

AN AESTHETIC DEFENSE OF THE NONPRECEDENTIAL  
OPINION: THE EASY CASES DEBATE IN THE WAKE  
OF THE 2007 AMENDMENTS TO THE FEDERAL RULES  
OF APPELLATE PROCEDURE

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*In this Article, I extol the virtues of the short, nonprecedential opinions (NPOs) that make up more than 80 percent of the output of the federal courts of appeals. The recent amendment to Federal Rule of Appellate Procedure 32.1(a), requiring that all circuits allow citation to NPOs, has provoked considerable debate about how, and whether, to issue written dispositions in the class of cases currently resolved by NPOs. I defend the issuance of NPOs not as a necessary concession to judicial overwork, but rather as a valuable decisional form that plays a useful if not vital role in inculcating in practitioners the perceptual faculties required to classify, analyze, and innovate within the cultural tradition of the common law. I identify certain features of NPOs that particularly foster this situation sense, and examine current circuit practices to develop a model of a pedagogically and aesthetically successful NPO.*

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## INTRODUCTION

Few observations about the federal courts of appeals are more certain than that the percentage of cases decided by precedential opinions published in the Federal Reporter is declining, and the percentage decided by unpublished, nonprecedential opinions (NPOs)<sup>1</sup> is increasing.<sup>2</sup> The proliferation of NPOs has been the cause of considerable academic

1. These opinions appear in a variety of forms and with a variety of names, depending on the circuit. Some are signed, some are per curiam; some are designated “opinions,” others “memorandum opinions,” others “orders,” others “summary orders.” I refer to these collectively as nonprecedential opinions (NPOs).

2. See ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL FACTS AND FIGURES, <http://www.uscourts.gov/judicialfactsfigures/2006/alljudicialfactsfigures.pdf> (last visited Jan. 25, 2008), for all the statistics mentioned in this note. While the total number of appeals increased from 40,893 in 1990, to 68,473 in 2005, *id.* at tbl.2.2, the number of published opinions has declined, not just as a percentage but also in absolute numbers. In 2005, there were 5499 published opinions issued by the federal courts of appeals (18.4 percent), and 24,411 unpublished opinions (81.6 percent). *Id.* at tbl.2.5. In 1990, by contrast, there were 6724 published opinions issued (32 percent), and 14,204 unpublished opinions (68 percent). *Id.*

The percentage and absolute number of cases argued orally has also declined. Looking at the year in the middle of this period, 1995, of the 27,772 cases disposed of on the merits, only 11,080 were argued (39.9 percent), as compared with 8645 out of 27,438 in 2004 (31.5 percent). *Id.* In 2005, the number of cases disposed of on the merits increased to 29,913, while the percentage of those cases in which argument was granted dropped again, to 9018 (30.1 percent). *Id.*

dismay, because they resolve cases without making law. Indeed, as of 2006, ten out of thirteen federal circuits placed restrictions on lawyers even acknowledging their existence by citing them in briefs.<sup>3</sup> Scholarly commentators on the jurisprudential and ontological status of NPOs generally agree that they are a disgrace—a furtive, dishonest body of secret law that betrays the ideal of democratic justice and the traditions of the common law.<sup>4</sup> Judges defend them, with occasional reservations, as a necessary (if unfortunate) response to an overwhelming caseload.<sup>5</sup> Practicing attorneys fall somewhere in the middle.<sup>6</sup>

But the anonymity of the NPO has now been undone, at least in one important respect. A new rule of federal appellate procedure, Rule 32.1(a),<sup>7</sup> has eliminated all NPO citation restrictions: The circuits must now allow unrestricted citation of all NPOs issued on or after January 1, 2007.<sup>8</sup> The sudden evaporation of citation restrictions has given new urgency to the question how courts should accord differing doctrinal weight<sup>9</sup> to their opinions—how, in other words, they ought to distinguish between easy and hard cases.

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3. See *infra* notes 148–152 and accompanying text (listing the circuits in each category).

4. See, e.g., David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1155 (2002) (“[I]t is fair to ask why taxpayers are paying for this prose if they cannot cite it . . .”).

5. For some examples of judges defending NPOs, see REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130 (1990); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. (1999); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 25 AM. U. L. REV. 909 (1986); Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This!*, CAL. LAW., June 2000, at 44. For some examples of judges expressing reservations, see Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995) [hereinafter Wald, *Rhetoric of Results*]; Patricia M. Wald, *Change of Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 500–02 (1986).

6. See ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., *CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS* 17–19 (2005).

7. FED. R. APP. P. 32.1(a).

8. Amended Federal Rule of Appellate Procedure 32.1(a) reads: “A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like, and (ii) issued on or after January 1, 2007.” *Id.*

9. I use this form of words to avoid the question of what, exactly, are the definitional and constitutional constraints on the concept of precedent. The most straightforward interpretation of the new rule is that while courts must allow parties to cite NPOs, they may decline to treat them as controlling authority. See Niketh Velamoor, *Proposed Federal Rule of Appellate Procedure 32.1 to Require That Circuits Allow Citation to Unpublished Opinions*, 41 HARV. J. ON LEGIS. 561 (2004) (criticizing that indeterminate or permissive approach and advocating a uniform national rule on the precedential status of NPOs).

The jurisprudential,<sup>10</sup> political,<sup>11</sup> equitable,<sup>12</sup> ethical,<sup>13</sup> and constitutional<sup>14</sup> issues raised by the use of NPOs have been amply evaluated in the literature, and it would be ironic indeed to commit, in an article on the NPO, the very sin of needless duplication that the NPO is designed to curtail. Most criticism of the NPO has focused on the circuits' no-citation rules.<sup>15</sup> But now the rules are gone, and they have left in their wake an

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10. Do NPOs contravene the tradition of evolving precedent that underlies our common law heritage? See, e.g., Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2d 17 (2000); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004).

11. See, e.g., David S. Law, *Judicial Ideology and the Decision to Publish: Voting and Publication Patterns in Ninth Circuit Asylum Cases*, 89 JUDICATURE 212 (2006) [hereinafter *Law, Judicial Ideology*]; David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817 (2005) [hereinafter *Law, Strategic Judicial Lawmaking*]; Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001); Donald R. Songer et al., *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 983 (1989).

12. For example (and this is obviously more than just an equitable concern), do NPOs allow for differing results on what should be relevantly similar facts? See, e.g., Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217 (2006) (comparing published and unpublished state-created danger cases and documenting significant "doctrinal inconsistencies").

13. See J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27, 33-34 (2005) ("The attorney's duty of candor to the court and the duty to uphold the integrity of the judicial system outweigh the duty to comply with local circuit rules barring citation of 'unpublished' legal authority.").

14. For example, are no-citation rules prior restraints on speech prohibited by the First Amendment? See, e.g., Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202 (2003). Does the issuance of NPOs violate Article III? See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) (finding an Article III violation), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) (declining to reach the issue of constitutionality); Arnold, *supra* note 5 (suggesting that they are violations); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 315-23 (2001) (same). Do no-citation rules deprive litigants of due process rights? See, e.g., Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional*, 50 U. KAN. L. REV. 195 (2001); Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001). Do no-citation rules violate the First Amendment's guarantee of the right to petition for redress of grievances? See, e.g., Katsh & Chachkes, *supra*, at 297-315 (arguing that no-citation rules violate the First Amendment).

15. See, e.g., David C. Vladek & Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1672 n.13 ("[O]ur main concern goes to circuit rules forbidding or discouraging even the citation of unpublished opinions. Many, but not all, of our concerns about the current publication practices of the courts would be addressed by the adoption of a rule, like that proposed by the Advisory Committee on

urgent and unresolved question: What remains of the formal and explicit classificational distinction between decisions that are straightforward instances of rule application (easy cases) and decisions that require expansion or refinement of legal rules (hard cases)? Prominent defenders of the NPO (notably, Ninth Circuit Judges Reinhardt and Kozinski) have asserted that without the no-citation rules, that distinction is pointless.<sup>16</sup> But I want to defend the distinction on aesthetic grounds,<sup>17</sup> as an important element in the development of the appellate corpus as an organic body of culture, and in the professional development of the judges, clerks, and practitioners who must sustain and superintend that body.

This defense involves three central propositions that overlap and build on one another. First, the classification of appellate decisions as precedential or nonprecedential (however labeled) tracks a real and important distinction in the structure and substance of those decisions. Second, the use of straightforward and articulable rules to produce generic cultural artifacts is widespread in and integral to the development of such cultural traditions as literature, music, and art, and the ability to recognize instances of rule following and rule breaking is a necessary condition of appreciating a particular cultural tradition. To the extent that there is a meaningful analogy between the reception of art by its target audience and the reception of law by the legal community, generic law may have some significant jurisprudential value. Third, the cultivation of a discriminatory eye for strong, weak, and uncertain claims—an integral part of appellate judging—is furthered by the evaluative signaling function of the NPO-precedential distinction. It may be that reading and writing NPOs helps develop the faculty of casuistry or situation sense that legal scholars have long identified as integral to good judging.

In making this argument, I rely on my own experience both as a U.S. court of appeals law clerk and as a trial and appellate attorney, on the major 2005 study by the Federal Judicial Center on the use of NPOs,<sup>18</sup> and, parenthetically, on analogies to other forms of cultural production: literature, music, and art. I think these analogies are worth pursuing, particularly when the subject is one as broad sweeping as the

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Appellate Rules of the United States Judicial Conference, forbidding circuits from imposing and enforcing no-citation prohibitions.”).

16. See generally Kozinski & Reinhardt, *supra* note 5.

17. By “aesthetic,” I certainly intend something more than pertaining to beauty. I think it reasonably self-evident that the goal of law is justice not beauty, and that beauty and justice are valuable independently of one another.

18. REAGAN ET AL., *supra* note 6.

institutional arrangements for the production and reception of the entire body of appellate case law.<sup>19</sup>

In Part I of this Article, I first identify the problem facing the circuits in the new Rule 32.1(a) environment: What should they do with their NPO docket? I then set out the academic criticism of the NPO as a jurisprudential category, and attempt to meet this criticism by reflecting on the sorts of cases that, in practice, typically give rise to NPOs and by asking what benefits might accrue to the legal community, the parties, or the public in general from various types of formal disposition of those cases. I identify some features of NPOs that are necessary conditions for such a beneficial function to be served, and I provide examples of NPOs that do and do not meet those conditions.

Then, in Part II, I conclude that NPOs can play a useful role in the life of the law—quite apart from whatever savings in time and paper they offer—because their production and dissemination contributes to the development of situation sense in the appellate bar: the ability to intuitively perceive the bounds of current doctrine, both its heartland and its margins. That situation sense is vital to the life of the law insofar as it facilitates both the internalization of legal norms (the “inside” virtue of practitioners) and the perceptual ability to spot points of doctrinal uncertainty, instability, and atavism (the “critical” virtue of academics). The radical critic, no less than the stolid bureaucrat, needs the easy-hard distinction.

## I. RULES AND NPOS: THE REALLY EASY CASES

### A. The Reality of Rules: The Indeterminacy Critique and NPOs

NPOs, by their own terms, do not make law; they simply point to already made law and explain to the parties that that law governs their dispute. NPOs apply only to the parties, are not published in the Federal

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19. In particular, I think if one looks closely at the hundreds of comments by judges and attorneys recorded by the Federal Judicial Center, *see id.*, one finds that these legal professionals (though couching their comments in instrumental terms) do have and rely on an inchoate sense of the body of law as an aesthetic object, by which I mean only that “the law” is something distinct from the sum total of all the official actions of legal authorities. Of course, I do not mean to summon the ghost of *Swift v. Tyson*, 41 U.S. 1 (1842), and I think most practicing lawyers understand the difference.

Though I suppose there remain those who reject, on principle, any attempt to analogize legal practice to other cultural realms, the comparison of law and literature (and the analogizing of one to the other) is a venerable legal endeavor—one that, if taken seriously, might make us all better lawyers.

Reporter, and, prior to January 2007, were subject in most federal courts of appeals to citation limitations restricting the extent to which other litigants could even mention them before the court. The theoretical justification for not putting NPOs in the Federal Reporter and denying them precedential status relies on two assumptions: first, that there really is such a thing as a “legal rule”; and, second, that some sort of evaluative and normative hierarchy is not only an inevitable but also a desirable feature of a coherent body of decisional law.

The Ninth Circuit’s criteria for publication of opinions are typical:

A written, reasoned disposition shall be designated as an OPINION only if it:

- (a) Establishes, alters, modifies or clarifies a rule of law, or
- (b) Calls attention to a rule of law which appears to have been generally overlooked, or
- (c) Criticizes existing law, or
- (d) Involves a legal or factual issue of unique interest or substantial public importance . . . .<sup>20</sup>

In the Ninth Circuit, roughly nine out of every ten written dispositions fail to make that cut, and are designated as unpublished, nonprecedential memoranda. This huge volume of quasi-case law could be safely ignored when citation could be prohibited by circuit-rule fiat. But the amendment of Rule 32.1(a) forces the easy cases debate to the fore of appellate practice. Now that unpublished dispositions can be freely cited, courts must reconsider exactly how they are going to dispose of those cases—the vast majority—that in the eyes of the panel are directly controlled by existing precedent.

The most straightforward option, which has been advocated by some commentators, is simply to equalize the jurisprudential status of all opinions: Every case should create precedent in precisely the same way.<sup>21</sup> Implementing this proposal would require that every opinion be published in the Federal Reporter and include a complete analysis of all the available authorities and arguments. This approach asks: How can you ever say of a precedent that it is “directly controlling”? The facts of every case are different, and so by making the decision that a prior ruling is squarely determinative of these facts, you are already making a legal judgment that necessarily changes the shape of the law by applying the rule to new facts.

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20. 9TH CIR. R. 36-2.

21. See, e.g., Drew R. Quitschau, Case Note, *Anastasoff v. United States: Uncertainty in the Eighth Circuit—Is There a Constitutional Right to Cite Unpublished Opinions?*, 54 ARK. L. REV. 847, 871–75 (2002).

We could call this option the critical legal studies (CLS) approach, borrowing as it does the existential critique of legal rules identified with the CLS movement of the 1980s.<sup>22</sup> On this critique, there is literally no such thing as a legal rule and no such thing as an easy case, where these terms are definitionally intertwined so that the former refers to abstract propositions of law that apply to particular fact patterns, and the latter refers to fact patterns to which such propositions apply. From the perspective of this critique, angst about the very idea of the NPO makes sense. If the distinction between propositions of law and fact patterns is denied, then so too is the possibility, even in theory, of applying law to fact. In the most extreme critical picture of the life of the law, law really is politics, because every legal act is, at root, *sui generis*—a bald assertion of political power.

Frederick Schauer summarizes the strong-form CLS position as follows:

[The assumption] that there are at least some cases in which the result flows almost inexorably from a relatively straightforward application of plainly applicable and identifiable legal rules contained in easily located preexisting legal materials. . . . is exactly what the Realists deny. In its more extreme versions, Realism would maintain that sufficient precedents, some conflicting and many intersecting at various angles, exist so that an appellate judge can rationalize from precedent or written law a result conceived prior to consultation of that precedent or law. Under this view, a judge's own moral, political, psychological, Oedipal, or intestinal predilections determine the result. The judge only constructs a post hoc legal justification for the nonlegally derived result in order not to affront the accepted myths of society, including the myth of the rule of law.<sup>23</sup>

Appellate judges, it is fair to say, are not likely to be sympathetic to this characterization of the decisional process, and thus are unlikely to rely on it in fashioning their responses to the new Rule 32.1(a).<sup>24</sup> And it likewise

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22. An excellent recent introduction to critical legal studies (CLS) ideas generally, and the "law is politics" view specifically, is the anthology, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3d ed. 1998). A good summary of the major themes of the movement, written during its height, is Owen M. Fiss, *The Death of the Law?*, 72 *CORNELL L. REV.* 1 (1986). Among the most influential early exemplars of the critical attack on the possibility of rule-based adjudication is Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563 (1982). Another oft-cited core text of the movement is Gary Peller, *The Metaphysics of American Law*, 73 *CAL. L. REV.* 1151 (1985).

