. As Schauer describes, the special salience of the facts at hand may tempt the judge to overrule the rule or revise it by drawing a distinction. In the process of reviewing precedents, however, the judge ordinarily will be exposed to at least one additional factual setting in which the rule produced a good outcome, and as a result will be alerted to the broader benefits of the rule.[35] Particularly for an appellate court, operating at some distance from the testimonial narratives of the parties, one or a few contrary examples may be sufficient to dispel the effects of anchoring, issue framing, and availability.

Another indirect consequence of attention to precedent comes into play when a judge concludes that no precedent rule applies. Now the judge is cast in the role of lawmaker: even if the judge's opinion

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inconsistent distinctions). Ideally, courts should overrule precedent rules only when they are defective as rules, and not simply when they produce undesirable outcomes in particular cases.

34 See Alexander and Sherwin, *The Rule of Rules* at 11–15 (cited in note 25) (discussing the benefits of authoritative settlement); Schauer, *Playing by the Rules* at 135–66 (cited in note 15) (outlining and assessing reasons for rules); Eisenberg, *The Nature of the Common Law* at 4–5 (cited in note 5) (noting that legislatures cannot meet the "enormous demand for legal rules that private actors can live, plan, and settle by").

35 This would not be the case if the precedent rule were wildly misconceived, but in such a case modification would be welcome.

does not announce a rule for future cases, the reasons the judge offers for his or her decision are likely to be treated by the legal audience as law. Accordingly, the distorting influences that Schauer describes are serious concerns. Yet if the judge has performed the preliminary duty imposed by the doctrine of precedent—searching past opinions for applicable rules—the judge will approach the task of formulating a new rule with a larger set of factual possibilities in mind. This in turn will help the judge assess the impact of a tentative rule beyond the situation at hand.

B. Analogical Reasoning

Another practice associated with the common law is reasoning by analogy.[36] Analogy is a method of decision when no precedent rule applies (or perhaps when a judge wishes to avoid a seemingly applicable rule by narrowing its scope). The analogical reasoner studies an array of intuitively related cases and "abduces" criteria that make them relevantly similar or different.[37] The reasoner then decides the case at hand in a manner that conforms to the outcomes of prior cases classed as similar.

This technique is taught to law students, practiced by lawyers, and incorporated by judges in their opinions. It is often characterized as a form of reasoning, although it differs from both induction and deduction.[38] It has been praised as the special skill of lawyers and a principal

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36 On the subject of analogical reasoning, see Alexander and Sherwin, *The Rule of Rules* at 128–35 (cited in note 25) (assessing the advantages and disadvantages of analogical reasoning and concluding that it can only be justified on "second-best" grounds); Larry Alexander, *Bad Beginnings*, 145 U Pa L Rev 57, 80–86 (1996) (arguing that analogical reasoning entrenches the erroneous outcomes of past decisions); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 Harv L Rev 925, 925–29, 962–63 (1996) (delineating a three-step model of analogical reasoning and claiming that analogical reasoning can produce results with rational force); Cass R. Sunstein, *Legal Reasoning and Political Conflict* 62–100 (Oxford 1996) (arguing that courts are drawn to analogical reasoning largely because analogies do not require completely theorized agreements); Steven J. Burton, *An Introduction to Law and Legal Reasoning* 27–41 (Aspen 2d ed 1995) (discussing the three steps of analogical reasoning: identifying an authoritative precedent, assessing factual similarities and differences from the precedent case, and judging whether the similarities or differences are more important); Edward H. Levi, *An Introduction to Legal Reasoning* 1–6 (Chicago 1948) (explaining that legal reasoning primarily consists of "reasoning by example" on a case-by-case basis).

37 This article uses the term "abduction" in the sense employed by Brewer. See Brewer, 109 Harv L Rev at 962 (cited in note 36) (describing the process of drawing an "analogy-warranting rule" from the facts of prior cases as "abduction").

38 See Weinreb, *Legal Reason* at 12 (cited in note 4) (analogical reasoning is "a valid, albeit undemonstrable, form of reasoning"); Brewer, 109 Harv L Rev at 934, 954–55 (cited in note 36) ("[T]he process of exemplary argument lends itself to far more intellectual discipline—to a much higher degree of rational force—than generally has been recognized."). Compare Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 Tex L Rev 35, 57–58 (1981) (de-

source of the genius of the common law.[39] Whether or not these claims are justified, seeking out analogies is second nature to most legal actors.

On close analysis, the suggestion that drawing analogies is a special "legal" form of reasoning is nonsense. The similarities that justify like treatment of nonidentical sets of facts are not simply properties of the facts. They depend on generalized prescriptions that group facts into types in furtherance of some end.[40]

For example, suppose that two parties claim ownership of space in a cave: the owner of the land above the disputed space and the owner of the entrance to the cave, which lies elsewhere. Prior cases have held that mineral deposits belong to the owner of the surface land above. Reasoning by analogy, the court presiding over the cave case concludes that the surface owner is likewise the owner of the cave.[41] If in fact this is a reasoned conclusion, it cannot be because caves and minerals are *alike*, or *because* both lie underground. It must be because a rule allocating all subterranean resources to the owner of the surface is a sensible rule, one that is easier to comprehend and administer and less likely to generate disputes than a rule that allocates ownership to the party best able to develop the resource.

