

THE TROUBLE WITH CASES

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I. INTRODUCTION

The recent hearings on Judge Sonia Sotomayor's nomination to the Supreme Court vividly exemplify the enthusiastic concurrence between the Senators and the nominee that judges make neither law nor policy. Judges decide particular cases between particular litigants, the questioners and the responders agree, and in doing so they apply laws and policies made by the allegedly more representative legislative, administrative, and executive branches of government.

Thus goes the collusive charade played out before each Supreme Court nomination, one designed simultaneously to reassure and mislead the general public. Denying the law- and policy-making role of the courts is the standard mantra, and no nominee intelligent enough to

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find herself in that position would dare acknowledge at the hearing that judges serve, at least in part, as law-makers and policy-makers.

Most of us, of course, know better. Courts make law and set policy all the time, an inevitable consequence of the indeterminacy and open-endedness both of the common law and of the vague language in which many constitutional and statutory provisions are drafted. When the Supreme Court concludes that tying arrangements³ and resale price maintenance⁴ violate the Sherman Act's prohibition on "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . .",⁵ for example, the Court is establishing antitrust policy no less than if those prohibitions had been explicitly set forth in the statute or adopted as formal regulations by the Federal Trade Commission. And so too with the determination of which types of searches and seizures will be deemed "unreasonable" and consequently in violation of the Fourth Amendment, of what forms of discrimination constitute denial of "the equal protection of the laws," and of which varieties of non-disclosure to investors will count as

³ See, for example, *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958).

⁴ See, for example, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). Minimum resale price maintenance agreements are now subject to a so-called rule of reason rather than being per se invalid, *Leegin v. Creative Leather Products, Inc.*, 551 U.S. 877 (2007), but that does not detract from the fact that finding such agreements to be legally problematic, regardless of the degree of scrutiny, is a product of judicial law-making in the common-law style that the vague language of the Sherman Act has plainly (and intentionally) spawned.

⁵ 15 U.S.C. §1 (2006).

“device[s], scheme[s], or artifice[s] to defraud” for purposes of Section 17(a) of the Securities Act of 1933⁶ and of Rule 10b-5 issued by the Securities and Exchange Commission.⁷

Policy-making by appellate judicial interpretation is well-known to the cognoscenti, and almost certainly to the Senators and nominees who in publicly denying it tell a form of white lie to reassure a legally unsophisticated polity. But policy-making also occurs at the trial level when decisions in particular cases influence the non-litigants who contemplate acting similarly to or differently from those whose behavior has previously been the subject of litigation. When a jury or judge convicts a particular defendant of negligent homicide for unintentionally killing someone while driving under the influence of barbiturates, for example, it is likely to affect the decisions and behavior of countless other drivers who might be considering taking barbiturates before getting behind the wheel or getting behind the wheel after taking barbiturates. More commonly, when a jury determines that a manufacturer of a chainsaw is negligent and responsible for user injuries as a result of not having fitted its products with a particular safety device or not having provided sufficiently vivid warnings of the dangers associated with using a chainsaw, the verdict, especially if accompanied by a large damage award, will affect the future conduct of chainsaw manufacturers as much (or more) as if the safety device or warnings had been required by an Act of Congress or by the regulations of the Consumer Product Safety Commission or the Occupational Safety and Health Administration.

⁶15 U.S.C. §77q (2006).

⁷ 17 C.F.R. §240.10b-5 (2008).

Our goal in this paper is to examine policy-making in response to particular cases. When commentators refer to “regulation by litigation,” this is what they typically mean, but we shall argue that the problem is not one peculiar to litigation, because much legislation and some administrative rule-making is shaped by particular cases – or highly salient examples -- as well. Still, we focus initially on litigation, and suggest that litigation’s necessary and usually desirable focus on the particular litigants and their particular actions is a flawed platform for more broad-based policy-making. And this problem is not, we emphasize, a function of the errors that juries or judges may make in the decision of cases. Although such errors are often the subject of commentary and outrage, our claim is not dependent on the possibility of judge or jury error in deciding the case before the court. Rather, the argument is premised on the distinction between particular adjudication and the inherent generality of policy-making. This distinction would be of little moment were the particulars of particular litigation representative of the kinds of problems like to arise in the future. But that is not the case. Instead, the goals and incentives of the litigation process are likely to contribute to aberrational rather than representative cases being the subject of lawsuits, and a collection of phenomena – most notably the availability heuristic – will cause the policy that emerges from litigation to be systematically based on an imperfect picture of the terrain that the policy is designed to regulate.

Yet although it is tempting and not wholly inaccurate to see the problem as one caused by litigation and intrinsic to it, in fact the problem is larger, and is a consequence of a focus on one or a few particular events, regardless of the setting in which the stories about those events may be told. Thus we will argue that even outside of the context of litigation, many regulatory

policies also flow from experience with one or a few cases, and that the same problems that flow from case-based policy-making in litigation also flow from case-based policy-making with ex ante rule-making. The thrust of our argument is that the individual cases that receive sufficient attention to affect policy significantly are often both salient and highly unrepresentative, and so the strategy of using such cases to provide the principles that inform policy is broadly misplaced.

II. THE GENERALITY OF POLICY

Policies are general, both by definition and necessity. Bobbie had a bowl of cereal for breakfast this morning, but it is her *policy* to have a bowl of cereal for breakfast *every* morning. Officer Smith may stop Susan Jones for driving at 47 miles per hour at a particular point on Main Street on a particular day, but it is a policy if all police officers are expected to stop all drivers driving more than 40 miles per hour at all points on Main Street. A policy is not an action. Rather, it is a course of action. Policies, by their very nature, are decisions about what is to be done in a multiplicity of cases involving a multiplicity of acts by multiple people at multiple times.