23. Frederick Schauer, *Easy Cases*, 58 *S. CAL. L. REV.* 399, 410–11 (1985).

24. Judges do, however, occasionally make comments that at least tend in that direction. For example, Judge Posner has explained:

The way I approach a case as a judge . . . is first to ask myself what would be a reasonable, sensible result, as a lay person would understand it, and then, having answered that

may be doubted whether very many lawyers or commentators ever actually believed the strong-form no-rules position. When Paul Carrington, former dean of Duke Law School, lashed out at CLS professors for being “nihilists” who undermined legal professionalism,<sup>25</sup> for example, the professors responded that Carrington had misunderstood them. Stanford’s Robert Gordon observed that if Carrington’s proposed “loyalty oath” was “that law has an autonomous content, and therefore influences, channels, and restrains the exercise of power,” then “CLS people [could] take it cheerfully” because none of them thought that “law has no content.”<sup>26</sup>

What he *really* thought, said Gordon, is that the law has irreducibly contradictory content (apparently in every conceivable case).<sup>27</sup> This position is generally known as the indeterminacy critique, and most commentators concede that it has a fair degree of merit.<sup>28</sup> Applied to the debate over the future status of NPOs, the indeterminacy critique would hold not that prior case law could never “control” new fact patterns, but

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question, to ask whether that result is blocked by clear constitutional or statutory text, governing precedent, or any other conventional limitation on judicial discretion.

See Richard A. Posner & Philip B. Heymann, *The New Republic Online Debate: Tap Dancing*, NEW REPUBLIC ONLINE, Jan. 31, 2006, <http://www.law.harvard.edu/programs/criminal-justice/posner-heyman-debate.pdf>, quoted in Posting of Brian Tamanaha to Balkinization, Judge Posner’s Seductive Realism and Pragmatic Adjudication—Beware the Pied Piper, <http://balkin.blogspot.com/2006/12/judge-posners-seductive-realism-and.html> (Dec. 4, 2006, 10:27); see also Audio recording: Debate between Richard Posner and Brian Leiter, University of Chicago Law School (Nov. 16, 2006), available at [http://uchicagolaw.typepad.com/faculty/2006/11/what\\_do\\_and\\_wha.html](http://uchicagolaw.typepad.com/faculty/2006/11/what_do_and_wha.html) (discussing pragmatic adjudication at length). And note that this approach still relies on the existence (at least in theory) of some real, identifiable barriers—legal rules—that might prevent a certain result in a certain case.

25. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

26. Letter from Robert W. Gordon, Professor, Stanford Law Sch., to Paul D. Carrington, Dean, Duke Law Sch., reprinted in Peter W. Martin, “Of Law and the River,” and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 2–9 (1985) (internal quotation marks omitted).

27. See *id.* Parenthetically, I wonder how much practical difference there is between the proposition avowed and the proposition disavowed, and, more emphatically, whether Gordon actually would defend his claim for every single legal dispute.

28. I can certainly understand the indeterminacy critique as applied to contract law, substantive due process, and standing. Contract law is the mother’s milk of CLS, and with good reason. In my view, the best CLS work is by scholars who have paid minute attention to the doctrinal shifts of contract law. One excellent example is Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985). For an example of the indeterminacy critique as applied to substantive due process, see generally Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1383 (1984), and, in particular, *id.* at 1364–70 (discussing abortion rights specifically). Cass Sunstein applies the indeterminacy critique to standing in his capsule history of the meandering course of the injury-in-fact requirement, which he thinks is a disguised substantive due process doctrine, at least in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 168–85 (1992).

rather than it “controls” fact patterns in multiple ways.<sup>29</sup> Because, on this view, prior case law can always serve as authority for either of two opposite outcomes in any given case, every case is precisely as hard as every other, and precisely as governed.

That is what, in theory, one could say about NPOs, because the indeterminacy critique necessarily applies, by its own terms, to every case, without exception. But should one? The numerous articles debating the indeterminacy critique and hashing out the easy cases debate derived therefrom do not, so far as I am aware, ever analyze or even mention NPOs or the sorts of cases that give rise to them. But the critique of the NPO as a jurisprudential category is premised on the basic CLS critique of rules: If judges can never fairly and accurately apply existing legal rules to clearly covered fact patterns, then the NPO, as a legal category, is fundamentally dishonest.

It is unfortunate that the theoretical debate over the reality of rules did not engage, from the outset, with the circuits’ practice of issuing NPOs. It could have. The conference that inaugurated the CLS movement occurred in 1977,<sup>30</sup> just as the first generation of no-citation rules began to attract the attention of the bar and the legal academy.<sup>31</sup> But, for perhaps understandable reasons,<sup>32</sup> the putative easy cases over which CLS scholars and their critics battled were cherry-picked, indeed rather blatantly so, from the universe of interestingly hard classroom examples.<sup>33</sup> There is, to be sure, an important truth to the indeterminacy critique when the universe of case law is restricted to, say, Establishment Clause cases decided in the U.S. Supreme Court. But none of the many eloquent defenses of variant CLS positions are addressed to the sorts of fact patterns most NPOs actually present, such as judicial review of executive

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29. I put “control” in quotation marks to query whether the word retains its traditional (or any) meaning when thus used.

30. See Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 461, 461 n.1 (1984) (“[T]he Conference on Critical Legal Studies . . . was founded at a meeting in Madison, Wisconsin in 1977.”).

31. See REAGAN ET AL., *supra* note 6, at 2 (explaining that after the Judicial Conference authorized selective nonpublication in 1964, the circuits began developing local rules, and that “[t]he issue of whether unpublished opinions could be cited arose in the 1970s when federal courts of appeals developed plans for selective publication of their opinions”).

32. Legal theorists looking for a wide audience are more apt to talk about the U.S. Constitution, after all, than about, for example, the substantial evidence standard of review under the Immigration and Nationality Act.

33. Some examples from constitutional law are: How many senators must there be? How old must the president be? What does “natural born” mean? And, for contract law, what does “unconscionable” mean?

agencies' factual determinations.<sup>34</sup> And the more such cases one works on, the more one is tempted to say that in most of them, while the losing party can always utter the words (for example), "the decision was not grounded in substantial evidence in the record," that does not mean that reasonable people are likely to have a good-faith disagreement about whether that is true.<sup>35</sup>

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34. The extent of the academic insulation from the truly easy cases that comprise so much of circuits' dockets is manifested in the CLS easy cases debate of the 1980s, in which several scholars took as their easy case model the constitutional provision that the president must be at least thirty-five years old. Then others found reasons to make application of the rule hard. See, e.g., Peller, *supra* note 22, at 1174; see also, e.g., Schauer, *supra* note 23, at 420 (applying a similar argument to the two-term limit on the presidency). But no court would possibly treat any first impression case about the interpretation of a hitherto unlitigated constitutional provision as an easy case! Of course it is going to be hard in important respects—separation of powers concerns and the political question doctrine—and it certainly would be argued and published.

No, the truly easy cases are the ones in which, to take one example, the courts review factual determinations by executive branch agencies under extremely deferential standards of review established by longstanding statutes subject to controlling U.S. Supreme Court interpretations. Some of those cases do turn out to be hard; but most do not, in any honest application of that term. As Robin West has pointed out, it is a mistake to assume that constitutional interpretation is an appropriate template for modeling all applications of law to the world. Constitutional interpretation, she argues, may

owe as much to the nontextual and nonlegal attributes of the Constitution, as to its textual and legal functions and contours. We should not falsely generalize from those conversations to the conclusion that what is true of constitutional interpretive dialogue must be true of the interpretive debates over the meaning of all laws . . .

Robin L. West, *Are There Nothing but Texts in This Class? Interpreting the Interpretive Turns in Legal Thought*, 76 CHI.-KENT L. REV. 1125, 1146–47 (2000).

35. In my view, the indeterminacy critique is based on a mistaken analogy to the formal incompleteness of mathematics. That an inferential system is incomplete simply means that there is always at least one true proposition that is unprovable because its proof would also entail proof of its negation. This seems to be what Robert Gordon is getting at, and what, for example, Mark Tushnet is suggesting about abortion rights. See Martin, *supra* note 26, at 2; Tushnet, *supra* note 28, at 1364–70. But the incompleteness of mathematics does not call into question the result of every single mathematical calculation, nor does it diminish the usefulness or the accuracy of mathematics as a whole. To identify one particular case or class of cases for which the law provides contradictory commands is not to have said anything at all about the possibility of resolving the bulk of legal disputes according to legal rules in an essentially uncontroversial way. From the observation that the rules are sometimes indeterminate upon good-faith application, it just does not follow that they always are. Mathematical incompleteness was scary to theorists like Bertrand Russell, see generally RAY MONK, BERTRAND RUSSELL: THE GHOST OF MADNESS, 1921–1970 (2001), because mathematics was thought to be a single, coherent, crystalline system in a sense that presumably no one, not even Christopher Langdell, would have applied to the law.

The interdisciplinary temptations in legal scholarship are such that there is a fair body of work assessing the implications of mathematical incompleteness for legal theory in general, and the CLS critique in particular. See, e.g., Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Mathematics*,

If such cases are subject to any version of the indeterminacy critique, it will be only the weak or modal version, which holds that legal rules, though in fact determinate in particular cases, are indeterminate in theory because there are logically consistent possible worlds in which other rules were promulgated.<sup>36</sup> This modal version of the indeterminacy critique says, in other words, that when a court undertakes the formulation of a legal rule to cover a particular set of facts, there are typically multiple possible forms the rule could take. It does not say, however, that once the rule has in fact been formulated, at least some subsequent fact patterns cannot meaningfully be held to be governed by the rule. This position is dramatically more limited in its consequences than is the extreme position that rules never decide cases—unless, that is, we are thinking only about, say, the Supreme Court’s docket, in which more or less every case exemplifies the formulation of a new rule, or about the

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43 HASTINGS L.J. 1439 (1992); Mike Townsend, *Implications of Foundational Crises in Mathematics: A Case Study in Interdisciplinary Legal Research*, 71 WASH. L. REV. 51 (1996).

Mark Brown and Andrew Greenberg provide a good summary of the various putative applications of Gödel to legal theory, so I will not do so here, besides concurring with the assessment of Robert Birmingham, who observes that the “lay reader of logic is unequipped to understand the incompleteness theorems. I carried my dog to contracts class until I conceded that she could not keep up.” Robert Birmingham, *Calculations*, 30 CONN. L. REV. 1019, 1020 (1998) (reviewing JOHN W. DAWSON, JR., *LOGICAL DILEMMAS: THE LIFE AND WORK OF KURT GÖDEL* (1998)).

I have seen firsthand the ease with which Gödel’s Theorem can transmogrify into sweeping mistrust of the very possibility of reliable inference. I taught symbolic logic for years and often, at the end of the semester, I introduced the concept of incompleteness to classrooms full of young people emotionally primed to seize on any available fulcrum with which to unseat whatever political, religious, or sexual norms they had come to find unbearably confining. This is not an unhealthy impulse, but I think it is somewhat less well suited to the law, at least in its more transcendent manifestations.

36. See, e.g., Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 125 (1984). Joseph Singer, characterizing at least one version of the indeterminacy critique, explains:

Legal doctrines are always potentially indeterminate. Judges can move the line between rules and exceptions, or create new exceptions. They can nullify the application of a rule to a particular case by widening a legally enforceable standard so far that it eclipses the apparently applicable rule. Ultimately, judges always have the power to revise the rules. [However, the fact] that judges may do these things . . . does not mean they will do them. Because judges participate in a legal culture that suggests how they are to act as judges, we can often predict how they will act.

Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 22 (1984). Lawrence Solum, noting the extreme weakening of the indeterminacy critique entailed by its reformulation in terms of modal logic, observes that if that is all indeterminacy means, then “the truth about indeterminacy is different from that implied by most, if not all, formulations of the indeterminacy thesis in critical legal scholarship. These versions of indeterminacy will seldom, if ever, make a practical difference to the parties to a dispute.” Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 495 (1987).

precedential circuit cases that make it into the casebooks (and blogs and newspapers and water-cooler conversations).<sup>37</sup>

I agree that at least some version of the indeterminacy critique applies to at least some of the circuits' precedential decisions. I want to insist, though, first, that it does not apply to all circuit cases; second, that the NPO-precedential distinction tracks, and signals, the distinction between determinate and indeterminate cases; and third, that preserving an explicit category distinction between the determined and the underdetermined<sup>38</sup> cases helps judges, clerks, and the appellate bar learn to tell the difference between them.

The indeterminacy critique may, at the end of the day,<sup>39</sup> be something like Kant's doctrine of perfect metaphysical freedom<sup>40</sup>: You may struggle to apply the doctrine to all your moral judgments, but you just cannot—your actual moral judgments just do not fall in line the way they should, despite your best efforts.<sup>41</sup> Thomas Nagel summed up that feeling nicely: “We may be persuaded that these [un-Kantian] moral judgments are irrational, but they reappear involuntarily as soon as the argument is over.”<sup>42</sup> So it may be with indeterminacy, at least in its strong form. One can believe it at some times and in some places, but a prolonged exposure to the actual world of NPO fact patterns forces it involuntarily and irresistibly from one's mind.

My view, as a lawyer, is that practicing law entails some minimum acknowledgment of the theoretical existence and separability of rules and facts. And, in fact, the available evidence<sup>43</sup> seems to indicate that most practicing lawyers believe that there exists a real class of cases for which

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37. See, e.g., Solum, *supra* note 36, at 497. Solum points out that most CLS professors either went “straight from attending a law school to teaching at one,” or “possibly [did] a brief stint as a clerk for a federal appellate judge.” *Id.* at 496. This is true enough, though I think that appellate clerkships probably moderate more indeterminacy enthusiasm than they stoke.

38. See *id.* at 473 (“The law is *underdeterminate* with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.”).

39. And I recognize that it is very late in the day for me to be writing about it now, thirty years after the inaugural CLS conference. I do so only as background to my real subject, to which I now turn: NPOs as they actually exist in our appellate jurisprudence.

40. Kant thought that “ought” must imply “can,” so that it would never occur that a person would have a moral obligation that circumstances barred him from meeting. See IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 63–79 (Allen W. Wood ed. and trans., Yale Univ. Press 2002) (1785).

41. *Id.*

42. THOMAS NAGEL, *MORTAL QUESTIONS* 33 (1979).

43. See REAGAN ET AL., *supra* note 6. The study's conclusions are borne out by reflection on the types of legal and factual settings in which NPOs typically arise.

it is true, first, that the facts are governed by an existing rule, and second, that application of that rule to those facts does not result in a material alteration of the rule.

#### B. The Structure of NPOs

An NPO, for our purposes here, is a short opinion issued by an appellate court resolving a case on the basis of an obviously governing legal rule. The best NPOs are models of concision, understatement, and modesty, reminiscent of Japanese brush drawings in which the artist uses only three or four strokes, but a cat, for example, immediately leaps off the page.<sup>44</sup> The aesthetic ideal is to employ just enough strokes to convey a cat (and only a cat), but no more. The worst NPOs, by contrast, fail to convey the cat: They do not present sufficient information to allow any meaningful connection to be drawn between law and fact. They do not explain themselves, and, as a result, they justly earn whatever opprobrium they draw. However, while some circuits, for example, the Fourth, write particularly bad (uninformative) NPOs, others, such as the Third, write particularly good (informative) ones.

NPOs observe a particular structure: An NPO first identifies the issue and recites the governing rule supported by a citation to a single precedential case that states that rule precisely. The NPO then summarizes the facts of the case that implicate the rule. Of course, the issue-rule-fact trinity is present in all judicial opinions. However, absent from NPOs are a number of features common to precedential opinions, including articulation of rules synthesized from the holdings of several prior cases, explanation of the justification for the holding in a prior precedential case, exploration of the rules of other circuits, discussion of legislative history or other persuasive background authority, citation to secondary sources, broad hortatory statements of principle, literary quotations, and weighing of countervailing authorities. The main structural distinction is that while a precedential decision typically must synthesize, restate, extend, clarify, or otherwise explain the source of the governing legal rule it applies, an NPO applies a known rule whose meaning, scope, and applicability are not in doubt.

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44. The archetypal practitioner of this form is probably the eighteenth-century master Ike Taiga. See FELICE FISCHER WITH KYOKO KINOSHITA, IKE TAIGA AND TOKUYAMA GYOKURAN: JAPANESE MASTERS OF THE BRUSH (2007) (exhibition catalog).

A useful NPO, then, is one that tells the reader the following information: (1) that the panel thought this was an easy case; (2) what legal issue is presented; (3) what legal rule is controlling; (4) where that rule is stated in a precedential case; and (5) what facts in the record implicate that rule. These could be thought of as minimally sufficient conditions for a case's successful integration into the body of precedent. Without these elements, no one learns anything about the law from the disposition of the case, and no one can challenge that disposition on grounds internal to the court's reasoning. And it is precisely the fact that judicial opinions make clear the governing law and open themselves up to criticism of that law that distinguishes them from discretionary executive actions. Every judicial opinion carries within it the seed of its own reversal; NPOs should be no exception. If we concede that there is absolutely no reason why every NPO should not successfully perform these functions, then we should agree that courts are justly criticized for issuing one-sentence per curiams that lack all of the features listed above. But this is not a criticism of the NPO as such, but simply of sloppy judicial practice.