In other words, "abduction" of criteria of similarity is either intuition with no justificatory force or implicit application of a purposive rule. If it is the former, it is not a form of reasoning. If it is the latter, it is a combination of rule formulation and deduction rather than a special form of reasoning.

Yet, even more than attention to precedent, the practice of analogical decisionmaking can curb the tendency of judges to focus on the readily available facts of cases that come before them. Again, the effect is indirect: the corrective lies not in the analogies themselves but in the search for analogies. The process of reviewing and comparing the facts of prior cases gives courts a much broader view of the poten-

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scribing analogical reasoning as a form of "rationality" consisting of "the application of trained, disciplined intuition").

39 See Weinreb, *Legal Reason* at 4 (cited in note 4) (noting that analogical reasoning is the "hallmark" of legal reasoning); Fried, 60 Tex L Rev at 57–58 (cited in note 38) (characterizing the use of analogy in legal argument as "a civilized attempt to stretch reason as far as it will go").

40 See Alexander, 145 U Pa L Rev at 86 & n 96 (cited in note 36) (referring to analogical reasoning as "a phantasm"); Schauer, *Playing by the Rules* at 187 (cited in note 15) (describing analogical reasoning as a form of deduction from rules); Eisenberg, *The Nature of the Common Law* at 87 (cited in note 5) (describing reasoning by analogy in the common law as "a special type of reasoning from standards"); Peter Westen, *On "Confusing Ideas": Reply*, 91 Yale L J 1153, 1163 (1982) ("One can never declare *A* to be legally similar to *B* without first formulating the legal rule of treatment by which they are rendered relevantly identical.").

41 See *Edwards v Sims*, 232 Ky 791, 24 SW2d 619, 620 (1929) (holding that "the owner of realty . . . is entitled to the free and unfettered control of his own land above, upon, and beneath the surface").

tial effects of a rule than they would derive from the facts before them, or from imagined hypotheticals. Thus, analogical reasoning may be spurious as a source of actual guidance in decisionmaking, but it induces a process of reflective equilibrium that counteracts bias.[42]

Another probable effect of the practice of analogical reasoning is to narrow the scope of judicial lawmaking. The rules and reasons courts cite in support of analogies tend to operate at a low level of generality.[43] A court may well decide that caves are like minerals because both fall within a sensible definition of the physical domain controlled by a landowner; it is not likely to make the complex calculation needed to conclude that like treatment of minerals and caves will promote utility. The courts' choice of low-level rules of similarity is not surprising. In most cases, multiple analogies are available, sometimes pointing to the same outcome and sometimes pulling in opposite directions. Under these conditions, a modest extension of existing rules is easier to reconcile with the body of examples provided by prior cases than a broad new proposition of law. Thus, the perceived obligation to draw analogies helps to keep judicial lawmaking incremental. Of course, incremental rulemaking does not in itself counteract situational biases; in fact, it may exacerbate the bias by narrowing the scope of the court's inquiry. But, as Schauer suggests, it can minimize the harm done when bias distorts judicial reasoning.[44]

CONCLUSION

Nothing I have said contradicts Schauer's fundamental insight, that the necessity of deciding a real-life dispute is more likely to dis-

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42 See Sherwin, 66 U Chi L Rev at 1187–89 (cited in note 25) (explaining that a judicial practice of exploring analogies wields benefits larger than the particular case, by creating a culture where judges "do the intellectual work of study and comparison"). On reflective equilibrium as a method of moral reasoning, see John Rawls, *A Theory of Justice* 20, 48–51 (Belknap 1971) ("It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation.").

43 See Sunstein, *Legal Reasoning and Political Conflict* at 65–69, 91–93 (cited in note 36) (arguing that the use of analogies supported by low-level rules of similarity to justify legal decisions permits litigants to accept the judgment of courts without compromising higher-level ideals).

44 Schauer, *Playing by the Rules* at 186 (cited in note 15) (noting that even without authoritative precedent, judges who search for analogies remain constrained by the "existing linguistic and conceptual structure"). Anthony Kronman has expressed a related idea. He suggests that lawyers tend to be conservative in the sense that they prefer "pragmatic gradualism" to broad reform in response to abstract ideas. The reason he gives is that legal education focuses on the study of cases that typically involve a conflict of plausible principles; in this setting, narrow rulings are more appealing because they do less damage to the competing principle. See Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 155–58 (Belknap 1993) (maintaining that students are encouraged "to search . . . for some small distinguishing mark . . . that will permit them to decide a particular case one way or another without compromising too greatly the losing principle the case involves").

tort than to enhance the products of judicial rulemaking. My point is only that, for purposes of comparison with legislation or other sources of law, the common law, as traditionally practiced, has features that serve as partial correctives to the biases Schauer identifies.