The observation that policy is general is banal, but the banality is worth emphasizing because doing so makes clear that *policy-making* involves setting a policy that will cover many acts by many actors in many places at many times. Good policy-making, therefore, involves making an aggregate determination of what ought to be done over a multiplicity of instances.⁸

⁸ See generally Edith Stokey & Richard Zeckhauser, *A Primer for Policy Analysis* (New York: W.W. Norton & Co., 1978).

But in order to make this aggregate determination, the wise policy-maker must be able to assess initially just what these instances, in the future, are likely to be. The optimal speed limit is not the speed limit that would be optimal for the worst driver, nor is it the one that would be optimal for the best driver. Rather, it involves determining what the full range of driving abilities covered by the policy will look like, as well as assessing the expected benefits and costs consequent upon applying alternative policies to that range. But although the assessment of benefits and costs is difficult and important, it is subsequent to the determination, our principal concern in this paper, of just what the future array of applications of any policy will look like. Thus, it is a necessary condition of good policy-making that the policy-maker be able to assess the current range of relevant behaviors (and their consequences) and the range of behaviors likely to exist under various different policy options.

III. SURVEYING THE FIELD OF POLICY APPLICATIONS

How, then, are policy-makers expected to survey the range of applications of any policy, and predict the range of behaviors that one or another policy option will produce? There is of course no single method of empirical assessment and prediction that will apply for all policies or for all types of policies. Still, the goals of the assessment are clear, which are to gauge not only what activities are now taking place, but also what change in those activities will be brought about by some policy, or indeed by other changes in society. If a policy-maker were contemplating, to take an issue recently in the news, a prohibition on the use of cellular telephones while driving, the policy-maker would want to know, among other things, what percentage of drivers owned cellular phones, how many of those drivers used the phone while

driving and in what fashion, how many accidents and of what kinds and with what consequences were caused by cellular phone use, and how cell phone use while driving will evolve in the future, say through Blue Tooth and other methods of hands free calling, or, as is now the greatest concern, with the capacity to send and receive text messages. Finally, it is crucial to be able to predict with some accuracy what changes (and at what cost) in all of the foregoing would be brought about by various different potential policy interventions. And we can imagine and understand similar exercises with respect to workplace safety, misrepresentation in the sale of securities, tobacco-related illnesses, environmental hazards, and much else.

Whatever methods might be used to pursue an empirical survey of this type, it should be clear that assuming too quickly that any one event or practice is representative of all of the events or practices to be encompassed by some policy is a recipe not for accuracy but for distortion. To be sure, an accurate evaluation of expected benefits and costs will recognize that it is often (or at least sometimes) desirable to engage in strategic over-regulation as regards the average case as the only or most effective way of controlling low probability events with serious negative consequences. Nevertheless, it is a mistake to assume that unrepresentative events or practices are in fact typical or representative, and making that kind of empirical error at the outset of a policy-making exercise is the path to ineffective and perhaps harmful policy.

IV. WHEN EASY AVAILABILITY MAKES FOR BAD LAW

With this broad goal of empirical accuracy across multiple instances in mind, we are now in a position to evaluate litigation and ex ante rule-making along the dimension of fostering or impeding an accurate assessment of the terrain of potential policy application.⁹ And from this perspective, litigation appears to present significant risks of distortion, and in at least two different ways.

At times, a court making a decision will announce a rule that is to be applied in cases other than the one that is actually before the court. Typically, this is a feature of appellate decision-making rather than decisions (by judge or jury) at trial, for an appellate court will justify its decision with an opinion that implicitly or explicitly announces a rule of decision to be applied in other cases. In part the extension of a decision beyond the immediate case is a function of the logic of reason-giving, for to give a reason is to make a claim about a type or category that is necessarily broader than the particular instance that the reason is a reason for.¹⁰ And the extension of application beyond the immediate case is even more apparent when an appellate court explicitly announces a rule rather than simply giving a reason, for a rule, even more than a reason, necessarily and by reason of its generality encompasses

⁹ Some of the existing literature describes the relevant choice as one between litigation and regulation, e.g., W. Kip Viscusi, ed., *Regulation Through Litigation* (Washington, D.C.: Brookings Institution Press, 2002), but this strikes us as a poor characterization. Because the entire point of the inquiry is to understand and evaluate litigation as a regulatory strategy, the real question is about the relative merits of regulation by ex post litigation and regulation by ex ante rule-making, we will frame the issue in terms of litigation versus rule-making and not litigation versus regulation.

¹⁰ See Frederick Schauer, "Giving Reasons," *Stanford Law Review*, vol. 47 (1995), pp. 633-59.

instances other than the one that initially inspired the announcement of the rule.¹¹ When an appellate court, for example, upholds a trial court verdict against a franchisor which required its franchisees to purchase napkins and cleaning products from the franchisor as a condition of being allowed to use the franchisor's trademark and food recipes,¹² the appellate court will announce a rule regarding tying arrangements that represents a policy about some general category of tying arrangements, and not just about the particular tying arrangement at issue in this particular case. Maybe it will be a policy about all tying arrangements involving non-food products in the food industry, maybe about all tying arrangements in the food industry, maybe about all tying arrangements within a particular market structure, and maybe about all tying arrangements, but the rule will be about all of something, for that is just what a rule is and just what rules do.

There is considerable debate in legal theory over the extent to which the court that announces such a rule is or should be constrained by the rule in subsequent and different cases. Some argue that the rule announced in the first case exerts genuine pressure on the determination of a subsequent and different case that lies within the linguistic contours of the rule announced in the first case, and others claim that it is the characteristic virtue of the common law that the so-called rules it announces are little more than weak guides, rarely if ever requiring a court to reach a result other than the one it would have reached on its all-

¹¹ Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991).