### C. The Factual and Legal Setting of NPOs

The Rule 32.1(a) amendments have forced on us the revivification of the easy cases debate in precisely the jurisprudential context in which it should have been carried on from the outset. Two categories of cases that are resolved, the vast majority of the time, through NPOs—petitions for review of government denials of asylum applications, and direct appeals of criminal sentences that were imposed under the pre-*Booker*<sup>45</sup> mandatory guidelines regime—seem to be, in most instances, clearly not indeterminate. In such cases, legal practitioners acting in good faith likely will not find genuine grounds for disagreement about the meaning of the decisional materials relevant to the outcome.

#### 1. Asylum Cases

Among the most common NPOs are appeals from asylum claims denied by the Board of Immigration Appeals (BIA). The claims are purely statutory, and the relevant statutory language has been interpreted in detail in precedential opinions. An immigrant is eligible for a grant of asylum if she demonstrates a well-founded fear that she will be subject

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45. *United States v. Booker*, 543 U.S. 220 (2005).

to persecution if deported to her home country. “Persecution” means severe ill-treatment by a government (or aligned or uncontrolled private forces) for one of the statutorily enumerated reasons—race, nationality, religion, political opinion, and social group.<sup>46</sup> “Well-founded” means that the immigrant’s story has to be credible and roughly consonant with available background information about the country.<sup>47</sup> An immigrant seeking asylum makes his or her case to an immigration judge (IJ), who is an executive branch officer, and, if necessary, can appeal first to the BIA, also within the executive branch, and then to an Article III court of appeals.<sup>48</sup>

a. Adverse Credibility Determinations

The most common reason for denial of asylum claims is that the immigration judge finds the immigrant’s story to be not credible. The statute provides specific grounds on which an adverse credibility determination can be made,<sup>49</sup> and the standard of review is extremely deferential: “[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”<sup>50</sup>

The typical basis for an adverse credibility determination is the existence of discrepancies between an immigrant’s story as told in his or her asylum application and the story as told at the hearing before the IJ.<sup>51</sup> The theory is that a truthful story ought to be same each time it is told. But of course we do not insist on verbatim narratives; some amount of discrepancy is inevitable between any two retellings (particularly when they are years apart). So courts apply the following rule: Adverse credibility determinations must be specifically grounded in the record and

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46. See 8 U.S.C. § 1101(a)(42)(A) (2000); *Navas v. INS*, 217 F.3d 646, 655 & n.9, 656 & n.10 (2000).

47. See, e.g., *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002).

48. See, e.g., *id.* at 271 (explaining the standard of review).

49. See 8 U.S.C. § 1158(b)(1)(B)(iii).

50. *Id.* § 1252(b)(4)(B); see also *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) (interpreting the former governing statute to articulate the same standard of review).

51. Prior to 2005, courts construed the governing statute to require that the discrepancy “go to the heart” of the story—in other words, that it relate to some aspect of the story that could be dispositive of the claim. See, e.g., *Valderrama v. INS*, 260 F.3d 1083, 1085 (9th Cir. 2001). But the U.S. Congress amended the statute in 2005 so that now any discrepancy will suffice. See Real ID Act of 2005 § 101(a)(3), 8 U.S.C. § 1158(b)(1)(B)(iii) (Supp. 2005) (“[A] trier of fact may base a credibility determination . . . without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of applicant’s claim . . .”).

must not be based on trivial discrepancies.<sup>52</sup> If they are adequately grounded, for example, in specific discrepancies between the application and the hearing testimony, then asylum denials will be upheld.

In most cases, this rule is not that difficult to apply: The IJ specifies the points of discrepancy and the reviewing court examines the record. The substance of the legal standard—Would a reasonable factfinder be compelled to find the story credible?—is generally not materially altered by individual applications of it.<sup>53</sup> To be sure, substantial evidence review is not mechanical. Instead, it relies on the cultivation of a discriminatory eye by judges and clerks who have to sort the problem cases from the easy ones. And, the only way to cultivate that sense of discrimination is to read lots and lots of asylum cases. In reading those cases, one of the most useful pieces of information is whether the panel responsible for a given decision thought that the case was routine or difficult—and the clearest signal of that is the opinion’s classification as NPO or precedential.

Some adverse credibility cases are indeed difficult and do change the contours of the rule, giving greater specificity to the concept of reasonableness on which it relies. New immigration precedents are published all the time, including adverse credibility determination cases.<sup>54</sup> But this fact does not negate the additional fact that most adverse credibility determinations are not controversial. There are two obvious reasons for this. First, BIA decisions are appealable as of right in the circuit courts, and assuming an immigrant can pay for a lawyer, there is no reason not to appeal an asylum denial, because the result of losing on appeal is the same

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52. *Gao*, 299 F.3d at 272 (“Generally minor inconsistencies and minor admissions that reveal nothing about an asylum applicant’s fear for his safety are not an adequate basis for an adverse credibility finding.” (citations omitted) (internal quotation marks omitted)).

53. You can always insist that every time a rule is applied the rule itself is changed; the rule is nothing but the sum of its applications; it’s a Heraclitean river, etc. But do you really believe that? Did Heraclitus? I doubt it. I imagine that when he sent his slave down to the river to get some water he identified the river by name and expected that the water would be in relevant respects identical to the previous day’s water, or close enough to be worth drinking. Most of the time, in my observation, when people quote Heraclitus on rivers, they are not serious.

54. For example, which iterations of an applicant’s story may the immigration judge (IJ) comb through in search of discrepancies? A typical asylum applicant has filled out a formal application that contains a written narration of the relevant events. The applicant must then testify orally before the IJ, who will often use the application to try to trap the applicant by quizzing him or her on details. Some applicants were also interviewed upon arrival at U.S. airports by immigration agents. Should these airport interviews be thrown into the mix? The answer to that question changes the scope of the underlying rule, and so, when that question arises, the opinions are published, generally holding that airport interviews should not be used against applicants. See, e.g., *Singh v. INS*, 292 F.3d 1017, 1021–24 (9th Cir. 2002); *Balasubramaniam v. INS*, 143 F.3d 157, 163 (3d Cir. 1998).

as not appealing. Second, the substantial evidence standard of review, which appellate courts apply in the bulk of asylum appeals, is in essence simply an appeal to the good sense of the reviewing court: Could a reasonable person find otherwise?<sup>55</sup> In the vast majority of these cases, the court affirms the adverse credibility determination on the basis of the discrepancies noted by the IJ.<sup>56</sup>

In most adverse credibility cases, then, no legal analysis is required beyond identification of the standard of review and the evidentiary discrepancies. Such opinions serve a useful signaling function by identifying situations in which the standard for affirming an asylum denial is clearly met. But to serve that function, the opinion must, at a minimum, identify the applicable rule (the governing precedential opinion) and the specific factual findings that implicate that rule.

Here are two NPOs from the Fourth Circuit that manifestly fail to serve any meaningful signaling function. First: “We find substantial evidence supports the immigration judge’s findings that Zetchem was not

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55. Existing published case law sets some negative conditions on reasonableness: It cannot be, for example, conjecture, speculation, or stereotype. See, e.g., *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003) (“If the IJ’s conclusion is not based on a specific, cogent reason, but, instead, is based on speculation, conjecture, or an otherwise unsupported personal opinion, we will not uphold it because it will not have been supported by such relevant evidence as a reasonable mind would find adequate.”); see also, e.g., *Kaur v. Ashcroft*, 379 F.3d 876, 887 (9th Cir. 2004) (rejecting an adverse credibility determination based on the IJ’s “personal conjecture” that Indian passport officials would never misalign a signature card when gluing it onto a passport); *Berishaj v. Ashcroft*, 378 F.3d 314, 324–25 (3d Cir. 2004) (rejecting an adverse credibility determination based on the IJ’s assumptions about, inter alia, how long it would take an Albanian speaker to learn Serbian, and whether the Serbian army would issue weapons to Albanian conscripts); *Singh v. INS*, 292 F.3d 1017, 1024 (9th Cir. 2002) (rejecting an adverse credibility determination based on the IJ’s “assumptions about what the motives of the police should have been” when the applicant was arrested); *Gui v. INS*, 280 F.3d 1217, 1226 (9th Cir. 2002) (rejecting an adverse credibility determination based on the “IJ’s own opinions as to how best to silence a dissident”).

Of course, one might well wonder, then, why, if the legal standard is so readily applicable, one sees patterns such as this: In the Ninth Circuit, Judge Reinhardt votes for the immigrant in 62 percent of asylum cases, while his colleague Judge Wallace votes for the immigrant in only 4 percent of asylum cases. Law, *Judicial Ideology*, *supra* note 11, at 215. The median among the Ninth Circuit judges is 15 percent, with only four judges of forty granting asylum in over 30 percent of the cases; the top three judges, at 45 percent, 50 percent, and 62 percent, are clearly outliers. *Id.* The answer is that a wide spectrum of results fit the reasonable classification, and writing more precedential opinions on the meaning of substantial evidence is probably not going to clarify the standard any further. The statute and the case law hand a wide degree of discretion to judges; the fact that they exercise that discretion in measurably different ways does not signify that the law’s meaning changes with each particular discretionary application of it.

56. See, e.g., *Shadhat v. Gonzales*, 182 F. App’x 704 (9th Cir. 2006) (upholding the IJ’s finding that the immigrant’s claim of a knife attack by government supporters was contradicted by the medical report he submitted from his own doctor).

credible and she failed to provide reliable corroborative evidence supporting her claim.”<sup>57</sup> Second: “We have reviewed the evidence of record and conclude that Theinkeu-Donfack fails to show that the evidence compels a contrary result.”<sup>58</sup> The quoted sentences are the sum total of legal analysis in those cases.

Such opinions are, in a word, appalling. Presumably, it is opinions like these that Judge Wald had in mind when she characterized the decision to issue an NPO as a statement that “[y]ou never had a real chance, and we have gone through the least possible trouble to tell you why.”<sup>59</sup> Such meager opinions can serve no useful signaling function because they fail to tell us what in the record the panel examined and found decisive. This omission is especially problematic in the asylum context, given that the legal rule controlling these cases is that an adverse credibility determination must be upheld unless no reasonable factfinder could fail to find the story credible. The issue—for the parties, other litigants, the bar, the public, legislatures, repressive foreign regimes, or anyone with an interest in the state of U.S. asylum law—is precisely what sorts of factual discrepancies in an immigrant’s story can permissibly be deemed to invalidate asylum claims. If asylum NPOs are to be a part of asylum law in any meaningful sense, they must tell us what discrepancies or implausibilities the immigrants’ stories involved.

An example of a better NPO comes from the Ninth Circuit, which, like the Fourth, is notable for the brevity of its NPOs. I have reproduced the opinion in full, including the “memorandum” designation and the no-citation disclaimer.

MEMORANDUM\*\*

Artur Blbulyan, a native and citizen of Armenia, petitions pro se for review of the Board of Immigration Appeals’ decision affirming an immigration judge’s order denying asylum. We have jurisdiction under 8 U.S.C. § 1252. We review for substantial evidence, *Li v. Ashcroft*, 378 F.3d 959, 962 (9th Cir. 2004), and we deny the petition for review.

Blbulyan offered inconsistent evidence regarding when his schoolmates attacked him, when he was conscripted, the circumstances of his conscription, the injuries he suffered during a serious assault while in the military, and the identity of his parents.

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57. *Zetchem v. Gonzales*, 184 F. App’x 332, 333 (4th Cir. 2006).

58. *Theinkeu-Donfack v. Gonzales*, 182 F. App’x 172, 172 (4th Cir. 2006).

59. Wald, *Rhetoric of Results*, *supra* note 5, at 1373.

Substantial evidence therefore supports the adverse credibility finding.  
*See id.* at 962–64.

PETITION FOR REVIEW DENIED.

\*\*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.<sup>60</sup>

This opinion exemplifies the generic NPO structure. The reader is signaled from the very first lines that this case expresses and instantiates a clear legal rule: “Memorandum” is the Ninth Circuit’s term for NPO, and the disclaimer, some form of which accompanies NPOs from every circuit, emphasizes that the panel saw nothing in the case that required clarification, elaboration, or innovation. One then looks for the issue—the credibility of an asylum applicant. Next, one looks for the source of the controlling rule, which will be a citation to a precedential opinion—the *Li* case. Finally, one looks for an application of the rule to the facts of the case, which is a list of the claims about which the asylum seeker’s evidence was inconsistent. Whatever the holding was in *Li*, then, this panel thought that it obviously and straightforwardly covered these facts.

The reader may then turn to *Li* for a complete statement of the governing rule. *Li* turns out to have been a forcible sterilization claim (a common category of asylum cases involving Chinese immigrants), in which the primary inconsistency supporting the adverse credibility determination was Li’s failure to mention the most significant allegation—that his wife had been forcibly sterilized—in three successive asylum applications.<sup>61</sup>

So the *Blbluyan* NPO tells us that the panel thought *Blbluyan* was like *Li*. But the *Blbluyan* NPO falls short in one significant respect: The reader is not told the nature of the inconsistent evidence *Blbluyan* presented. Did he, like *Li*, fail to mention significant events in his asylum application? Or, did he describe the incidents, but do so in inconsistent ways? This sort of narrative omission is, unfortunately, not uncommon in NPOs, and it significantly undermines their jurisprudential utility. We must be told, even briefly, how *Blbluyan* resembled *Li*, or else the opinion does not advance our ability to apply the *Li* rule in future cases.

For NPOs to serve their aesthetic, pedagogical, or developmental function, in short, they must provide sufficient information for a meaningful connection to be drawn—in the writer’s mind as well as the reader’s—between a rule of law and a set of facts. Providing that information is

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60. *Blbluyan v. Gonzales*, 181 F. App’x 681, 681–82 (9th Cir. 2006).

61. *Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004).

typically not an onerous task, and it requires hardly any additional verbiage. Indeed, a single sentence will usually do the trick; for example, “The IJ found Lin not to be credible because he failed to mention in his three asylum applications and his first supplemental statement that his wife was allegedly forced to undergo an abortion.”<sup>62</sup>

The best NPOs tie the rule and the facts together with sufficient specificity to allow readers to understand exactly why the rule applies. One good adverse credibility NPO from the Third Circuit provides, in relevant part:

Inconsistencies between the asylum application and hearing testimony can support an IJ’s adverse credibility finding. *See, e.g., Xin Jie Xie v. Ashcroft*, 359 F.3d 239, 243 (3d Cir. 2004). The IJ concluded Zheng’s testimony was inconsistent with her asylum application. For example, Zheng testified her mother had been forcibly sterilized. In assessing her credibility, the IJ found Zheng’s failure to mention this purported forced sterilization in her asylum application significant. Because Zheng claims her fear of future sterilization is based on her mother’s purported history of forced sterilization (for having too many children), her failure to mention this in her application is an important inconsistency. *Id.* (“One of the principal inconsistencies and omissions discussed by the BIA as supporting the IJ’s finding of lack of credibility was Xie’s failure to mention in his written asylum application that his wife had been sterilized.”)<sup>63</sup>

Here, we get a statement of the rule, a citation to the precedential opinion in which it can be found, and more than a conclusory application of the rule. *Xie*, the precedential opinion supplying the rule, is just like the *Li* opinion cited by the Ninth Circuit, in that it involved an asylum applicant who alleged that his wife had been forcibly sterilized, but who had not mentioned that event in his written asylum application.<sup>64</sup> The Third Circuit, though, unlike the Ninth and the Fourth, tells us in the NPO exactly what the specific inconsistent statements were in the case before it, and exactly what rule in the precedential opinion it finds controlling.

The jurisprudentially useful feature of a well-crafted NPO is its unambiguous statement that the rule it is applying is clear in its meaning and application. All together, the mass of adverse credibility NPOs tells us that the effect on asylum claims of inconsistencies between written asylum applications and hearing testimony is a reasonably settled area of law. If an asylum seeker raises a significant claim of persecution that she

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62. *Guo Fu Lin v. U.S. Att’y Gen.*, 177 F. App’x 150, 151 (2d Cir. 2006).

63. *Mei Rong Zheng v. Gonzales*, 181 F. App’x 279, 281 (3d Cir. 2006).

64. *Xin Jie Xie v. Ashcroft*, 359 F.3d 239 (3d Cir. 2004).

did not mention on her initial written application, that discrepancy will support an adverse credibility finding.<sup>65</sup>

b. The 1998 Indonesian Riots

In 1998, Indonesia experienced a wave of rioting and sporadic street violence directed at ethnic Chinese Indonesians, who are generally not Muslim.<sup>66</sup> Ethnic and religious discrimination and violence are facts of life in Indonesia, which has long struggled to maintain a secular civil society in the face of extraordinary racial, religious, and linguistic diversity and concomitant hostility. Ethnic Chinese Indonesians regularly apply for asylum in the United States on the grounds of persecution due to race, national origin, or religious belief. These claims, like all asylum claims, stand or fall on their individual facts. However, following the 1998 riots, many claims were filed in which the sole bases for the persecution claim were (1) the occurrence of the riots (supported by U.S. State Department reports or news accounts); (2) the applicant's ethnic and religious background and presence in Indonesia in 1998 (supported by testimony or primary documents); and (3) the applicant's narrative of experiencing some sort of violence or harassment—typically rocks thrown in the street, racial slurs yelled by passersby, or, in some cases, vandalism of homes or businesses.