The two corrective practices I have mentioned, adherence to precedent rules and development of law by analogy to prior decisions, are open to serious criticism. Both are inferior to sound, unobstructed reasoning by lawmakers because they carry past errors forward into the future.[45] Precedent rules compensate by providing settlement and coordination. The more amorphous and manipulable practice of drawing analogies is less likely to further these ends. This makes analogical reasoning particularly hard to defend unless its indirect benefits outweigh the errors it generates.

More generally, both adherence to precedent rules and reasoning by analogy conflict with ideals of reasoned decisionmaking and public accessibility to the processes of justice. Following precedent rules means reaching at least some outcomes that the judge would not endorse based on an unconstrained assessment of reasons for decision (including the value of settled precedent). Analogical decisionmaking means accepting as starting points past decisions that may have been wrong and then proceeding to draw analogies either intuitively or based on unstated rules.[46] Both practices, therefore, require judges either to act against their own best-reasoned judgment or to act without entering into the full process of reasoning.

Not only are the antirational features of precedent and analogy worrisome in themselves, they also raise questions about how these methods survive. Because these practices require judges to disregard or suppress reason, their survival, and whatever usefulness they may have in counteracting bias, depend on the propensity of judges to engage in them without much reflection. A judge who perceives that a precedent rule or an analogy yields the wrong result, all things considered (including the settlement value of precedent), cannot rationally decide as the precedent rule or analogy requires.[47] To do so—and, by extension, to

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45 See Alexander, 145 U Pa L Rev at 80–82 (cited in note 36) (pointing out that analogical reasoning builds from a body of past decisions, some of which are sure to be erroneous). See also note 31 and accompanying text regarding the entrenchment of rules.

46 See Alexander, 145 U Pa L Rev at 81 (cited in note 36) (observing that analogical reasoning "is the method for finding the legal principles that 'justify' the morally unjustified").

47 See Heidi M. Hurd, *Challenging Authority*, 100 Yale L J 1611, 1620, 1625–28 (1991) (arguing that it is irrational to follow a rule when the rule's prescription differs from one's best all-things-considered judgment); Donald H. Regan, *Authority and Value: Reflections on Raz's* Morality of Freedom, 62 S Cal L Rev 995, 1006–18 (1989) (arguing that a conscientious decisionmaker cannot treat a rule as a conclusive reason for action). But see Scott J. Shapiro, *The Difference That Rules Make*, in Brian Bix, ed, *Analyzing Law: New Essays in Legal Theory* 33, 47–54 (Clar-

endorse a method that entails deciding in ways that conflict with reason—the judge must act reflexively, based on habit, training, and generally accepted custom. Thus, indirect benefits that come from studying precedent and searching for analogies in prior cases depend critically on widespread, unexamined practice. Sustained criticism can diminish both the prevalence of these methods and their influence on judicial lawmaking, and probably has done so in the past century.

It is unsettling to think that the quality of common law rules may depend on such unstable features of judicial practice. Moreover, we would like to believe that law is developed through reasoned deliberation and open debate. The suggestion that indirection may play a significant role runs contrary to these ideals. Yet, judicial rulemaking is unavoidable: we want courts to give reasons for their decisions, and as long as they do so, the reasons they give will function as rules of law. If judges inevitably are rulemakers, and if judicial rulemaking is adversely affected by the need to resolve particular disputes, practices such as following precedent and reasoning by analogy may be the best available correctives. The type of conscious diffidence Schauer recommends is a sensible direct response to cognitive bias. But less direct, less rational curbs may be needed as well, and may ultimately have a more powerful effect.

It is worth pointing out that law relies in other ways on indirection and on responses that are habitual rather than rational. The most striking example is rules themselves. As Schauer has famously described, law governs behavior through the medium of general prescriptions, and its effectiveness in settling potential disputes and coordinating human activities depends on a general practice of following legal rules.[48] Yet, rules, because they are general, prescribe the wrong results in some cases. Following the rule in such a case is not rational for the individual decisionmaker. Nevertheless, because decisionmakers often err, it may be best in the long run if all decisionmakers followed rules in all cases.[49] For this reason, the utility of legal rules depends on the willingness of actors and judges to follow them without much reasoned scrutiny. In other words, the very institution Schauer seeks to protect—governance by rule—incorporates elements of indirection and irrationality.

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endon 1998) (suggesting that decisionmakers can—consistent with rationality—commit themselves in advance to follow rules in ways that would otherwise be irrational).

[48] Schauer, *Playing by the Rules* at 135–49 (cited in note 15) (offering fairness, reliance, and efficiency arguments for the general adherence to rules).

[49] See Alexander and Sherwin, *The Rule of Rules* at 53–55 (cited in note 25) (discussing the "gap" between an authority's reasons for issuing rules and demands that they be followed and an individual's reasons for following rules); Schauer, *Playing by the Rules* at 128–34 (cited in note 15) (discussing the "asymmetry of authority").