¹² This is a frequently-litigated scenario. See, for example, *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3rd Cir. 1997); *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3rd Cir. 1976); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971).

things-considered best judgment about how the particular case should be resolved.¹³ But even if this latter view is empirically and jurisprudentially correct, the rule announced in the first case will still be a rule that lower courts are expected to follow, and, more importantly, will still be a rule that primary actors and their lawyers will look to in trying to predict what will happen in a case that appears to be encompassed by the rule.

Once we realize, therefore, that the rule announced by an appellate court is a policy, and, further, that the rule is a policy that will affect numerous agents other than the ones before the court, all of the above-mentioned considerations about assessing the terrain of policy application come into play. The question, then, is whether the decision of a particular case involving a particular dispute between particular parties is the optimal or even a desirable vehicle for announcing a rule and a policy that will affect the behavior of parties other than the ones whose dispute prompted making the rule, and will influence actions at least somewhat at variance with the actions that were adjudicated in the initial case.

There is a view, and one embodied in much of American constitutional doctrine, that seeing a real “case or controversy” between real litigants is the best way for a court to understand the actual landscape that will be affected by one of its rulings.¹⁴ By delving into the

¹³ The respective positions are described and analyzed in Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Massachusetts: Harvard University Press, 2009), pp. 108-18.

¹⁴ See, for example, Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, Massachusetts: Harvard University Press, 1988); Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Massachusetts: Harvard University Press, 1982). See also Steven Shavell, “The Appeals Process as a Means of Error Correction,” *Journal of Legal Studies*, vol. 24 (1995),

detailed facts of a genuine controversy, so it is said and so it has been held countless times, a court can truly know what the impact of its rulings is likely to be.¹⁵

With respect to making the best decision in the particular controversy, there is much to be said for the traditional view. A judicial decision will produce, typically, a real winner and a real loser, and only by serious immersion in the situation can the court appreciate the consequences of its decision, as well as understand the fit (or lack thereof) between an outcome and the relevant legal language and legal doctrine.

As a result of understanding, however, that at the appellate level the consequences and reach of a decision will extend beyond the particular parties and the particular decision, substantial new problems become apparent. If a court is making a decision whose influence goes beyond the particular case, and thus beyond the identical situation before the court, one might think that the court should, ideally, have some sense of the range of instances encompassed by its rulings. If the decision in this case is to have consequences for other cases, other disputes, and other actions, it seems plainly desirable for the court to know what those other cases, disputes, and actions are likely to look like before issuing a ruling that will affect

pp. 379-423 (“appeals courts sometimes can learn about opportunities for lawmaking only from disappointed litigants”).

¹⁵ In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), for example, the Supreme Court noted that “a concrete factual context” will generate “a realistic appreciation of the consequences of judicial action.” 454 U.S. at 472. See also *Baker v. Carr*, 369 U.S. 186 (1962) (concrete disputes “sharpen[] the presentation of issues” and thus aid “the illumination of difficult constitutional questions”); William A. Fletcher, “The Structure of Standing,” *Yale Law Journal*, vol. 98 (1988), pp. 221-77 (a concrete case will inform a court of “the consequences of its decisions”).

them. One problem, however, is that appellate courts are especially structurally ill-equipped to assess the full field of potential applications of any ruling, even though it is entirely appropriate, at the appellate level, for an appellate court to take account of the effect of a ruling on future cases. Typically, it would not be in the interests of the parties themselves to provide information about other potential cases, although there are exceptions.¹⁶ Moreover, apart from cases in the Supreme Court, and to some extent even for Supreme Court cases, the information provided in amicus curiae submissions, even opposing ones, is likely to be incomplete. And most significant is the absence of any way in which an appellate court, lacking an investigate arm and often even the rudiments of non-case-specific factual research capabilities, can actually go out and find the information it might need to understand the full import of one of its rulings.

Even more serious, however, is the way in which the particular case, the particular facts, and the particular litigants are likely to dominate a judicial assessment of the relevant terrain. The particulars of the case are *available*, in the technical sense of that term,¹⁷ and the risk is

¹⁶ One such exception would arise in the common situation in which an undesirable claimant of constitutional rights has a strong incentive to show a court how many other and more desirable claimants would benefit from a ruling in favor of the undesirable litigant before the court. When groups such as the American Nazi Party and the Ku Klux Klan claim free speech rights under the First Amendment, for example, it is obviously in their interest to show how rulings in their favor would benefit less repulsive dissident organizations. And when the generally guilty claimants of criminal procedure rights under the Fourth, Fifth, and Sixth Amendments argue that their convictions should be overturned because of a violation of such rights, they similarly have an interest in informing the court of the existence of innocent or less culpable defendants who would be among the beneficiaries of such a ruling.

¹⁷ See Amos Tversky & Daniel Kahneman, "Availability: A Heuristic for Judging Frequency and Probability," *Cognitive Psychology*, vol. 5 (1973), pp. 207-32. Useful overviews include Scott Plous, *The Psychology of Judgment and Decision Making* (New York, McHraw-Hill, 1993), pp.

that their very availability will lead a court to assume, mistakenly, that future cases will resemble the cognitively available case now before the court.¹⁸ Just as someone who has just learned about a death from a rattlesnake bite is likely to overestimate the number of deaths caused by rattlesnake bites compared to the number caused by bee stings,¹⁹ so too can we expect a court immersed in the details of particular litigation with particular parties and particular facts to assume, possibly mistakenly, that other and future events within the same broad category will resemble the events involved in the case now before the court. The case before the court may indeed be representative of the full population of cases of that broad type, but the availability of this case may lead to an assumption of representativeness even when such an assumption is unwarranted.²⁰ Thus, although it is possible that the single case before the court accurately represents the larger array, and although it is possible that a court will properly assess the particular case as exemplary of many cases, it is precisely the ease of

125-27, 178-80; S.J. Sherman & E. Corty, "Cognitive Heuristics," in *Handbook of Social Cognition*, vol. 1 (Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1984), pp. 189-286; Robert M. Reyes, William C. Thompson, & Gordon H. Bower, "Judgmental Biases Resulting from Different Availabilities of Arguments," *Journal of Personality and Social Psychology*, vol. 39 (1980), pp. 1-12; S.E. Taylor, "The Availability Bias in Social Perception and Interaction," in Daniel Kahneman, Paul Slovic, & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge: Cambridge University Press, 1982), pp. 190-20.