Taking these facts as sufficiently established to meet the “well-founded” standard, courts faced the question of whether they were legally sufficient to establish persecution. The dispositive question was whether the Indonesian government had been involved in the violence in any of three ways: actually participating, supporting or tolerating groups that participated, or trying but failing to control groups that participated. The latter two forms of involvement constitute the “unable or unwilling” standard for government involvement in private violence: If no evidence is given for actual government participation, asylum applicants must make some showing that the government was either unable or unwilling to control the violence.<sup>67</sup>

In the case of the 1998 riots, the question facing the BIA was whether the Indonesian government had been unable or unwilling to control private violence during those riots. If so, then any ethnic Chinese Indonesians who

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65. For another good example of a succinct but sufficiently informative application of the rule, see *Ri Fu Yang v. Department of Homeland Security*, 183 F. App'x 74 (2d Cir. 2006).

66. See *Lie v. Ashcroft*, 396 F.3d 530, 532–33 (3d Cir. 2005); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—INDONESIA (2000).

67. *Lie*, 396 F.3d at 537.

had been targeted during the riots could state colorable asylum claims. However, the agency concluded, based on its review of the available evidence, that the Indonesian government was not unwilling to control the violence, and had in fact brought it substantially under control.<sup>68</sup> This determination was affirmed by the Third Circuit in a lengthy precedential opinion, *Lie v. Ashcroft*.<sup>69</sup> The court analyzed at length the State Department's report on the riots and the government's response, and concluded that

as with any claim of persecution, violence or other harm perpetrated by civilians against the petitioner's group does not constitute persecution unless such acts are committed by the government or forces the government is either unable or unwilling to control. . . .

. . . The 1999 Country Report on Indonesia indicated that there was a sharp decline in violence against Chinese Christians following the period of intense violence in 1998, and noted that the Indonesian government officially promotes religious and ethnic tolerance. Moreover, this violence seems to have been primarily wrought by fellow citizens and not the result of governmental action or acquiescence. Given these considerations, we are not compelled to find that such attacks constitute a pattern or practice of persecution against Chinese Christians.<sup>70</sup>

How, then, should subsequent asylum claims brought by Indonesian Chinese Christians on the basis of the 1998 riots be resolved? Because *Lie* holds as a matter of law that the Indonesian government was not involved in the riots in such a way as to support a persecution claim, subsequent cases alleging simply Chinese Christian identity, presence in Indonesia during the 1998 riots, and exposure to street violence become, after *Lie*, easy cases.<sup>71</sup> One example of a post-*Lie* denial comes from *Yulianty v. Attorney General*<sup>72</sup>:

Assuming Yulianty's story is true, she is an Indonesian citizen of ethnic Chinese descent. She was born and raised a Buddhist, and

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68. *Id.*

69. 396 F.3d 530.

70. *Id.* at 537 (internal quotation marks omitted).

71. To be sure, asylum claimants may still argue that although their past experiences in their country of origin did not constitute persecution, they have a well-founded fear of future persecution. Country conditions might have changed, for example. Thus, it remains open to ethnic Chinese Christian Indonesian asylum claimants to argue that the government is now involved in street violence to a greater extent than in 1998. But in dozens of cases, the only basis for the applicant's allegation of well-founded fear was the 1998 riots, and these claims continue to be made. See, e.g., *Wijaya v. Att'y Gen.*, 207 F. App'x 251 (3d Cir. 2006); *Tanudidjaja v. Att'y Gen.*, 198 F. App'x 267, 268–70 (3d Cir. 2006).

72. 186 F. App'x 331 (3d Cir. 2006).

later attended Christian churches and a Christian college in Indonesia. She experienced several incidents of harassment and crime: on various occasions she heard ethnic slurs shouted at her on the streets; on at least one occasion rocks were thrown at her house; during street riots in 1998, there was an attempted break-in of her house; on one occasion a boy riding a bike “grabbed [her] breasts” while riding by her on the street; on another occasion her purse was snatched by a thief riding a motorcycle. . . . What we said in *Lie v. Ashcroft* applies equally to the record before us in this case.<sup>73</sup>

The court then quoted the relevant language from *Lie* and noted that “[t]he facts alleged in this case are far less extreme and threatening than those alleged in *Lie*.”<sup>74</sup>

The *Yulianty* opinion epitomizes the ideal NPO structure outlined above: It tells the reader that the relevant legal analysis and rule are to be found in a prior precedential opinion, it points the reader to that opinion, and it tells the reader why the facts at hand straightforwardly fall under the rule given in the prior case. It focuses the jurisprudential and policy inquiry onto *Lie*.<sup>75</sup>

The 1998 riot claims present a class of cases in which the relevant facts are both limited by the nature of the appellant’s claim, and legally identical insofar as the individual claim turns entirely on the legal characterization of a single entity, practice, or rule, rather than on idiosyncratic facts. The validity of the 1998 riot claims turned on the legal characterization of the Indonesian government’s role in the riots, and the court held as a matter of law that because of inadequate state involvement, the riots do not constitute persecution. Once that characterization had been made, all claims turning on that characterization were straightforwardly determined. Parties could always request en banc review for the purpose of reconsidering *Lie*, but failing that, their claims really were controlled, making the NPO the appropriate decisional vehicle. All a court then needed to do was note the continuing validity of *Lie* and the basis for the instant asylum claim.

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73. *Id.* at 332–33.

74. *Id.* at 333.

75. See, e.g., *Liliana v. Att’y Gen.*, 161 F. App’x 198, 200–01 (3d Cir. 2005).

## 2. Booker Pipeline Remands

Between 2004 and 2005, the number of criminal appeals filed in the circuits jumped 28.4 percent, from 12,507 to 16,060.<sup>76</sup> This was a huge increase considering that in the preceding five years, the average increase was less than 5 percent.<sup>77</sup> This anomaly can largely be explained by *United States v. Booker*,<sup>78</sup> in which the Supreme Court invalidated the provision of the U.S. Code that made the Guidelines “mandatory and binding on all judges.”<sup>79</sup> As thousands of federal prisoners learned that they had been sentenced unconstitutionally, the circuits were presented with large numbers of criminal cases in which the defendant had been sentenced under the mandatory Guidelines regime.

Each circuit followed the same course: an initial precedential opinion establishing a rule for the *Booker* cases, then a flood of NPOs applying the rule and occasional precedential cases clarifying or extending the rule.<sup>80</sup> In the Third Circuit, for example, the initial precedential case, *United States v. Davis*,<sup>81</sup> announced that all pre-*Booker* Guidelines sentences would be vacated and the cases remanded for resentencing, on the grounds that prejudice was presumed because the entire legal framework informing the sentencing decisions was unconstitutional.<sup>82</sup> Hundreds of NPOs promptly issued forth in which nothing was needed but the date of sentencing, an invocation of *Davis* and *Booker*, and a remand.

The question is, then, would there have been any value—practical, jurisprudential, equitable, constitutional, aesthetic—to publishing all of those cases in the Federal Reporter? I cannot see any. Those hundreds of NPOs applying *Davis* were purely and simply applying a rule to facts that were identical in the relevant respects, and I challenge even the most ardent rule-skeptic to make a plausible argument to the contrary. Consider the following NPO, which consists of a statement of the date of the defendant’s sentencing, a citation to the governing precedential case, *Davis*, and then the following:

Our practice, therefore, is to vacate and remand all sentences imposed in which the District Court acted under the mandatory

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76. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 2, at tbl.2.3.

77. *Id.*

78. 543 U.S. 220 (2005).

79. *Id.* at 245 (excising 18 U.S.C. §§ 3553(b)(1), 3742(e) (Supp. 2004)).

80. See, e.g., *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc).

81. 407 F.3d 162 (3d Cir. 2005) (en banc).

82. See *id.* at 165–66.

Guidelines framework, so that all sentencing issues may be properly resolved in the first instance by the District Court in light of *Booker*.

*Booker* was decided on January 12, 2005, one year after Penzera's guilty plea and six months after her sentence was imposed. Because Penzera was sentenced under the mandatory Guidelines framework, *Davis* requires that her case be returned to the District Court for resentencing. Accordingly, we will vacate the judgment of the District Court and remand the case for resentencing in light of *Booker*.<sup>83</sup>

There are hundreds of such *Booker* NPOs out there,<sup>84</sup> applying whatever rule the particular circuit has developed for dealing with *Booker* pipeline cases.<sup>85</sup> Of course, there were multiple options ab initio for creating such rules, and the circuits' applications of *Booker* were obviously indeterminate in some sense, at least insofar as the remedies actually adopted by the circuits differed to some degree.<sup>86</sup> But once a given rule has been adopted in a circuit, most subsequent pipeline cases are genuinely easy cases. Is there something indeterminate about the date the defendant was sentenced? Or about the stated rule ("vacate and remand all sentences imposed under the mandatory guidelines framework")? What is there about this case that is hard?

To be sure, not all *Booker* pipeline cases were easy.<sup>87</sup> For example, some canny prosecutors inserted explicit *Booker* appeal waivers in plea agreements.

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83. *United States v. Penzera*, 166 F. App'x 637, 638–39 (3d Cir. 2006).

84. See Quin M. Sorenson, *The Illegality of Resentencing*, 44 DUQ. L. REV. 211, 222 n.68 (2006) (reporting the number of *Booker* cases disposed of by remand in the twelve months after *Booker* at approximately 1100).

85. See Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 667 (2006) ("Pipeline cases are cases in which the defendant was sentenced prior to *Booker* but the case was not yet final, usually because it was on appeal. Because the Supreme Court held that the *Booker* decision must be applied to all cases on direct review, the pipeline cases had to be reconsidered, because in all of them the district court treated the Guidelines as mandatory." (footnote omitted)).

86. For example, the Third Circuit adopted a remedy of automatic remand for resentencing, with certain narrow, enumerated exceptions (like a statement on the record by the pre-*Booker* sentencing judge that the sentence would be the same regardless of how *Booker* was resolved). See, e.g., *United States v. Hill*, 411 F.3d 425, 426 (3d Cir. 2005); *Davis*, 407 F.3d at 166. The Seventh Circuit, however, adopted a case-by-case policy of remand for hearings to determine whether the sentence would have been the same. See, e.g., *United States v. Paladino*, 401 F.3d 471, 483–84 (7th Cir. 2005). That is, the Third Circuit adopted a presumption of error, while the Seventh Circuit did not. Each circuit's decision to adopt one or the other remedy was, as an initial matter, underdetermined by *Booker* itself. But within each circuit, subsequent appeals based solely on the pre-*Booker* sentencing date (appeals in which the only error alleged was sentencing under the mandatory Guidelines) really are determined, in the strongest sense of that term.

87. I use the past tense because the *Booker* pipeline cases have almost all been decided.

Could a defendant waive his right to a *Booker* remand? The Third Circuit answered in the affirmative.<sup>88</sup> Additionally, some prudent judges saw the writing on the wall before *Booker*<sup>89</sup> and began stating, on the record, that the sentence would be the same in an advisory regime as in the mandatory one. The Third Circuit found that remand was not necessitated in such cases.<sup>90</sup> Both questions required precedential opinions the first time they arose, but subsequent cases raising the same issues simply were not hard in the sense the indeterminacy critique requires.

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Of course, asylum denials and *Booker* pipeline remands are not the only cases decided by NPOs, but such cases do account for a substantial portion of the circuits' NPO output at present. Further, many appeal contexts are structurally similar to immigration credibility cases. Social Security appeals, for example, also use the substantial evidence standard. And in *Anders* brief cases,<sup>91</sup> another significant category, the issue for the reviewing court is whether counsel for a defendant with an as-of-right appeal is correct that there are no appealable nonfrivolous issues.<sup>92</sup> In such cases, neither the substantive issues nor the standard of review are meaningfully altered by the vast majority of individual applications of the underlying rule.

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88. *United States v. Lockett*, 406 F.3d 207, 212–14 (3d Cir. 2005).

89. One year prior to *Booker*, the Supreme Court, in *Blakely v. Washington*, 542 U.S. 296 (2004), vacated a sentence imposed under Washington's mandatory sentencing guidelines because "[t]he facts supporting [the judge's] finding were neither admitted by [the defendant] nor found by a jury"—a violation of the defendant's Sixth Amendment right to trial by jury. *Id.* at 303, 301–05. The Court noted that the federal guidelines were not before it, *id.* at 305 n.9, but the writing was on the wall.

90. The Third Circuit found that remand was unnecessary where "a District Court clearly indicates that an alternative sentence would be identical to the sentence imposed under the Guidelines" because "any error that may attach to a defendant's sentence under *Booker* is harmless." *Hill*, 411 F.3d at 426–27 (citing similar cases from other circuits).

91. An *Anders* brief is a brief filed by an attorney in an as-of-right direct appeal of a criminal conviction, in which the attorney states that he or she has diligently reviewed the record and cannot identify any nonfrivolous grounds for appeal. The practice was approved in *Anders v. California*, 386 U.S. 738 (1967), which held that an appointed appellate attorney must file such a brief when he or she concludes that there are no colorably meritorious appellate arguments.

92. An electronic search of Westlaw's U.S. Court of Appeals cases (CTA) database conducted in January 2008 reveals over two hundred *Anders* brief opinions issued by the circuits between January 2007 and January 2008.

## II. DEVELOPING A DISCRIMINATORY EYE

The available statistics indicate that the circuit practitioners who already comb the reams of unpublished opinions find that they almost never need to cite them in their briefs.<sup>93</sup> Good practitioners have an intuitive faculty for discriminating between cases that advance the law and cases that do not, between cases in which the rules are stretched or unclear and cases in which they are not. That intuitive faculty is developed by ostension, by classification and labeling of concrete instances. Law school syllabi are often criticized for including only hard and borderline cases. Those cases are, of course, historic and fun to teach and think about, but reading only those cases gives a misleading impression about the day-to-day life of the law. The easy cases rebuttal to CLS indeterminacy arguments, for example, asserts simply that when one engages in the practice of law, one finds that most actual legal disputes are resolvable in ways that the parties in fact recognize as legitimate instances of rule application.

Not every case is a hard case. This is a lesson judicial clerks learn quickly. We are inspired in law school by the examples of past jurisprudential masters who, as Robin West puts it, “appraised a social reality,”<sup>94</sup> “ethically opened themselves to dialogue with past texts,”<sup>95</sup> and fused “a horizon composed of judgments based on moral sense and a perception of a worldly injustice with a horizon composed of legal possibilities.”<sup>96</sup> When new clerks page through their first pile of briefs, every asylum case expands into a vast field of opportunities to engage in a creative interpretive dialogue with legal authority. But we must resist; as West also cautions, sometimes there really are rules to follow, and “interpretation is important enough . . . that we should be wary of trivializing it with the insistence that it is everywhere.”<sup>97</sup>

### A. The Aesthetic Function of Generic, Rule-Governed Conventions

One of the first lessons clerks learn in drafting NPOs is that we have to draft them as NPOs. We do not get to be Cardozo or Jackson in every opinion. We have to resist throwing in our most elevated rhetoric,

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93. See *infra* Part II.D.

94. West, *supra* note 34, at 1142 (emphasis omitted).

95. *Id.* at 1164.

96. *Id.* at 1143.

97. *Id.* at 1164.

our choicest turns of phrase, our minute factual recitations, our extensive string citations for every point of law. “This is an NPO,” we have to remind ourselves.

That reminder is an aesthetic lesson that arises in other settings as well. In many professional artistic contexts, for example, the music or the writing or the visual art serves an understood, rule-governed, generic function, and the artistic goal is to apply those generic conventions and explicitly not to innovate. It would be, for example, a misunderstanding of the aesthetic function of Pachelbel’s Canon in D at most weddings, or the Star Spangled Banner at most baseball games, for a musician to push the boundaries of interpretation and try for something novel and groundbreaking. And it is precisely because the generic form and function is well understood that we can appreciate innovative interpretations when we encounter them.<sup>98</sup>

The lesson is simple: You must master the conventional forms first. Learning that lesson makes one a better innovator because the key to successful innovation is to take an existing, familiar aesthetic model and apply it with alterations. That is why artists spend decades playing scales and arpeggios, or doing figure drawing, or writing for pulp magazines, or even working in a video store. Artistic innovation is never random, and in this it resembles legal innovation.

One might object that popular music, for example, moves much more rapidly through its evolutionary phases than does the law, and that innovation is presumptively favored in the former while presumptively disfavored in the latter. But I am not so sure that either claim is true. In some respects, mainstream popular music has been quite stable, both structurally and thematically, for the past half-century—far more so than, say, constitutional criminal procedure. For example, the popular music of the late 1950s is far more at home in today’s popular music milieu than is that period’s interpretation of the Fifth and Sixth Amendments. All the definitive components of modern pop music<sup>99</sup> were in place by the mid-1950s, but virtually all of today’s Fifth and Sixth Amendment standbys were wholly unknown to the constitutional

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98. Two prominent examples are JIMI HENDRIX, *Star-Spangled Banner, on LIVE AT WOODSTOCK* (MCA Records 1999) (1969), and the fabulous YouTube version of Pachelbel’s *Canon in D Major* performed by the formerly anonymous guitarist Funtwo, see YouTube, guitar, [www.youtube.com/watch?v=QjA5faZF1A8](http://www.youtube.com/watch?v=QjA5faZF1A8) (last visited Jan. 26, 2008).

99. The electric guitar-bass-drums instrumentation, the verse-chorus-bridge structure, the roughly three-minutes-length constraint, the love-breakup-rebellion thematic universe, the unaugmented-power-chord harmonic vocabulary, the 4/4 backbeat rhythm, and the acceptable auxiliary instruments (keyboards, saxophone).

criminal procedure of that era.<sup>100</sup> A 1950s pop star could get onstage with most modern pop bands with minimal adjustments, while a 1950s criminal lawyer would need to learn an entirely new body of law.

There is an evident and quite strong formal conservatism to popular culture, despite the lip service given to the radical and new.<sup>101</sup> Perhaps the most influential analysis of the role of generic structural elements in the aesthetic appeal of popular culture is Robert McKee's *Story: Substance, Structure, Style, and the Principles of Screenwriting*.<sup>102</sup> McKee, Hollywood's eminence grise of screenwriting, explains that "the audience is already a genre expert. It enters each film armed with a complex set of anticipations learned through a lifetime of moviegoing."<sup>103</sup> McKee identifies twenty-five basic film genres based on the specific constraints each imposes on narrative structure and thematic content.<sup>104</sup> To appreciate, understand, and create new aesthetically and commercially successful movies, the

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100. Most of the basic structures and constraints that inform modern criminal practice are of startlingly recent origin. For example, the application of the exclusionary rule to state law enforcement officers dates from 1961. See *Mapp v. Ohio*, 367 U.S. 643 (1961). The right of indigent felony defendants to publicly funded counsel at trial dates from 1963, see *Gideon v. Wainwright*, 372 U.S. 335 (1963), as does the right of indigent defendants to publicly funded counsel for as-of-right appeals, see *Douglas v. California*, 372 U.S. 353 (1963). The requirement that prosecutors turn over all evidence favorable to criminal defendants also dates from 1963. See *Brady v. Maryland*, 373 U.S. 83 (1963). The requirement that suspects be informed at arrest of their right to remain silent and their right to counsel dates from 1966. See *Miranda v. Arizona*, 384 U.S. 436 (1966). The modern "reasonable expectation of privacy" framework for Fourth Amendment analyses dates from 1967. See *Katz v. United States*, 389 U.S. 347 (1967). Two good reflections on the Warren Court's "criminal procedure revolution" and its shortcomings are William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997), and Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004).

As a final dramatic example of the instability of criminal procedure, on January 12, 2005, the procedure by which every single federal criminal defendant had been sentenced for the previous two decades was held unconstitutional. See *United States v. Booker*, 543 U.S. 220 (2005); see also *supra* Part I.C.2.

101. That is, pop culture has a strong underlying stare decisis principle overlaid with a heavy dose of revolutionary rhetoric. To pursue the constitutional analogy, you might say that recent popular culture is, in that respect, the inverse of recent constitutional theory, in which revolutionary constitutional innovations are cloaked in the rhetoric of continuity with the past. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 952 (1992) (Scalia, J., dissenting).

102. ROBERT MCKEE, *STORY: SUBSTANCE, STRUCTURE, STYLE, AND THE PRINCIPLES OF SCREENWRITING* (1997). This work has undoubtedly exerted a significant influence on the structure of modern movie plots, as Robert McKee has, for decades, taught screenwriting seminars that a substantial percentage of working screenwriters have attended.

103. *Id.* at 80.

104. *Id.* at 80–86.

screenwriter and the viewer must have a visceral, intuitive familiarity with the conventions imposed by the form.<sup>105</sup> For example:

In the *Thriller* the criminal must “make it personal.” Although the story may start with a cop who works for a paycheck, to deepen the drama, at some point, the criminal goes over the line. . . . The criminal menaces the family of the cop or turns the cop himself into a suspect . . . [or] he kills the detective’s partner. Ultimately, the cop must identify, apprehend, and punish the criminal.<sup>106</sup>

The “making it personal” element, to briefly pursue this analogy, is one of the key distinctions between the thriller and the mystery.<sup>107</sup> A plot that tracks one genre but then either omits a necessary element or adds an inconsistent one will strike the audience as intuitively wrong.<sup>108</sup> An otherwise conventional thriller that progresses smoothly through the generic form—villain commits bad acts, hero tracks villain, villain makes it personal, hero and villain square off for final confrontation—but then has the villain kill the hero and escape, will violate the audience’s aesthetic sensibilities, and will be a failure. The audience will read it as a rule violation, as an incorrect application of the governing generative rules.

On the other hand, a similar plot might succeed if it signals early on that it is not a conventional thriller—that it is a hybrid, say, of “thriller” and “black comedy,” or that it is not a thriller at all but rather a “caper,”<sup>109</sup>

105. See *id.* at 89.

106. *Id.* at 87.

107. The novelist Raymond Chandler explains that the hero of a detective story must have no personal side at all: He has an office, not an apartment; a secretary, not a wife. THE RAYMOND CHANDLER PAPERS: SELECTED LETTERS AND NONFICTION, 1909–1959, at 259 (Tom Hiney & Frank MacShane eds., 2002).

108. MCKEE, *supra* note 102, at 90 (“Having told our filmgoers to expect a favorite form, we must deliver as promised. If we botch genre by omitting or misusing conventions, the audience knows instantly and badmouths our work.”). I challenge the reader to name a Hollywood thriller in which the bad guy does not in some way threaten the hero’s loved one. The implication that the hero would not be adequately motivated without a threat to or the loss of the beloved has a good pedigree, coming as it does from Homer (Achilles and Patroclus in the *Iliad*). The reader may ponder at leisure whether the prevalence of this trope reflects an ambivalence in individualistic Western audiences about the normative status of sacrifice for the common good.

109. A “caper” is a movie in which a criminal is the protagonist, or co-protagonist along with the cop trying to catch him. The story is told at least partly from the criminal’s point of view, and the plot revolves around the clever means he employs to succeed in his plot and escape capture. *Ocean’s Eleven*, in its original or remade incarnation, is an obvious example of the genre, with its focus solely on the crooks. See OCEAN’S ELEVEN (Warner Bros. Pictures 1960); OCEAN’S ELEVEN (Warner Bros. Pictures 2001). *Inside Man*, another recent pure caper, splits its perspective between crook and cop. See INSIDE MAN (Universal Pictures 1995).

a “social drama,” or perhaps even a “historical drama.”<sup>110</sup> These genres, unlike the pure thriller, permit down endings, in which the protagonist fails or is killed. The signaling is achieved through the use of character, narrative, and thematic elements that the audience recognizes as characteristic of a given genre. To take one example, Robert De Niro plays the nominal villain in the movies *Cape Fear*<sup>111</sup> and *Heat*<sup>112</sup> and is killed at the end of each after a climactic confrontation with the nominal hero—Nick Nolte and Al Pacino, respectively. *Cape Fear* is a pure thriller, *Heat* an essentially pure caper, as the genre-convention signals make clear.

From his first scenes in *Cape Fear*, De Niro reveals himself to be a psychopath. He has no interpersonal relationships whatsoever; he interacts with others solely through manipulation or violence; his only motivation is vengeance; he has no scruples as to means or collateral consequences, showing himself willing to inflict death or grievous injury on innocent victims in the process of taking revenge on Nolte. The violence escalates to the moment of climactic confrontation, with Nolte and De Niro duking it out face to face on the bank of a raging river.

In *Heat*, by contrast, De Niro, while still a criminal, is anything but a psychopath. He has meaningful interpersonal relationships, not only with his gang but also with their wives and children, and he has a romantic relationship with a noncriminal girlfriend. He eschews violence except as a last resort and never engages in it gratuitously. As in many capers, the film leaves ambiguous whether De Niro’s robber or Pacino’s cop is the protagonist: We, the audience, sympathize with both, and it is not a triumphant moment for Pacino when he shoots De Niro on the LAX runway.

The interpretive question is whether either movie could sustain its aesthetic appeal if, in the climactic fight scene at the end, De Niro instead were to kill his rival or just get away. Asking that question is how we can discern which set of generative and normative rules is operative. *Cape Fear* plainly would not work as a movie if De Niro killed Nolte in the final fight or if he ran away and then the movie ended. By contrast,

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110. See MCKEE, *supra* note 102, at 92–93. Historical dramas sometimes cannot resist incorporating thriller elements, like the making it personal trope. Does Mel Gibson, for example, actually think that William Wallace would not have gotten involved in the Scottish rebellion if the English magistrate had not killed his wife? See BRAVEHEART (Paramount Pictures 1995).

111. CAPE FEAR (Universal Pictures 1991).

112. HEAT (Warner Bros. Pictures 1995).

the theme, structure, characters, and plot of *Heat* are all compatible with De Niro escaping at the end. To be sure, some minor plot alterations might be required, but, as a whole, it would be the same movie, in the same category, and with the same aesthetic success if De Niro did not die. The film succeeds as a caper, and the caper genre does not require the robber's death. One crucial reason for this is that the robber in a caper never makes it personal. Pacino's cop has a young daughter, just as Nolte's lawyer does in *Cape Fear*. But unlike his character in *Cape Fear*, De Niro's character in *Heat* would never target an opponent's daughter to get at the opponent.

McKee is undoubtedly right that devotees of popular culture—whether of sitcoms, western pulp, detective stories, romantic comedies, or buddy-cop movies—have a finely tuned perceptual or casuistic faculty for distinguishing rule adherence from rule violation and for identifying generic and innovative works. In many if not most cases, we like the generic better because there is something very satisfying in witnessing the technically competent application of familiar aesthetic principles. We do not always want something new at the archetypal level thrown into our cultural fare, but we are very good at recognizing when a given work has done so.<sup>113</sup>

We could not, however, recognize such innovation, successful or otherwise, without a deep and visceral familiarity with the genre conventions themselves. And that familiarity can only come with repeated exposure to generic works that we know are generic; we need a set of genre templates that we can appeal to in assessing the novelty of new works.

Good lawyers and judges must develop the same ability. They must be able to spot facts that push on existing rules; they must be able to spot rules that are being doctrinally undermined; they must be able to separate, in other words, the routine from the complex. Treating every case as complex

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113. How do you tell pop culture NPOs from pop culture precedent? Here's how: Can you construct a set of simple rules, instantiated by prior representative examples, the operation of which will yield the cultural artifact in question? Appendix 1 includes, as an example, rules for a standard NPO country song. See *infra* app. 1. The process by which you will test my rules by applying them to your own experience as a music fan is precisely the process by which judges and clerks classify cases as easy or hard, familiar or novel, and the more utterly generic, rule-embodiment, radio-ready country music you have experienced (for good or ill), the more ably you will evaluate new songs and decide in a given case whether to apply or modify the rules.

is like treating every buddy-cop movie as Oscar-worthy, denying the differences between, for example, *Training Day*<sup>114</sup> and *Metro*.<sup>115</sup>

#### B. Genre as a Stable Background for Innovation

The process of identifying rules governing generic cultural forms and classifying particular instances of cultural production as rule following or rule breaking (and hence successful, unsuccessful, or innovative) has a long pedigree in cultural studies—indeed, the longest pedigree of all, being the method employed in one of the Western tradition's first works of cultural studies, Aristotle's *Poetics*.<sup>116</sup> Greek tragedy, in Aristotle's view, is a necessarily formulaic art form, in which the details of presentation may be reworked but the structural elements must remain constant—and sacrosanct.<sup>117</sup> To a lawyer, the *Poetics* looks like an appellate opinion, or maybe a restatement. It states generative and normative rules, always with citation of authorities that instantiate those rules. It classifies particular instances of literary production and sets out models for classifying future instances.<sup>118</sup> The value of this sort of cultural analysis is the same

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114. TRAINING DAY (Warner Bros. Pictures 2001).

115. METRO (Touchstone Pictures 1997). I chose *Metro* more or less at random from the panoply of bad buddy-cop movies. The film astonishes with its utter lack of originality in any respect. Even Roger Ebert, who was, as usual, far too generous, complained that the genre conventions were ill-used because the script runs through the customary first-act setups, but forgets to pay them off in the second act. Ebert did not mind, though, because at least the omissions shortened the film's running time: "Perhaps it is even a good thing that this is the first cop buddy movie that uses all the cliches from the first half of the formula and none from the second. It's not like I missed them." Roger Ebert, *Cut to the Chase; 'Metro' Thrives on Thrills, Not Story Line*, CHI. SUN-TIMES, Jan. 17, 1997, at 31. *Variety* similarly lamented the "predictable script, cliched characters and perilous scenes[, which] come off like an assemblage of TV police episodes." Howard Feinstein, *'Metro' Boasts Murphy Multiplicity*, VARIETY, Jan. 13–19, 1997, at 151.

116. ARISTOTLE, *Poetics*, in BASIC WORKS OF ARISTOTLE 1455 (Richard McKeon ed., 1941).

117. See *id.*

118. We can imagine the *Poetics* being written in the context of, say, a trademark case, in which two companies with similar marks each agreed not to infringe on the other's mark by entering its commercial field. If one company achieves a commercial success, which the other company claims crossed the line and violated the agreement, the court is then forced to delineate the boundary between them.

One recent example is the dispute between Apple, the computer company, and Apple Corps, the Beatles' distribution company, over the meaning of "music." The computer company, the junior user of the mark, had agreed not to enter Apple Corps' business by selling music, but it subsequently found a profitable market selling digital downloads of music for its computers and MP3 players. Is it selling "music" or "lines of code"? Sadly, we will not get a decision on this question, because the parties settled. See, e.g., Robert Verkaik, *Beatles Downloads Beckon as 25-Year Dispute Ends*, INDEPENDENT, Feb. 6, 2007, at 15.

as it is in judicial opinions: It makes explicit the substantive points of disagreement on the issue and thus makes possible meaningful debate, by specifying points of potential challenge. The great Walter Kaufman, for example, thought some of Aristotle's rules were wrong, and proposed a modified set.<sup>119</sup>

If we want to test Aristotle's governing rules for tragedy, we can do so by appealing to works that contravene the rules but are nonetheless recognizable as tragedies.<sup>120</sup> Or, we can create our own works that self-consciously deviate in some respect. Some influential critics have identified this sort of self-conscious transgression of established generic norms as the defining feature of twentieth-century visual art.<sup>121</sup> And the existence of a stable background of generic cultural production, understood and identifiable as such, is the necessary backdrop against which transgression and innovation can occur.

For consumers of art, generic work serves as an introduction to the relevant cultural milieu. For artists, attaining proficiency in a generic form is a precondition for the exercise of artistic originality. The same holds true for the law: The classification of cases as routine, and the production of generic, rule-following opinions in those cases, is a vital step in the process of learning to competently understand and apply the relevant law. We rely, in our casuistical development, on the signaling function served by the explicit categorization of opinions as innovative or generic. Judges and clerks derive a great substantive, developmental benefit from the repeated exercise in ostension that is the production of each sitting's NPOs; practitioners derive the same benefit from recognizing what courts see as routine and what they see as difficult or new. It is not just about saving time; it is also about cultivating a visceral or intuitive sense of what matters and what does not, what feels right and what feels wrong. That sense, an

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119. See WALTER KAUFMANN, TRAGEDY AND PHILOSOPHY 62–63 (1968). Kaufman thought that Aristotle overgeneralized from a few of his favorite plays and ignored others that did not quite fit, and that he venerated Sophocles and disdained Euripides. *Id.* at 72–73.

120. To take one of Kaufman's examples, *Oedipus at Colonus* is surely a tragedy—it was written by Sophocles, it was performed at the yearly tragic festival, and it includes Oedipus as the main character—but it fits none of Aristotle's generative rules. See *id.* at 232–41.