¹⁸ For an earlier and more rudimentary presentation of this argument, see Frederick Schauer, "Do Cases Make Bad Law?," *University of Chicago Law Review*, vol. 73 (2006), pp. 883-918.

¹⁹ N.H. Anderson, *Contributions to Information Integration Theory, vol. 1: Cognition* (Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1991).

²⁰ See Daniel Kahneman & Shane Frederick, "Representativeness Revisited: Attribute Substitution in Intuitive Judgment," in Thomas Gilovich, Dale Griffin, & Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge: Cambridge University Press, 2002), pp. 49-81.

recall of the case before the court that may lead the court to assume from the ease of recall that the case is representative when in fact it is not.²¹

Litigation is also especially likely to exacerbate the availability problem because the judge or court is obliged not only to see the details of the case before it, but also, and more importantly, because the judge or court must *decide* that case. Whatever possibility a decision-maker may have of ignoring the most available event and thus transcending the availability-produced mis-characterization of the larger array, that possibility is likely to decrease when the decision-maker has a particular *task* to perform with respect to the available example. Because tasks narrow a decision-maker's focus, and because tasks thus make it more difficult for those performing a task to see beyond what is necessary to perform that task,²² a decision-making situation in which the primary task is to decide a particular case will narrow the focus of the decision-maker on the facts of that case, and make it less likely that the decision-maker will

²¹ See Norbert Schwarz & Leigh Ann Vaughn, "The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information," in Gilovich, Griffin, & Kahneman, *op. cit.* note 13, at 103-19. In fact the broad field of behavioral decision making throws up other cautions about the dangers of inappropriate extrapolation. Individuals substantially underestimate the uncertainties in the world, and are overconfident about their ability to predict ranges of outcomes, expecting that the outcomes will lie closer to our experiences to date than they actually do. See Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (New York: Random House, 2007). Individuals often do not recognize that the world presents us with fat-tailed distributions (which produce many extreme outliers), not the normal distributions found in most textbooks. And courts are likely to be subject to the same bias, believing that the world will present us with situations that cluster reasonably closely, when in fact many deep outliers are to be expected.

²² See Max H. Bazerman & Dolly Chugh, "Decisions Without Blinders," *Harvard Business Review*, vol. 84(1) (2006), pp. 88-97; Dolly Chugh & Max H. Bazerman, "Bounded Awareness: What You Fail to See Can Hurt You," *Mind and Society*, vol. 6 (2007), pp. 1-18.

perceive the broader set of facts necessary to perform the secondary task of establishing a precedent, setting forth a rule, making law, or making policy.

A good example of this phenomenon in practice is the United States Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*.²³ The case dramatically changed American law with respect to libel actions brought by public officials, setting forth the rule that in all such cases the plaintiff would henceforth be required to show with "convincing clarity" not only that what was said or published about him was false, but also that it was published with knowledge by the publisher (or writer or speaker) of its falsity at the time of publication. In placing such a heavy burden on a public official libel victim, the Court set out a rule that has been followed by no other country in the world, and that has brought about the virtual elimination of public official defamation suits in the United States.

Seeing such a result, it is logical to inquire how it came about. The answer is that it is in many respects a *celebrity case*, and one with a quite uncharacteristic fact pattern. And it is the combination of celebrity, or high salience, combined with the unusual fact pattern that led to an extreme change in policy. The plaintiff was the Montgomery, Alabama, City Commissioner in charge of the Montgomery police, and his libel suit was based on an advertisement placed in 1960 by a group of civil rights leaders in the *New York Times* charging Sullivan with, among other things, hostility to the civil rights movement in his treatment of civil rights demonstrators. The case arose in a context, therefore, in which it was highly questionable whether the plaintiff had suffered any reputational damage at all, in which the factual errors in the advertisement

²³ 376 U.S. 254 (1964).

were largely trivial, in which the underlying substance of the issue was a matter of great national social and political importance at the time, in which only 43 copies of the offending publication were sold in the entire state of Alabama, and in which the jury-awarded damages -- \$500,000 in 1964 uninsured dollars -- were substantial. In short, this was both a celebrity case and an outlier case.

Despite the unusual nature of this case, however, unusual even when compared to other libel cases brought by public officials against the media, a Supreme Court (and a Court highly protective of the civil rights movement) set out a rule -- made law, if you will -- that governed the full array of public official libel cases, even though most of the libel cases controlled by the rule bear little resemblance to the actual events that, but for the rule, would have generated libel litigation. Now it is possible that the so-called actual malice rule of *New York Times v. Sullivan* is the best rule, or at least a good rule, but the case nevertheless presents a good example of a rule whose content would almost certainly have been quite different had the case before the Supreme Court been more representative of the typical libel case -- a newspaper accusing a local official of financial malfeasance, for example -- involving a public official.²⁴

V. SELECTION EFFECTS AND THE BATTLE OVER AVAILABILITY

The availability problem in litigation would be substantial even if the cases that prompted rule-making were ones that were randomly selected from the larger array, because

²⁴ See Richard A. Epstein, "Was *New York Times v. Sullivan* Wrong,?" *University of Chicago Law Review*, vol. 53 (1986), pp. 782-818.

there would still remain the problem of assuming from a small sample size – typically a sample of one – a set of characteristics for the full array.²⁵ But the problem is actually greater, because the incentives to litigate (or refrain from litigating) are likely to make unrepresentative cases especially likely to be the ones that wind up before appellate courts.²⁶ If ordinary events are disproportionately unlikely to generate disputes, if ordinary disputes are disproportionately unlikely to generate litigation, if ordinary litigated disputes are disproportionately likely to settle, if ordinary trial court verdicts are disproportionately unlikely to be appealed, and if ordinary appellate cases are disproportionately unlikely to generate the published opinions that are the vehicles for appellate rule-making, then the result will be that the cases that prompt rule-making are likely to be especially unrepresentative of the events that the rules that emerge from appellate rule-making will encompass.