121. See, e.g., ARTHUR C. DANTO, THE PHILOSOPHICAL DISENFRANCHISEMENT OF ART (1986); ARTHUR C. DANTO, THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART (1981); Leslie Graves, *Transgressive Traditions and Art Definitions*, 56 J. AESTHETICS & ART CRITICISM 39 (1998) (analyzing a number of trends in twentieth century art as self-consciously transgressive of prevailing aesthetic norms).

aesthetic one,<sup>122</sup> is an integral part of all judging and lawyering that will persist however much we might like it to be otherwise.<sup>123</sup>

### C. Genre as the Genesis of Situation Sense

Several legal scholars have recently borrowed from the virtue ethics literature of contemporary philosophy and suggested that the central question of constitutional interpretation (or legal interpretation generally) should be, essentially: What sorts of people make good judges?<sup>124</sup> This character-based inquiry derives from the unresolved, if obvious, problem that any interpretative theory must be applied by individual people who must perforce “know[] when the theory applies and when it does not.”<sup>125</sup> Or, as another scholar puts it, because “[t]he complexity of the world

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122. I think that the development of this aesthetic sense, this belief in the law as a real and coherent entity, is a good thing. I do not think a society founded on the denial of the reality of rules as such is either a possibility or an ideal. But, then, I am a practitioner of the law, and cannot be expected to hold such a view of society. As the French literary theorist Pierre Bourdieu eloquently put it:

The specific property of symbolic power is that it can be exercised only through the complicity of those who are dominated by it. . . . As the quintessential form of legitimized discourse, the law can exercise its specific power only to the extent that it attains recognition, that is, to the extent that the element of arbitrariness at the heart of its functioning . . . remains unrecognized. The tacit grant of *faith* in the juridical order must be ceaselessly reproduced. . . . It is indeed necessary to relate universalization and the creation of forms and formulas.

Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 844 (Richard Terdiman trans., 1987).

123. Ward Farnsworth recently published an illuminating empirical study of this phenomenon in the Supreme Court’s criminal docket. Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court’s Criminal Docket*, 104 MICH. L. REV. 67 (2005). He employed the intriguing methodology of classifying every nonunanimous criminal case heard by the Court over the last fifty years as constitutional or nonconstitutional and comparing the voting patterns—government wins or defendant wins—of each individual Justice in the two classes. Because the legal considerations in constitutional cases are different from those in nonconstitutional cases (most obviously, Congress’s intent does not matter in constitutional cases), one would expect, if legal argumentation were driving outcomes, that voting patterns would differ. But, instead, Farnsworth found that the patterns were nearly identical: 94 percent of the variance in voting trends in one class could be predicted from the voting trends in the other class. Farnsworth concluded:

[J]udges, like anyone, have messy interiors comprising lots of different preferences and values—clear and obscure, high and low, conscious and not. But the data and cases we have seen permit a few speculations about where on the spectrum the priors tend to lie. They suggest that the important ones do not take the form of anything so grand as clear philosophical principles of political morality; nor are they likely to be drawn from other legal materials in any comforting sense.

*Id.* at 92.

124. See Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003); Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2004).

125. Sherry, *supra* note 124, at 797.

outruns the capacity of any set of moral rules. . . . [r]ight action requires what we might call ‘moral vision’—the ability to perceive the morally salient aspects of particular situations.”<sup>126</sup>

This ability is what Karl Llewellyn famously called “situation sense.”<sup>127</sup> As he and his successors at Yale have strenuously maintained as a defense to the charge of not teaching hornbook law, situation sense is not honed by learning black-letter rules.<sup>128</sup> Dan Kahan, in his 2006 Yale commencement remarks, analogized the development of situation sense to chicksexing, the famously inchoate but incredibly accurate ability of professional chicksexers to look at anatomically identical newborn chicks and separate the males from the females:

[W]hile the nature of the chicksexer’s skill may be inexplicable, how he acquired it isn’t. To become chicksexers, individuals go off for an extended period of study with a chicksexing grandmaster. He doesn’t give lectures or assign texts. Instead he exposes his pupils to slides—“male,” “female,” “male,” “male,” “female,” “female,” “male,”—continuing on in this way until the students acquire the same special power to intuitively perceive the gender of a newborn chick, even without being able to cogently explain how.<sup>129</sup>

Kahan defends an analogous “law, Yale style” methodology of exposing students to successive examples of “good” and “bad” lawyering, taking Yale alumni Jack Goldsmith and John Yoo as his exemplars.<sup>130</sup> The two lawyers worked successively at the Office of Legal Counsel (OLC) in the current Bush Administration. Yoo, tasked with finding a legal rationale for coercive interrogation practices being employed at Guantanamo Bay and elsewhere, wrote the now-infamous torture memo that drastically reduced the scope of the regulatory prohibition on torture; when challenged, Yoo defended his actions as law not policy.<sup>131</sup> Goldsmith, taking

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126. Solum, *supra* note 124, at 497.

127. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121–57 (1960).

128. Dan M. Kahan, Deputy Dean and Elizabeth K. Dollard Professor of Law, Yale Law School Commencement Remarks (May 22, 2006) (transcript available at <http://www.law.yale.edu/documents/pdf/kahanREVISED.pdf>).

129. *Id.*

130. See *id.* I think this is a worthwhile methodology in professional education; the Yoo-Goldsmith parable should become one of the defining templates of the professional responsibility canon.

131. *Id.* See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007). For more detailed accounts of the tensions and arguments within the Office of Legal Counsel (OLC), see Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559, 1570–73 (2007); Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, *N.Y. TIMES*, Oct. 4, 2007, at A1.

over at OLC as the public first began to learn of the brutality unfolding at Abu Ghraib, Bagram, and Guantanamo (and unknown secret locations around the globe), repudiated the memo and its rationale.<sup>132</sup> Goldsmith's position ultimately won the day.<sup>133</sup>

Kahan stresses the importance of a lawyer taking moral responsibility for his legal arguments. But that is not the only, or the most important, lesson of the story. As I see the parable, Yoo is a "bad" lawyer because he artificially manufactured a hard case: He took what should have been an open-and-shut legal question—for example, may government agents legally strap a person to a board and hold him under water until he is on the point of drowning?—and treated it as though it were indeterminate.<sup>134</sup> The Goldsmith figures in parables like Kahan's can only prevail if they have a more forceful critique to bring to bear than that they do not like the outcome of the Yoo figures' approach. They must be able to say—as Goldsmith in fact did—that there is something *legally* wrong with the torture memo; if the parable is to be useful in legal education, Goldsmith must be a legal exemplar, and students must take away the lesson that there really are some easy cases.

Reading—and especially writing—NPOs teaches that lesson, much in the way that a chicksexing education teaches that there really are differences between male and female chicks that a person can come to reliably spot. A longstanding critique of law school pedagogy has been that legal academics' perspectives are derived in large part from (the luxury of) thinking only about borderline cases, hard cases, cases with weird facts or contested rules.<sup>135</sup> It is easy to succumb to the temptation to see the corpus of appellate case law as a mass of Socratic teaching hypotheticals, and thus to treat all legal questions as insoluble riddles or invitations to bald political gestures. But they are not. And a formal legal mechanism by which a court may make an explicit statement that

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132. See GOLDSMITH, *supra* note 131, at 142–59.

133. For the full documentary history of the torture debates in the Bush Administration, see THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005), in which the Yoo memo is reproduced. Kahan, *supra* note 128, at 38–79.

134. And to the extent that the Yoo memo reads like a right-wing CLS essay, one is forced to remark anew on the perils of teaching intelligent young people that any rule can fit any facts and any case can be decided any way.

135. Frederick Schauer's *Easy Cases* is probably the locus classicus of this critique. See Schauer, *supra* note 23, at 407.

a particular case is a straightforward application of law to facts is a salutary counterweight to that temptation.<sup>136</sup>

In a well-known contribution to the rule-application debate, Cass Sunstein argues that judges will always have to resort to intuitive classificational judgments in deciding whether to apply a rule in the first place:

[C]ategories receive their human meaning by reference to typical instances. When we are asked whether a particular thing falls within a general category, we examine whether that thing is like or unlike the typical or defining instances. Very much the same is true in the interpretation of rules. The process of examining whether an application is absurd or unjust occurs through seeing whether the application is fundamentally different from the core or defining applications. . . . When there is a fundamental difference, the case at hand is declared dissimilar, and the rule does not apply. In subsequent cases the judgment will turn on whether the new instance is similar to the defining or core applications, or similar instead to the case previously found dissimilar to those applications.<sup>137</sup>

The making of these judgments—the decision to apply a rule or instead to discard, extend, or revise it—is casuistry, the evaluation of individual cases in the absence of a clear governing principle. As Sunstein explains:

[T]he choice between rules and rulelessness . . . would itself be based on the practice of casuistry, in which judgments for or against rules emerge not from rules, but from careful assessments of particular circumstances. . . . [A] form of casuistry plays an important role in the interpretation of rules themselves, and it occupies a distinguished and prominent place even in a legal system committed to rule-bound justice and the rule of law.<sup>138</sup>

The practice of casuistry relies on a well-developed intuitive faculty of discerning that is familiar to scholars and devotees of the arts, as well as to the practices of medicine, politics, or war. And the development of that discerning faculty—the discriminating eye, so to speak—is

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136. The problem is that, at the moment, this positive function is overshadowed by the view of NPOs as simply the product of judges' desire to toss off sloppy opinions and to avoid careful analysis, an impression that the no-citation rules surely enhance. But the no-citation rules and the signaling function need not necessarily be conjoined. Judges Kozinski and Reinhardt are overstating the point when they suggest that without the rules, the technical classification is pointless. See Kozinski & Reinhardt, *supra* note 5, at 44 ("Lawyers argue that . . . we should . . . let the [NPOs] be cited as precedent. But what does *precedent* mean? Surely it suggests that the three judge panel subscribe not merely to the result but also to the phrasing of the disposition.")

137. Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 989 (1995).

138. *Id.* at 1023.

cultivated by longtime immersion in particulars, not just the experience but also the evaluation of them. As cultural studies professor Michael Bérubé points out:

[A]lthough there are legions of crabs, cranks, and curmudgeons who proclaim that all popular culture is worthless garbage . . . nobody who knows anything about popular culture has so simple a relationship to the stuff. Nobody says, “I just love all movies,” or “I like pretty much every song I hear,” or “I’m a fan of every sports team[”]. . . . [D]eveloping the faculty of discrimination is part of the fun of immersing oneself in the popular . . . .<sup>139</sup>

There is a very important distinction to be made here between a trivial observation (that some cultural production is better than others) and an insightful one (that understanding and appreciating a genre necessarily involve making evaluative judgments about whether a given work is important or not). Bérubé, who came of age in an era in which evaluation was anathema to criticism, reminds us that while academics may have come to disdain evaluation of culture, the popular culture audience—the consumers of artistic products—engages in evaluation continually as an integral part of its experience of culture.

#### D. The Utility of Generic Law in Making Arguments

Deciding whether to make a given opinion precedential is the quintessential exercise of Bérubé’s faculty of discrimination. I find it interesting, in this light, that scholarly discussion of NPOs typically assumes or insists that such evaluation is simply impossible, that there is no way for judges to reliably predict the precedential value of their opinions.<sup>140</sup> But no commentator makes any effort to substantiate this claim. Why do we imagine that judges (and clerks) are bad predictors? And what factors might play a role in making them good ones?

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139. Michael Bérubé, *Pop Culture’s Lists, Rankings, and Critics*, CHRON. OF HIGHER EDUC., Nov. 17, 2000, at B7.

140. See, e.g., Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 727 (2006) (“[T]he problem with putting judges in the position of predicting the future value and relevance of their opinions goes beyond that posed by the fallibility of judges. It is simply an impossible task to predict future value and relevance, because the information necessary for accurate forecasting does not yet exist.”); Joshua R. Mandell, Note, *The Trees That Fall in the Forest: The Precedential Effect of Unpublished Opinions*, 34 LOY. L.A. L. REV. 1255, 1291 (2001) (“It is simply impossible for a court to anticipate the value that any given opinion will have in the years to come.”).

There are many anecdotal accounts of opinions that were not published but should have been under the general “moves the law” criterion.<sup>141</sup> I would be the last to deny that this sometimes occurs, but is this really a widespread problem—so widespread that the standard and universally available remedy of a motion to publish<sup>142</sup> is not an adequate cure? That is, of the 80 percent of circuit dispositions that are unpublished, what percentage represents erroneous predictions of future value? When panels decide that a given decision does not materially advance the underlying legal rule, how often are they right, and how often are they wrong? Anecdotes will not help, nor will bald assertions that any such prediction is impossible. The only real evidence is the extent to which practitioners actually rely on unpublished cases when they are permitted to do so. If there were really substantial nuggets of new law waiting to be mined in NPOs—if, that is, the only thing keeping litigants from citing them was the rules—we could expect that jurisdictions that allow citation would see higher rates of citation than those that do not, and jurisdictions switching from restrictive to permissive regimes would see a spike in citation. But it in fact makes no difference: In jurisdictions that permit citation, the rate of actual citation is no higher than in jurisdictions that prohibit it.<sup>143</sup>

In an attempt to evaluate the way NPOs are actually used in the circuits, in 2005, the Federal Judicial Center reviewed 650 randomly selected circuit cases and sent the attorneys in those cases a questionnaire asking about their use of NPOs.<sup>144</sup> About 1.5 percent of all citations in the selected cases (244 out of 18,098) were to NPOs, and about 13 percent of all the surveyed cases contained at least one citation to an NPO in either the opinion or one of the briefs.<sup>145</sup> Strikingly, however, the citation rates for NPOs in circuits that prohibit or discourage their use were no different from those in circuits that freely permit it.<sup>146</sup> In those cases with briefs filed on each side, the study found NPO citations in the brief

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141. See, e.g., Greenwald & Schwarz, *supra* note 4, at 1154 n.80 (“[It is] remarkable and unusual that although the . . . Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion.” (quoting *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 n.3 (1993))).

142. E.g., 9TH CIR. R. 36-4.

143. See REAGAN ET AL., *supra* note 6, at 27.

144. *Id.* at 17, 22. The response rate was 89 percent. *Id.* at 17.

145. *Id.* at 27.

146. *Id.* To be sure, there may be some small deterrent effect at the margins, where a litigant would cite a precedential opinion instead of a slightly more on-point NPO because the NPO is an NPO, but the data do not support the conclusion that this effect is significant.

or the opinion in 29.75 percent of cases<sup>147</sup> in restrictive circuits (whose local rules prohibit NPO citation),<sup>148</sup> in 32.67 percent of cases<sup>149</sup> in discouraging circuits (whose rules disfavor but do not expressly forbid NPO citation),<sup>150</sup> and in 27.33 percent of cases<sup>151</sup> in permissive circuits (whose rules neither disfavor nor forbid NPO citation).<sup>152</sup> The data suggest, in other words, that allowing NPO citation, whether gladly or grudgingly, does not increase the extent to which practitioners cite NPOs.<sup>153</sup> Furthermore, “[w]hen unpublished opinions are cited, especially in briefs, they often are included in string citations [along with precedential opinions], and it does not appear to someone not intimately involved in the cases that inclusion or exclusion of these citations would make much of a difference.”<sup>154</sup> That is, the patterns of use indicate that litigants find a rule of law in a precedential opinion and then look for an NPO applying that rule that has similar facts to their case. This is precisely the citation model that my generic art analogy would suggest, as opposed to what one would expect if there were new propositions of law found in NPOs.

The responses of the surveyed attorneys are illustrative as well. Asked to comment on the utility of the proposed rule change allowing citation of NPOs, a majority of attorneys were in favor.<sup>155</sup> But even those attorneys who asserted, on principle, that they ought to be permitted to

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147. *Id.* at 60.

148. The Second, Seventh, Ninth, and Federal Circuits. *Id.* at 10.

149. *Id.* at 60.

150. The First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits. *Id.* at 7.

151. *Id.* at 60.

152. The Third, Fifth, and D.C. Circuits. *Id.* at 7.

153. There is one lacuna in the data: The percentage of total cases with at least one NPO citation was stratified by circuit, but the percentage of total citations that were NPO citations was not stratified by circuit. Thus, it is at least theoretically possible that while the percentage of cases with at least one NPO citation was the same, the permissive circuits had higher percentages of NPO citations among the cases that cited NPOs. However, that seems unlikely. The data show almost exactly thirty citations per case, which (at an overall rate of 1.5 percent NPO citations) would imply an average of about half an NPO citation (0.45) per case. *Id.* at 27. But because NPO citations appeared at all in only one-third of the cases, an average of about 1.33 NPO citations per case appeared in the cases that cited them at all. Given that every case in the set has to have at least one citation, the average is very close to the minimum possible value, which would tend to suggest the absence of significantly higher outliers. Of course, there were only three permissive circuits, so while it is possible that there was a difference, the data give us no reason to think so, or to think that it would be a large difference. After all, nearly 73 percent of cases in the permissive circuits cited no NPOs at all—a higher percentage than in the restrictive or discouraging circuits. *Id.* at 60. One would have to imagine that while fewer briefs in the permissive circuits used NPOs at all, those that did used more of them, and I see no reason to imagine that.

154. *Id.*

155. *Id.* at 20.

cite to any case did not claim that NPOs were particularly useful sources of law. As one such attorney put it, “I personally favor the proposed rule, but do not believe it would have a great impact.”<sup>156</sup>

These findings suggest two obvious conclusions: First, litigants will cite NPOs when they think they need to, regardless of the specific local citation rules.<sup>157</sup> Second, litigants do not find NPOs very useful in making their arguments. The inescapable conclusion, then, is that the judges who make the classification decisions are actually very good at predicting the precedential value of their cases.<sup>158</sup>

This observation, of course, raises the question whether judges draw their NPO-precedential distinctions in good faith. To answer that question, David Law recently devised a series of statistical tests to apply to over one thousand Ninth Circuit asylum cases to see whether judges were manipulating the nonpublication system.<sup>159</sup> He tested two hypotheses—scrutiny avoidance<sup>160</sup> and precedent steering<sup>161</sup>—as possible explanations for publication decisions and concluded that “[e]vidence from the Ninth Circuit suggests that some judges may attempt to steer the evolution of precedent by favoring publication of cases that lean in a particular

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156. *Id.* at 94. One attorney who favors free citation said, “I think that most opinions should be published and that the issuance of non-precedential decisions is hard to justify, but I honestly do not think that this case [referring to the case for which he was selected for the survey] would give much guidance to anyone.” *Id.* at 79–80. Another said, “The ability to cite the unpublished decision could facilitate our presentation of the argument in such an occasional situation. But many times I find that the unpublished decision is cumulative to many other published decisions on the same or similar point.” *Id.* at 80. Another, in a permissive circuit, noted that she “can cite unpublished cases from other circuits freely now, but I do it in only one or two appeals each year.” *Id.* at 93. An attorney in another permissive circuit “[had] never had occasion to cite or rely on an unpublished opinion.” *Id.* at 87. And another: “I have rarely found unpublished court of appeals cases helpful. My experience is that unpublished opinions are unpublished for a reason; i.e., either there is nothing remarkable about the case or the opinion is not worthy as precedent.” *Id.* at 97. And finally: “I do not believe that permitting the citation of unpublished opinions would have an appreciable impact, because the occasions where I have wanted to cite such a decision have been so few.” *Id.* at 97. It is worth noting that these are the comments of attorneys who favor a broader citation rule.

157. See *supra* note 142.

158. See REAGAN ET AL., *supra* note 6, at 27.

159. See Law, *Judicial Ideology*, *supra* note 11; Law, *Strategic Judicial Lawmaking*, *supra* note 11.

160. The scrutiny-avoidance hypothesis argues that “judges may seek to shield questionable decisions from scrutiny by refusing to publish them. Because they lack precedential effect, unpublished decisions are unlikely to arouse the attention of busy colleagues or attract en banc review.” Law, *Judicial Ideology*, *supra* note 11, at 213.

161. The precedent-steering hypothesis is that unanimous panels reaching ideologically unpalatable decisions may decide not to publish them in order to avoid steering precedent in that direction; or on divided panels, the minority judge may engage in “precedent bargaining,” agreeing to go along with the result as long as it is an NPO. *Id.* at 213–14.

ideological direction. The evidence does not suggest, however, that judges exploit nonpublication to hide ideologically driven decisions from scrutiny or reversal.”<sup>162</sup>

This is precisely the sort of research project that students of federal appellate practice ought to applaud, but I feel constrained to observe here that Law’s conclusion is almost certainly too strong for his data. His conclusion is supported solely by his identification of four Democratic appointees on the court who are more likely, to a statistically significant extent, to vote for asylum in published cases than in unpublished cases. The problematic question is whether that finding tells us anything. As Law points out, “notwithstanding the scope of the data set—which spans 5696 votes cast by 142 judges over 10 years—there were only 16 judges who voted in 10 or more published asylum cases.”<sup>163</sup> But of those sixteen, fifteen were more likely to vote for asylum in published cases. Indeed, the full set of twenty-eight judges with more than five published asylum votes, including fifteen Republican appointees and thirteen Democratic appointees, reveals that fully twenty-six of the twenty-eight were more likely to vote for asylum in published cases. And for the other two, the statistical effect of publication was so trivial as to be essentially zero (–0.06 and –0.03).<sup>164</sup>

In short, this is far too tiny a sliver of far too questionable data to support Law’s description of his results as showing “a number of Democratic appointees voting more often for relief in published cases,” or his conclusion that “[i]t is reasonable to think that some judges, but not all, take the precedential impact of a case into account when deciding how to vote.”<sup>165</sup> However reasonable it may have been to think so before reading this study, it seems to me equally reasonable afterward. To be sure, Law’s point, that “[i]t may well be that the opportunity to reach particular results under cover of stealth is simply not as attractive to strategically minded judges as the opportunity to shape the course of precedent,”<sup>166</sup> is eminently sensible. I just do not see that he has made an empirical case for it in this study.

More importantly, would the fact that judges calibrate their publication decisions in an effort to shape precedent expose the NPO system as

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162. *Id.* at 212.

163. *Id.* at 218–19.

164. *Id.* at 217.

165. *Id.* at 219.

166. *Id.*

a cancer on the appellate corpus? I do not think so.<sup>167</sup> Panel negotiation about the precedent-shaping effect of a decision is part of panel negotiation about how the case should be resolved generally. It applies to all facets of an opinion, not just whether the opinion should be published. Virtually every case presents not only multiple possible results, but also multiple paths to the result reached. There is no order of operations decreeing that certain issues have to be reached before others.<sup>168</sup> In asylum cases, for example, the agency often finds both that the immigrant was not credible and that the facts alleged would not support a claim even if the story were credible. If a judge fears the precedential effect of an affirmance on the legal ground, he can write an opinion affirming on the credibility determination, an option that, barring severe incompetence or misconduct by the immigration judge,<sup>169</sup> is almost always

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167. Query whether, in this context, there is much difference between Judge Arnold's claim that there is a constitutional obligation to create binding precedent in each case and the claim that there is a constitutional obligation to reach every issue raised by the parties. Compare *Anastasoff v. United States*, 223 F.3d 898, 905 (8th Cir. 2000), with Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 226 (1999). To be sure, one can analytically distinguish the two scenarios. But as to the constitutional rights of the parties, it is difficult to see how an individual could have a right to a judicial action that does not affect his particular case—whether it is the creation of a binding precedent or judicial resolution of a nondispositive issue.

168. To take one example, in *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002), the court was faced with an immigrant who had pled guilty to a criminal charge and then later sought to withdraw her guilty plea because her attorney had misadvised her about the immigration consequences of her plea. *Id.* at 184. The trial court refused her request, and on appeal, she raised two claims: (1) The trial court should have let her withdraw the plea because her attorney had been constitutionally ineffective, *id.* at 187; and (2) the court should have informed her of the consequences before she accepted the plea, *id.* at 190. The former is a constitutional issue; the latter, an interpretation of Rule 11 of the Federal Rules of Criminal Procedure. Which should the court decide? Or should it decide both? The court decided the constitutional claim, *id.* at 191, holding that misrepresentation of immigration consequences can constitute ineffective assistance, and did in this case, but demurred on the Rule 11 claim, calling it “persuasive” and “deserv[ing of] careful consideration,” but declining to decide it, *id.* at 190.

Why decide one rather than the other? One obvious reason is that an ineffective assistance claim is a case-specific, fact-intensive determination, while a Rule 11 interpretation would create a new rule that all district courts would have to follow. If we could pull aside the veil, I would guess that at least one member of the panel thought that the court ought to announce a Rule 11 requirement, at least one member thought it should not, and the ineffective assistance holding was a compromise that achieved the desired result for the litigant without setting a binding rule (though of course *Couto* is precedent for the possibility of an ineffective assistance claim based on collateral immigration consequences). How is this functionally any different from issuing an uncallable, nonbinding Rule 11 NPO (saying that, in this case, the Rule 11 colloquy was deficient, but the case has no precedential value)?

169. See, e.g., *Cham v. Att’y Gen.*, 445 F.3d 683 (3d Cir. 2006) (reversing an adverse credibility determination by Donald Ferlise, an IJ who was repeatedly found by appellate courts to have manufactured contradictions in immigrants’ testimony and to have ignored relevant evidence); *Guan Yu Lin v. Att’y Gen.*, 183 F. App’x 150 (3d Cir. 2006) (same).

available in these cases. There is an easy and generalizable rule for minimizing precedential fallout: Write a heavily fact-dependent opinion (which announces itself as such) that will be easily distinguishable in future cases.<sup>170</sup>

If a panel wants to reach a result without moving the law, it can find ways to do so; and if it wants to move the law, it can find ways to do so as well. This is just a fact about the Anglo-American legal tradition, and it has nothing in particular to do with the issuance of NPOs. The formal distinction between NPOs and precedential opinions does, however, allow litigants to make explicit two quite effective appellate arguments that otherwise would be stuck more or less between the lines: (1) The proposition I am arguing for is so obvious under this court's case law that after the first precedential opinion stating the rule, all subsequent cases raising this issue have been NPOs; and (2) this court can give my client either of two sorts of victories—a narrow, fact-specific NPO or a sweeping precedential opinion clarifying this area of law for years to come. Invocation of the NPO-precedential divide is, in my experience, enormously helpful in making such arguments. Obviously, the appeal to clear precedent and the offer of a soft landing are chestnuts of appellate practice, but insofar as both approaches are grounded implicitly in the easy-hard distinction, the formal classificational distinction between easy and hard cases gets them across much more viscerally than would otherwise be possible.

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170. In *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam with separate opinions by all but Justices Kennedy and O'Connor), for example, the majority notoriously tried to declare the case to be nonprecedential, *see id.* at 109, and, so far, it seems to be working: Equal protection challenges to local disparities in voting technology have not yet been able to successfully invoke it as a precedent.

Despite early hope from some commentators, *see, e.g.*, Edmund S. Sayer, Note, "Arbitrary and Disparate" Obstacles to Democracy: The Equal Protection Implications of *Bush v. Gore* on Election Administration, 19 J.L. & POL. 299 (2003), it has not happened. For a recent overview of subsequent litigation and possibilities, *see, for example*, Chad Flanders, Comment, *Bush v. Gore and the Uses of "Limiting,"* 116 YALE L.J. 1159 (2007). For an example of an early and failing effort to apply *Bush v. Gore* in an election case, *see Green Party of New York v. Weiner*, 216 F. Supp. 2d 176, 192 (S.D.N.Y. 2002) (rejecting the argument that "the Court's reasoning [in *Bush v. Gore*] broadens the constitutional protection afforded to voting rights by precluding different procedures for tabulating votes").

The closest that plaintiffs raising an equal protection challenge have yet come to prevailing on a *Bush v. Gore* argument was *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), in which a divided Sixth Circuit panel decided that *Bush v. Gore* prohibited the State of Ohio from holding elections in which a variety of different—and differently reliable—technologies were used to count votes. *Id.* The decision was vacated pending en banc review, and the en banc court dismissed the case as moot. *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007) (en banc).

### E. The Utility of Generic Law in Making Clerks and Judges

Let us agree, then, on the basis of both the available empirical evidence and the necessary ethical preconceptions of the practice of law itself,<sup>171</sup> that judges are reasonably good at separating the hard cases from the easy cases, and that they do so in good faith. How do judges develop this casuistical ability? The way in which federal appellate clerks develop it is illustrative. Most new clerks, upon receiving their first pile of briefs, are taken aback by the number of asylum appeals. They read through the records to find uniformly heartbreaking tales of suffering and woe; each case seems to present innumerable issues that must all be taken apart, scrutinized, worried over. To them, every case looks meritorious, or at least uncertain. The new clerks learn that of the perhaps fifteen or so asylum cases of each forty-case sitting, perhaps two or three are typically recommended for argument by the judges. A year later, at the end of the term, they can spot likely arguable cases and reversals practically upon opening the petitioner's brief. How do they develop this ability? From reading lots of opinions. And the most immediately obvious and salient fact about any given opinion is whether it is precedential or an NPO. From the moment one picks up a precedential opinion, one knows that there is something in the case that the panel found significant: Because of *these* facts, a legal doctrine is being announced, clarified, expanded, contracted, or renounced. What happened in this case required the court to do something it considered new, something it had not done in quite this way before. And from the moment one picks up an NPO, one knows that there is nothing in the case that the panel thought was not readily covered by existing law: On *these* facts, there is no need to expand or clarify the law. What happened here is squarely within the confines of rules already announced.

All one gleans from the NPO-precedential classification is what the panel thought about the novelty of the case before it. The casuistical ability fostered by the issuance of NPOs is the ability to spot novel issues, unsettled questions, untested applications of law. It has nothing to do with the merits of a particular case. Rather, it has to do, as Sunstein suggests, with the decision of whether to apply a particular rule to a particular set of facts.<sup>172</sup> And since one obviously cannot overcome the

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171. By which I mean that one cannot both engage in the practice of law and believe that judges do not, as a rule, act in good faith.

172. See *supra* notes 137–138 and accompanying text.

infinite recursion implied by constructing rules that govern when to apply rules, the only way to learn how to make that decision—how to apply the law—is to read, absorb, and then act.<sup>173</sup> The absorption process would be far more difficult if that opening signal about the panel's view of the significance of the case were stripped from opinions.

The more thoughtful critics of the NPO do not deny the underlying distinction marked by the NPO-precedential division. For example, attorneys David Greenwald and Frederick Schwarz, who assail the NPO and the no-citation rules in the strongest possible terms, make two suggestions for reform that rely on and underscore that distinction. Their first proposal is that courts issue, in cases in which they would now issue NPOs, per curiams, which, “though citable, [would be] tacitly understood to be . . . less significant precedent than . . . signed opinion[s].”<sup>174</sup> They also propose that courts dispose of such cases orally, from the bench,<sup>175</sup> without issuing a written opinion at all:

In cases in which the result was clear, dictated by well-known, well-established precedent, and in which preparation of a full-blown opinion would be overkill—in short, precisely those in which uncitable opinions are supposed to be prepared today—the members of the panel could instead deliver their opinion extemporaneously [from the bench] . . . . The opinions could also be transcribed [and cited] . . . . but their informal nature would inevitably make

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173. For an insightful meditation on this aspect of professional development, see Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245, 2324–42 (2001).

174. Greenwald & Schwarz, *supra* note 4, at 1168. As of this writing, some circuits appear to be moving in this direction, at least informally. See United States Court of Appeals for the Second Circuit, Decisions, <http://www.ca2.uscourts.gov/opinions.htm> (last visited Jan. 2, 2008) (summary orders are unsigned); United States Court of Appeals for the Third Circuit, Non Precedential Opinions (Last 30 Days), <http://www.ca3.uscourts.gov/recentop/week/reconprec.htm> (last visited Jan. 2, 2008) (nonprecedential opinions are usually unsigned); United States Court of Appeals for the Fifth Circuit, Opinions Page, <http://www.ca5.uscourts.gov/opinions.aspx> (last visited Jan. 2, 2008) (nonprecedential opinions are unsigned); United States Court of Appeals for the Ninth Circuit, Unpublished Dispositions, Log of Memoranda and Orders, <http://www.ca9.uscourts.gov/coa/memdispo.ndf> (last visited Jan. 2, 2008) (memoranda are unsigned).

In at least some circuits, however, this policy is not uniformly followed. Compare, e.g., *United States v. Carson*, No. 06-4847 (3d Cir. Nov. 5, 2007) (signed NPO) (Nygaard, J.), with, e.g., *Black v. Warden*, No. 07-3211 (3d Cir. Nov. 5, 2007) (unsigned NPO) (per curiam).

175. The revivification of appellate oral opinions is a great idea, one that would preserve the NPO-precedential signaling function while recapturing the theatricality and judge-like pomp of oral delivery from the bench, “put[ting] a face on justice and . . . giv[ing] it a voice.” Greenwald & Schwarz, *supra* note 4, at 1173.

them, in the vast majority of cases, less forceful precedents than their written counterparts.<sup>176</sup>

These proposals recognize that making a formal, explicit distinction between those cases judges feel are significant and those they feel are not is a valuable component of legal culture.