In the American legal system, all of the conditional “ifs” in the previous paragraph are likely to be satisfied, in large part because litigation is costly. And thus the cases that make it to the appellate level will represent an extreme selection. To illustrate, a tobacco manufacturer may settle two dozen cases, accept the trial court’s verdict in a dozen more, but appeal the case in which the warnings to the particular smoker were especially obvious and in which the smoker persisted in smoking even after health problems emerged. And a plaintiff’s attorney

²⁵ See J. Cohen, *Statistical Power Analysis for the Behavioral Sciences* (San Diego: Academic Press, 1969); J. Cohen, “A Power Primer,” *Psychological Bulletin*, vol. 112 (1992), pp. 155-59.

²⁶ See Gillian K. Hadfield, “Bias in the Evolution of Legal Rules,” *Georgetown Law Review*, vol. 80 (1992), pp. 583-617; Ronald A. Heiner, “Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules,” *Journal of Legal Studies*, vol. 15 (1986), pp. 227-51; Mark J. Roe, “Chaos and Evolution in Law and Economics,” *Harvard Law Review*, vol. 109 (1996), pp. 641-83.

who represents numerous smokers (individually, and not part of a class action) who have incurred smoking-related illnesses will similarly, say, settle two dozen cases, accept as unfortunate another dozen dismissals or defendant's verdicts, and appeal the case in which a sympathetic and largely non-negligent smoker was not, because of a grant of a motion to dismiss, or grant of a defendant's motion for summary judgment, or grant of a motion for a directed verdict, even allowed to present his case to a jury. Thus, the mere fact that a case is appealed suggests from that alone that the case is an outlier.

Although most of the foregoing analysis is about appellate rule-making, policy-making, and law-making, the fact is that it is trial court verdicts that have generated most of the controversy about regulation by litigation.²⁷ Whether it be the widely reported verdict against McDonald's for failing to warn customers about its especially hot coffee, or the verdicts and settlements in the tobacco litigation, or the extremely large punitive damage awards in some environmental and products liability cases, or the potential policy impact of litigation about guns, lead paint, breast implants, automobile insurance, fast food, and the managed health care industry, much of the concern about policy-making by litigation turns out not to be so much a function of rules set forth by appellate courts, but rather is directed at the opinion-free verdicts by juries at the trial level, verdicts (or settlements) that are often not appealed, and which, even when appealed, often have their behavior-influencing effects as soon as the verdict

²⁷ A good survey is in Timothy D. Lytton, "Using Tort Litigation To Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits," *Texas Law Review*, vol. 86 (2008), pp. 1836-76.

is issued, and without regard to any ultimate resolution of the controversy or opinion on appeal.

Because trial verdicts do not involve opinions and do not involve published statements of reasons,²⁸ it might seem as if the concerns about availability and selection effects (or, to make the same point positively, about their representativeness) drop out with respect to such judgments. In fact, however, the problem may be even worse for trial verdicts than it is with appellate rulings. Large verdicts and settlements may be highly unrepresentative, but they are the cases that get reported in the general press and in industry-specific publications. Given the thousands of trial court decisions every year in this broad domain, only cases that are remarkable in some way will get noticed. Thus, the set of reported verdicts will be an unrepresentative sample of the set of verdicts and an even more unrepresentative sample of some larger class of lawsuits, disputes, injuries, or simple events.

Billion dollar awards, after all, get everyone's attention.²⁹ Restaurants considering what kinds of warnings to issue in conjunction with serving hot beverages, for example, are unlikely to know about hot beverage lawsuits that were dismissed, or that were settled for small amounts because of the nuisance value of the lawsuit. These restaurants are even more unlikely to be aware of an even larger number of hot beverage injuries that generated no

²⁸ Although the cases often involve published preliminary rulings by the trial judges, especially the rulings denying motions to dismiss or motions for summary judgment.

²⁹ See the February 23, 2000, comments of Theodore Olson in Manhattan Institute for Policy Research, "Regulation Through Litigation: Assessing the Role of Bounty Hunters and Bureaucrats in the American Regulatory Scheme," available at <http://www.manhattan-institute.org/html.mics2b.htm>.

litigation at all, to say nothing about the literally billions of hot beverages consumed every year that produce no injury whatsoever. So although a verdict against McDonald's as a result of a hot coffee spill will be especially available to public knowledge because of the various media incentives that lead to reporting of the unusual story and not the routine event – man bites dog versus dog bites man – what becomes known will be especially unrepresentative.

Nevertheless, the unrepresentative but highly publicized verdict may still lead potential defendants to assume because of ease of access that such a verdict is more representative than it actually is.³⁰ And when potential defendants overestimate the likelihood of such exceptional verdicts, as the availability heuristic tells us they will, and when those potential defendants alter their day-to-day behavior based on an inflated view of the likelihood of liability, then the policy of potentially excess caution on the part of potential defendants is as much if not more a product of an availability problem as is a distorted rule emanating from an appellate court.

Just as the wise policy-maker assesses the full field of potential applications of a policy before adopting it, so too would a wise primary actor considering serving very hot coffee, for example, want to survey the full field of potential applications of that practice, in order to be able to determine, inter alia, what percentage of customers would spill hot coffee, how many of those would be injured as a result, how many of those would initiate a dispute, and what benefits the company would reap by offering very hot versus hot versus tepid coffee. But if the availability of a hot coffee verdict leads the same primary actor to overestimate the likelihoods

³⁰ The point is made forcefully in the context of more and more consequential events in Richard A. Posner, *Catastrophe: Risk and Response* (New York: Oxford University Press, 2004).

of spilling, of injury, of litigation, and of an unfavorable verdict, then that actor's behavior will be no different from, and no more optimal than, its behavior in response to an administrative regulation that required a too-low temperature because of the administrator's mis-assessment of the likelihood of injury. Even if potential defendants could calculate accurately the likelihood of an extreme award,³¹ they must also be concerned with the mindset of potential plaintiffs. If potential plaintiffs believe large awards are possible, they will be more likely to bring suit, making it even more important for defendants to try to limit their exposure. And thus we suspect that coffee temperatures dropped across America after the McDonald's decision, even for defendants who knew the odds.

Although it may be hard to grasp the social disadvantages of corporate hyper-caution in the context of serving hot rather than very hot coffee, or of selling serviceable and reliable tires rather than ultra-high-performance tires for consumer use,³² these disadvantages may be more apparent when the hyper-cautious actors are pharmaceutical companies, newspapers engaged in investigative reporting, or physicians refraining from performing risky but potentially life-saving operations, for in such cases the societal losses or public harms from inaction are more easily grasped.³³ But even if these harms are understood, hyper-caution is a concern because

³¹ Which will, ideally, take into account the way in which juries will also know something about outlier previous awards, and thus will have outlier information about award size and possibly outlier information about a jury's belief that a defendant should have been on notice.

³² See, for example, *LeBoeuf v. Goodyear Tire & Rubber Co.*, 623 F.2d 985 (5th Cir. 1980).

³³ Breast implants represent a case in which medical device manufacturers essentially gave up, establishing a \$4.25 billion compensation fund for "injured" recipients in the biggest class action settlement in history, even though the best scientific studies showed no evidence of harm. As is commonly the case, the most salient lawsuits involved the most sympathetic

in many psychological and legal contexts errors of commission count for more than errors of omission, implying that there is a already background tilt in the direction of insufficient action.

Still, our goal in this paper is not to enter into the debate about the socially optimal degree of caution that a manufacturer or other primary actor should adopt, assuming that the actor conducts an accurate empirical assessment of the expected social costs of the Type I errors of engaging in too much harmful conduct and the Type II errors of failing to engage in sufficient beneficial conduct. Rather, our two aims here are only to argue, (1) that such an assessment, a prerequisite to any determination of the proper risk level, cannot proceed wisely if the frequency of various potential events is mis-calculated or mis-estimated, and (2) that such mis-calculation or mis-assessment is especially likely to occur when aberrational events are highlighted because of the incentives of those – especially but not only the institutional press who report and the plaintiff’s bar who litigate – who would be in a position to provide information about litigation.

Although it seems likely that the problem of mis-assessment is especially likely with respect to non-representative verdicts for plaintiffs, from our perspective the mis-assessment would be equally problematic where the informational availability of aberrational defendant’s verdicts distorted the behavior of primary actors so that they underestimated the likelihood of liability. Did the extreme availability of the verdict of acquittal in the trial of O.J. Simpson, for example, lead potential spouse-killers to overestimate the possibility of acquittal? [Can we

plaintiffs. See the book by former *New England Journal of Medicine* editor Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case* (New York: W.W. Norton Co., 1997).

come up with a widely-publicized defendant's verdict in a products liability or class action lawsuit?]

The problem we highlight is one that is likely to be exacerbated because of the incentives that determine the identity of litigation parties as well. In class action lawsuits, for example, it would be a foolish plaintiff's attorney who selected a representative plaintiff rather than one who is especially sympathetic. It is true that Rule 23(a)(3) of the Federal Rules of Civil Procedure requires the judge to determine that the class representative present claims that are "typical of the claims . . . of the class," but such a determination will take place on only one side of the range. Some potential class representatives will in fact be typical of some class of plaintiffs, others will be atypically sympathetic, and some will lie in between. But none, unless the plaintiff's attorney is an idiot, will be atypically unsympathetic, and thus a judge faced with determining representativeness from candidates only on the sympathetic side of the typicality distribution can be expected systematically to incline the class of all class representatives in the direction of the atypically sympathetic. To the extent that this is so, the litigation-based policy-making that ensues from class action judgments is especially likely to suffer from judge or jury mis-assessments of the aggregate character of the class, thus compounding the perceptual mis-assessments that are the product of the way in which only exceptional and thus unrepresentative verdicts are publicized, and even beyond the extent to which only unrepresentative disputes are litigated and only unrepresentative suits get to verdict without dismissal or settlement.

VI. ON CASE-BASED RULE-MAKING

On the basis of the foregoing, it may be tempting to perceive litigation itself as the problem, but in fact that is not so. Litigation does indeed present an example of the problem, but the problem – or at least the availability/unrepresentativeness problem – is one that comes with an over-emphasis on specific cases in the policy-making process, whether the policy originates in a court of law, an executive agency, or a legislature, and whether it is formal policy or simply a prescribed practice. Over-emphasis on unrepresentative specific cases in policy-making appears across a wide range of regulatory/rule-making institutions, and is hardly restricted to litigation-based policy-making.

A good indication of the increasing tendency towards case-driven ex ante rule-making is the proliferation of laws named after particular individuals, of which Megan's Law, requiring the registration with local authorities of released sex offenders, is perhaps the most famous. Megan's Law, first enacted by the California legislature and then copied in many other states, is hardly unique, however, and federal laws dealing with missing children and adults include Kristen's Act, Jennifer's Law, and Bryan's Law, while among the federal laws dealing with sex offenders are Aimee's Law, the Jacob Wetterling Crimes Against Children and Sex Offender Registration Act, and the Hillary J. Farias and Samantha Reid Date-Rape Drug Prevention Act. Although many of these laws deal with missing persons and sex offenders, there are also case-generated laws dealing with drunk driving, including the Burton H. Greene Memorial Act, with crime on campus, as with the federal Jeanne Clery Act and the Michael Minger Act in Kentucky, with physically abusive dating partners, the object of Idaho's Cassie's Law, with hit and run driving in Brian's Bill in Maryland, with conditions of release for violent offenders, exemplified by Jenna's Law in New York, and many others.

These and similar named bills were drafted in response to celebrity cases, many of them representing the extremes of the bad behavior that winds up being the subject of the law. The Brady Law, for example, is a prime piece of federal gun control legislation, and it is named after President Reagan's press secretary, severely and permanently injured by a bullet meant for the President. But although gun control is mostly targeted at professional criminals and domestic violence, it is the celebrity attack on President Reagan and the injury to James Brady that spurred the legislation. And although most of these laws were prompted by crimes committed against the particular victims whose names are now on the laws, New York's Son of Sam Law, after which many other state laws restricting profitable activities by convicted felons are named, draws its title from the nickname for David Berkowitz, the perpetrator of a particularly notorious series of murders in New York in the 1970s.

It is of course difficult to avoid feeling sympathy for the victims of horrendous crimes and for their families, and it is understandable that many of these families view a law targeted at the specific crime from which their loved ones suffered as a fitting and enduring memorial. Nevertheless, the more a law, of necessarily general application, is designed in view of a specific example or specific case, the more risk there is either that the problem that prompted the law is itself rare or that the law is designed to deal with cases resembling the prompting case even though the highly salient prompting case is in fact unrepresentative of the problems that the ensuing law will in fact cover. Legislators who enact such laws are thus engaged in a two-level game with their constituents. The legislators may recognize the case-based law as somewhat misdirected, but feel they have no choice but to respond to public outrage over a

heinous act, and a law enshrining a victim, even an uncharacteristic victim, is often the easy path to follow.

Even when a law is not prompted by a specific event, it has increasingly become part of the law-making process for legislative hearings to feature victims and case studies rather than experts on the relevant fields. Using vivid examples is of course a good rhetorical and persuasion strategy, and it is no surprise, for example, that President Obama's speeches about health care reform have invariably described at least several scenarios involving more or less worthy citizens who through no fault of their own have found themselves in health-care related difficulties due to absent or inadequate health insurance. But no public speaker of the President's caliber – o, indeed, well below his caliber -- is going to pick unsympathetic examples, even if the unsympathetic examples may in fact be more representative. Moreover, and most importantly, it is extremely unlikely that the ensuing legislation would fail to "solve" the problem for the exemplar individuals, even though any law and any policy will of course not solve every problem. By relying on specific examples in circumstances in which specific and possibly unrepresentative examples are made salient and thus dominate the process, legislation may increasingly resemble litigation in being beholden to the unrepresentative and distorting example.

VII. THE LESSONS TO BE LEARNED

In trying to draw together the lessons to be learned, a shadow metaphor may be useful, and may illustrate the ideal situation for case-based policy-making. The policy can be thought of as a light beam, and the case a specific object. The policy should apply to all situations that

fall directly in the shadow of the specific case, closely resembling the specific case in terms of the critical elements of some principle. The difficult, we have argued, is that salient cases tend to get exaggerated, and thus to case perceived shadows that are far larger than the real shadows created by a more careful extrapolation from any one case. The result is a policy applicable not merely in the actual shadow, but across a much broader range of situations, and where the lessons from the original case do not apply.

Thus it is not a case's actual shadow, but its penumbra, its space of partial but not complete illumination, that winds up defining policy. And because the danger is that a case-based policy will be applied to a case's penumbra and not just to its shadow, it can be useful to think of the area of misapplication as the *penumbra problem*.

We have argued that the availability heuristic is the principal cause of the penumbra problem. Because availability leads individuals to judge the frequency of an event by how readily one can bring an instance to mind, it influences the extrapolation process. When a case is easily brought to mind, as with a salient litigation instance or a prominent case that prompts legislation, the availability heuristic tells us that there is a tendency to overestimate its relevance, and thus to think it applies much more broadly than it does. When this happens, future events merely falling in the penumbra will be mistakenly treated as if they were directly in the case's shadow.

The problem of the penumbra is exacerbated when we encounter the phenomenon of the *celebrity case*. Some situations gain prominence because of media attention, sometimes because of their extreme and thus newsworthy facts, and sometimes because of the celebrity

of the people involved. Almost by definition, newsworthy events are outliers, and celebrities are unusual. Basing policy on celebrity cases thus typically assures that their shadow will cover relatively few situations, but celebrity cases, like real world celebrities, appear larger than life, and their shadows will be exaggerated.

Consider a recent celebrity case in that gained international publicity even though no crime was committed, few people were involved, no money was lost, and no physical injury was suffered. In July, 2009, Sergeant James Crowley of the Cambridge, Massachusetts, Police Department arrested Harvard Professor Henry Louis “Skip” Gates in his Cambridge home. Gates, an African-American and probably America’s leading professor of Afro-American studies, was, with the help of his driver, trying to force the door to his own house, which somehow had jammed. The two were reported by a passerby as possible burglars. Sergeant Crowley responded to the call, and series of misunderstandings and missteps ensued, with charges of racism and unruliness flying. As the encounter became increasingly angry, an enraged Gates was arrested for disorderly conduct. Ultimately, the charges were dropped, with the Cambridge mayor, the Massachusetts governor, and the President of the United States all getting involved.

Commentators of varying political stripes chimed in, including the aforementioned three political leaders, all African-Americans. The thrust of their comments was that this case provided an excellent learning opportunity for some of the most important lessons for achieving an effective and peaceful multi-racial society. So far so good, but the difficult was that different commentators tended (and intended) to draw extremely different lessons. To

some, the case illustrated the ever-present dangers of racial profiling, if even a small, neatly dressed, middle-aged, cane-carrying extremely distinguished Harvard professor could be subject to such an indignity in his own home. To others, however, the most important facts were that Sergeant Crowley was a highly respected police officer, known to go by the book, and known not only as not a racist, but as someone who taught courses to other officers about avoiding racial profiling. And thus many people understood the event not as an example of racial profiling, but rather as an elitist attack on a dedicated police officer, or a reflexive response by black leaders – including the President – who tended to see racism in every case of disagreement between people of different races.

The charges against Gates were dropped, and Gates dropped his threat to sue, so there will be no formal legal precedent from these events. Nevertheless, Cambridge has appointed a distinguished commission whose recommendations will surely influence future policy, quite possibly in the form of administrative edicts or city ordinances. And Gates has stated his intention to create a television series about racial profiling, this increasing the likelihood that the events will have a major influence on policy more broadly, and possibly on specific legislation.

Yet although the effects of this case are likely to be major, it is hard to imagine a more unrepresentative case to address the twin issues of racial profiling by the police and respect for the police in minority communities. Each of the two protagonists was an extraordinarily appealing and extreme outlier on his side of any conceivable profiling situation. Gates is a highly distinguished African-American whose profession and appearance are extremely

unthreatening. Crowley is a very well respected police officer as deeply engaged in combating racial profiling as any white officer. Moreover, the locale and circumstances of the arrest were highly unrepresentative of typical racial profiling situations. The police officer was legitimately responding to an act reasonably arousing suspicion, yet the professor was in his own home. And thus the case is far afield from the much more common occurrence in which a white police officer asks young blacks just hanging out to move along, or in which a black person driving in a white neighborhood is stopped on general suspicion, thus explaining the facetiously-named crime of “driving while black.”

In short, any policy that emerges from this celebrity case will be built on a highly unrepresentative foundation. That failing, we have argued, is common to most policies that are built on the salient cases that tend to be the basis for regulatory policy, whether that policy emerges from litigation, from legislation, or from action by an administrative agency.³⁴

Although the pressures of politics and the ever brighter spotlights of the media have increasingly caused ex ante rule-making, especially by legislatures and occasionally by administrative agencies, to be plagued by the pitfalls of the available but unrepresentative case, these pitfalls are more of an unfortunate tendency of some legislative and administrative policy-making processes than something that is endemic or necessary to the process. By contrast, however, litigation will always carry these risks, because having a real and present controversy between real parties is a defining feature of litigation. In this respect, therefore,

³⁴ We recognize the irony, apparent throughout this paper, of using available and potentially unrepresentative examples of unrepresentativeness to illustrate the problem of unrepresentativeness.

the problem of the distortingly available example is almost always a problem with regulation by litigation, but only sometimes – even if increasingly – a problem with ex ante rule-making.

Still, the lesson is not that litigation is inferior to ex ante rule-making as a regulatory strategy. Rather, it is that case-based regulation entails risks of regulatory mismatch between regulatory goals and regulatory targets wherever case-based regulation appears, and that it is as problematic when it influences legislative and executive policy-making as when it distorts the policy-making that is an inevitable part of the litigation process.

Our goal here, however, is not to compare the negative aspects of case-based policy-making to the various positive features that it may possess, or with which it may contingently be coupled. Litigation-based policy-making, for example, may occasionally or usually bring advantages of non-bureaucratization – private versus public regulation³⁵ -- that will outweigh the disadvantages that a case-based approach to policy-making entail. Litigation may also at times be a useful spur to agency-based or legislature-based ex ante rule-making.³⁶ But some forms of so-called regulation by litigation may avoid some of the desirable procedural

³⁵ See Steven Shavell, "Liability for Harm Versus Regulation for Safety," *Journal of Legal Studies*, vol. 13 (1984), pp. 357-74.

³⁶ Peter D. Jacobson & Kenneth E. Warner, "Litigation and Public Health Policy Making: The Case of Tobacco Control," *Journal of Health Politics, Policy and Law*, vol. 24 (1999), pp. 769-804. Lynn Mather, "Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation," *Law and Social Inquiry*, vol. 23 (1998), pp. 897-932; Wendy E. Wagner, "When All Else Fails: Regulating Risky Products Through Tort Litigation," *Georgetown Law Journal*, vol. 95 (2007), pp. 693-746.

constraints incorporated in congressional rules or the Administrative Procedure Act.³⁷ And regulation by litigation can at times be unnecessarily complex, costly, unpredictable, and lengthy.³⁸ Numerous other factors also incline one way or another in the litigation versus ex ante rule-making debate, and it is far from our aim to even survey all of those factors, let alone evaluate them in general or in the context of particular policy-making topics. In short, any cost-benefit analysis would have to tally many elements on the benefit and cost sides of the litigation and regulatory rule-making approaches. But we leave that tally to others.

Our conclusion, therefore, is not that regulation by litigation is superior to or inferior to regulation by ex ante rule-making. It is simply that case-based policy-making is, *ceteris paribus*, a risky strategy, and that any approach to regulation is less desirable insofar as it relies too heavily on potentially unrepresentative examples, and more desirable insofar as it avoids this problem. This paper has sought to identify one large negative factor. Determining which form of regulation is, all things including this factor considered, most desirable is a more ambitious goal than we have had for this paper.

³⁷ See Center for Regulatory Effectiveness “What is Regulation by Litigation,?” at www.thecre.com/regbylit/about.html.

³⁸ Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (New York: Oxford University Press, 2001).