Martha Pearson, another strong critic of no-citation rules, also recognizes the jurisprudential utility of the easy-hard distinction. She favors a “‘free market’ of precedents,”<sup>177</sup> but suggests that an added dose of authorial self-discipline could cure the “blurring” problem by eliminating ambiguity-fomenting verbiage:

A better approach may be to impose upon all who have a hand in preparing opinions in cases receiving abbreviated treatment the discipline to prepare opinions that are fundamentally different from published opinions. Such opinions should be extremely brief. They should discuss only the case at bar and cases that control its outcome. They should not hypothesize about possible future cases. They can fulfill the goal of providing parties with reasons by citing controlling cases without extensively re-interpreting those cases.<sup>178</sup>

While this is certainly true, the difficulty is in reliably and uniformly drafting such opinions without falling victim to the vices of information deficiency or analytical excess. Perhaps the best solution would be issuing oral opinions from the bench, supplemented by a generic written form on which the panel would fill in, as needed, the issue, the controlling precedent, and relevant facts.<sup>179</sup> The use of a form would alleviate the most commonly voiced judicial concern about the Rule 32.1(a) amendment, which is that judges do not want improvidently worded NPO language cited back to them.<sup>180</sup> A form would have no such language, and though forms could be cited, it would be apparent from their structure and content that they were not making new law. For instance, the precedent section could consist, in its entirety, of a quotation of the controlling language from the precedential opinion cited. Use of the form would also ensure that the NPO satisfies the necessary criteria I identified earlier.<sup>181</sup> Filling out the form would require stating explicitly, for each

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176. *Id.* at 1169–70.

177. Pearson, *supra* note 10, at 1306.

178. *Id.* at 1303.

179. For a model of such a form, see *infra* app. 2.

180. See, e.g., Kozinski & Reinhardt, *supra* note 5, at 44.

181. See *supra* Part I.C.

issue, what the panel sees as the dispositive legal question, what the panel sees as the controlling legal rule, where the panel sees that rule expressed in a precedential case, and what facts the panel sees as salient in this case.

The form would serve a valuable heuristic purpose as well, insofar as it would require the judge completing it to specify the precise grounds for the result. And it would help to mitigate the danger of precedent-worthy cases being mistakenly resolved as NPOs: In hard cases, it would be difficult, if not impossible, to complete the controlling precedent section with a simple quotation from a prior case. The necessity of clarification, distinction, or expansion is precisely what makes a case worthy of publication in the Federal Reporter, and an attempt to shoehorn a hard case into a generic decisional form would likely make that necessity evident.<sup>182</sup> Of course, a panel issuing such a form could also explain its decision orally from the bench if it wished, and parties could petition for rehearing or en banc review as usual. Finally, circuits adopting a form might choose to allow petitions for issuance of a full opinion, just as they now allow petitions for NPOs to be published in the Federal Reporter as precedential opinions.

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182. Consider, for example, a recent asylum NPO from the Eleventh Circuit, *Garcia v. Attorney General*, 217 F. App'x 855 (11th Cir. 2007). Not only does this opinion run to ten pages as printed in the Federal Appendix and include a vigorous dissent, but it also concerns a pressing and uncertain area of the law: the application of the asylum statute to people who are threatened by armed nongovernmental factions in countries not experiencing an officially denominated civil war. In this case, the claimant had fled Colombia because of threats from a leftist guerilla group that had demanded that she pay a "war tax." *Id.* at 857. The majority engaged in a lengthy analysis of the facts and case law and concluded that the refusal to pay a guerilla group does not constitute the expression of political opinion, but merely of economic self-interest. *Id.* at 859. This is a potentially wide-reaching holding because, as the dissent points out, most of the world's social conflict revolves around economic class:

In Colombia, which is wracked by violent divisions based on class, and where Marxist groups subscribe to a political ideology that is explicitly based on class, cattle-ranchers and landowners face socially and politically motivated violence as well as financial extortion. . . .

. . . .

We undermine the purpose of those laws when we deny asylum to those whose political opinions happen to be aligned with their personal safety.

*Id.* at 863–64 (Barkett, J., dissenting).

This decision could not possibly have been expressed within the heuristic constraints of a form, and the attempt to make it fit would have immediately impressed upon the panel the need for publication.

## F. NPOs and Judicial Blindfolding

The jurisprudential virtues of formalized decisional procedures—the ritualistic aspects of the law—have, in other contexts, long been extolled by commentators. A fascinating recent essay by Jessie Allen ponders the importance of legal rituals in creating a “rule of law” culture that has enduring value even in the face of (indeed, perhaps because of) the ultimate indeterminacy of legal rules.<sup>183</sup> Allen, exploring the “blind Justice” image,<sup>184</sup> analogizes judicial decisionmaking to art forms in which one type of perception or expression is deliberately suppressed so as to channel creative energies in a particular way. Noting that “[w]hatever new perspectives the performed formalities of legal procedure may enable will come at the cost of the perceptual capacities we usually rely on for moral and practical judgments,”<sup>185</sup> Allen suggests that much of the value of restrictive formal rituals is to force judges to forgo their habitual human modes of thinking and to become, to the extent possible, laws rather than men. Further, she analogizes judging to formalistic visual art forms like twentieth-century abstract expressionism, in which the artist employs a highly restrictive methodology, such as eschewing brushes and dripping or pouring the paint onto the canvas: “[Jackson] Pollock and the ‘process artists’ who followed his example are perhaps the most rigorous rule followers, the most legalistic of innovators for whom formal procedure is the key to pushing past the limits of individual creative efforts.”<sup>186</sup> Perhaps, she suggests, “the adoption of restrictive, highly-structured public modes of argument and decisionmaking intervenes in legal actors’ normal perceptual and intellectual [sic] habits.”<sup>187</sup> Allen accordingly laments the decline in the number of oral arguments and “formal published opinions” as the “jettisoning [of] a practice that helps judges do justice, behaviorally as well as substantively.”<sup>188</sup>

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183. Jessie Allen, *Blind Faith and Reasonable Doubts: Investigating Beliefs in the Rule of Law*, 24 SEATTLE U. L. REV. 691 (2001).

184. *Id.* at 709.

185. *Id.* at 714.

186. *Id.* at 713. In my opinion, however, Jackson Pollock is not the best example here. For rigor of formal constraints among abstract expressionists, Pollock is much less of an exemplar than, for example, Joseph Albers. See H.W. JANSON & ANTHONY F. JANSON, *HISTORY OF ART* 823 (6th ed. 2001) (“Albers devoted the latter part of his career to color theory. *Homage to the Square*, his final series, is concerned with subtle color relations among simple geometrical shapes, which he reduced to a few basic types. Within these limits, he was able to invent almost endless combinations based on rules he devised through ceaseless experimentation.”).

187. Allen, *supra* note 183, at 713.

188. *Id.* at 718.

But there is a case to be made that the NPO is, in an important sense, more purely ritualistic, and forces judges into a more purely legal analytic mode—that is, NPOs cut off more of those perceptual faculties. If part of judging is blindfolding, then we should be worried about the longer, published, argued opinions, for it is there that political predilections and emotions, if lurking in the decisional background, are more likely to take root.

Oral argument comes with its own set of perils from a blindfolding perspective. If the danger is that appellate judges are capable of being swayed by conscious and unconscious nonlegal factors, it is at oral argument that these factors present themselves, because abstract legal principles have to speak through the voices of real people. An advocate might be overbearing, inarticulate, rude, condescending, or just ugly. These factors are irrelevant to the legal merits of the claim under consideration, and in cases submitted on the briefs, they will be. But, as anyone who has spent time at oral arguments can attest, it is not uncommon for a judge, or even the whole panel, to have a powerfully negative personal reaction to an advocate. Judges sometimes get angry at one of the lawyers, thus making them more receptive to the other side than they might otherwise have been.<sup>189</sup> If we think the appearance or demeanor of counsel is not a good legal reason for a result, we should favor more cases being decided on the papers. In most cases, in my experience, oral argument does what it is supposed to do: clarify the issues and answer nagging concerns raised by the briefs and the record. But the oral argument form is not inherently more lawlike or objective than other decisional formats, and it is important to recognize that critiques like Allen's cut both ways. If we want a system that structurally embodies the "laws not men" jurisprudential ideal, then there is a colorable argument to be made for the NPO form, which requires the highest level of abstraction from the facts, equities, and irrelevancies of the case.

Furthermore, as all new lawyers learn eventually, it is the willful self-imprisonment within a highly constrained formal structure that makes legal writing legal writing and makes judicial writing the law. It is fun to imagine ourselves, Holmes- or Douglas-like, writing gnomic sociological

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189. For example, in oral argument for one trademark case I observed as a clerk, a white lawyer argued to a black judge that "the word 'freedom' has an almost religious significance to African-Americans." The comment was not derived from the record and the judge was not impressed.

essays with “Reversed!” at the end,<sup>190</sup> but such structural and stylistic conceits are not the ideal way to convey the legal reasons for the disposition of a case. We understand that when such opinions do issue from the Supreme Court, it is because the traditional decisional materials really have run out (take, for example, the substantive due process cases of the past half-century). But it is the rare circuit court case for which it is genuinely impossible to follow a precise structure: You outline the relevant factual context and procedural setting, identify a governing rule of law, and explain why and how that rule applies.<sup>191</sup> The most important function a written opinion can serve, for litigants and for the public, is to precisely identify the part of the law that the court thinks controls the particular facts of the case. Only once courts have done so can the public respond, either by modifying its behavior or by modifying the law.

So, does writing NPOs deprive judges of any of the judge-like rituals by which they Platonize themselves to become proper judges, as Allen suggests? I do not think so. NPOs may be the “landfill[s]” of decisional law, but as David Luban observes, it is to the landfills that we must look if we want to truly understand a social practice.<sup>192</sup> NPOs inculcate judges and clerks into the background norms defining a given area of the law and allow all interested parties—judges, clerks, attorneys—to develop an intuitive faculty for distinguishing the innovative from the generic. Longtime exposure to the relevant genre allows one to sense immediately the rule expanders and precedent makers: The Charlie Daniels Band’s “The Devil

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190. For some colorful examples, see *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (Kennedy, J.) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (Douglas, J.) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (announcing, through Justice Holmes, that “[t]hree generations of imbeciles are enough”).

191. Some of the most interesting discussions of this dynamic have come in the context of judicial and academic criticism of Judge Posner’s self-described “pragmatic” decisionmaking methodology, whereby he first decides what outcome he thinks is “reasonable,” and only then asks what the applicable legal rules are (and only to determine whether there are any bright-line rules that flatly prohibit the outcome he would like to reach). See *supra* note 24. Posner has suggested that this is really the method employed by all appellate judges, but, not surprisingly, other judges have demurred from that assessment. For one good recent commentary, see Posting of Brian Tamanaha, *supra* note 24.

192. David Luban, *The Art of Honesty*, 101 COLUM. L. REV. 1763, 1767 (2001) (reviewing LAWRENCE JOSEPH, *LAWYERLAND* (1997)).

Went Down to Georgia” for country music,<sup>193</sup> *Training Day* for buddy-cop films,<sup>194</sup> *Unforgiven* for Westerns,<sup>195</sup> George Gershwin’s *Rhapsody in Blue* for the piano concerto,<sup>196</sup> Bob Dylan’s Newport Festival performance for folk music,<sup>197</sup> and so forth. We cannot appreciate popular culture without recognizing the difference between works that push interpretive categories and works that do not, and we cannot appreciate an aesthetically successful work without recognizing, intuitively, the successful application of existing generative rules to the appropriate raw material.<sup>198</sup> It is a mistake to deny that appellate opinions fit this model.<sup>199</sup>

### CONCLUSION

In a 2001 essay, Duncan Kennedy turned his eye to the ideological ramifications of “technical” legal issues—precisely the sort of issues that

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193. CHARLIE DANIELS BAND, *The Devil Went Down to Georgia*, on MILLION MILE REFLECTIONS (Sony 1979) (notable for its spoken melody, minor resolution, and multiple melodic elements); see also BIG & RICH, *Save a Horse, Ride a Cowboy*, on HOUSE OF A DIFFERENT COLOR (Warner Bros./Wea 2004).

194. TRAINING DAY, *supra* note 114 (precedent making for the use of a dominant black partner who turns out to be the bad guy).

195. UNFORGIVEN (Warner Bros. Pictures 1992) (notable because the hero’s motivation is money, the hero shoots first, and the hero unapologetically shoots an unarmed man).

196. E.g., GEORGE GERSHWIN, *Rhapsody in Blue*, on GERSHWIN PLAYS RHAPSODY IN BLUE (Shout Factory 2003) (1924) (groundbreaking for its extensive improvisation by a soloist in a classical concerto format).

197. See THE OTHER SIDE OF THE MIRROR: BOB DYLAN LIVE AT THE NEWPORT FOLK FESTIVAL 1963–65 (Sony 2007) (1965) (introducing the use of electric instruments in folk music).

198. On this theme, see Bérubé, *supra* note 139 (meditating on the cultural significance of “best of” lists and our compulsion to continually make and reorder them).

199. Frederick Schauer has made similar remarks, in a different context, on the pitfalls of refusing to treat law as culture:

Recent legal scholarship . . . indicates that a latent literary or art critic lurks within many law teachers. Dealing with cases, we law teachers have an ideal opportunity to play that role, but most of us squander the opportunity. Instead of seeing what can be done *with* a case, we devote our efforts to *attacking* it. We make snide and dismissive remarks about cases and their authors, rather than treating a case as the raw material from which theories, insights, and creative interpretations might be spun. . . . Imagine a course in modern art that started with a study of the fundamental errors committed by Manet, moved on to a broadscale assault on the Impressionists, Post-Impressionists, and Expressionists, poked holes in the work of Picasso, Bracque, and Gris, and then closed with a sarcastic attack on contemporary art from Pollock to Rothko, in the course of which never once praising unqualifiedly any painting, and never once saying that any painting or painter was really great. If this seems odd, and it does to me, then why is almost that exact style so commonplace in dealing with constitutional law?

Schauer, *supra* note 23, at 434 n.91.

so often generate NPOs. “I think,” Kennedy says, “that there are secondary political stakes [in the resolution of such issues].” He explains:

[T]he very understanding of these issues as “merely technical” has its own effect (regardless of how the issues are resolved), re-enforcing the public/private distinction in mainstream political thought, and thereby indirectly re-enforcing political centrism against radicalism (whether of the left or right). In other words, what is at stake, politically, in technical discussions is a set of quite indirect effects on the persuasiveness of positions in other, non-technical, domains, domains where there is a long running conflict between political points of view, or philosophies, or Habermasian universalization projects.<sup>200</sup>

Kennedy appears to be arguing that the very distinction between a technical legal question and a policy-based legal question—between reasons internal to legal doctrine and reasons external to legal doctrine—is itself a reactionary and oppressive one. Whether as a matter of pedagogy, practice, or politics, I cannot go along with that. Surely one can criticize, as producing unjust results, the technical constraints of an area of law without denying that those technical constraints really are technical constraints—that is, that they are real features of this particular body of law and do have a determinative effect on some cases. I would go further, indeed, and suggest that one must accurately and completely understand the actual technical boundaries and requirements of a field as such before one can effectively articulate, appreciate, and protest its political consequences, analogues, and ideological residue. To that end, the formal jurisprudential distinction between easy and hard cases furthers the critical ideal.<sup>201</sup>

The project of creating a more equitable, just, and inclusive set of asylum laws, for example, will not be helped by a critical insistence that the existing asylum laws really do not generate claim denials, in most cases, through the straightforward, legally correct, good-faith application

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200. Duncan Kennedy, *The Political Stakes in “Merely Technical” Issues of Contract Law*, 10 EURO. REV. PRIVATE L. 7, 8 (2001).

201. Solum comments wryly that [i]f one believes that the rules are strongly determinate, but fundamentally wrong, one is left with very little room to maneuver within the limited horizons of legal scholarship. The notion that it is possible to achieve radical results working with the existing body of legal doctrine—because the seeming constraints are illusory—has powerful attraction for those committed to social change, but whose professional lives are confined to the academy and not the capitol buildings. Solum, *supra* note 36, at 497.

of statutes and case law. I have worked on dozens of asylum cases, both as a clerk and as counsel, and I would suggest that precisely the opposite is true: It is only through recognizing that most denials really are easy cases under existing law that we can begin to galvanize reform. Take one notorious example: The persecution of women as such is not covered by the asylum statute. True, gender persecution can sometimes successfully be shoehorned into the religion, social group, or political opinion categories, but that does not mean that the asylum laws do not actually determine denials in many other gender persecution cases in a straightforward way. The injustice here is crying out for legislative reform, not deconstruction of case law.

Law is a central part of our culture, and the body of appellate law is a significant part of the cultural production that sustains the institution itself. The distinction between generic and innovative production within that body functions in all the ways it does in other bodies of culture: It allows the practitioners of the culture to learn to make the intuitive, casuistic judgments that are so vital to making both art and law. And it should be preserved, even as citation prohibitions fall. The law's structural elegance derives from the persistence of its generic rules and forms. Just as not every artwork heralds a revelatory new method, and not every law review article can boldly shift the paradigms of legal thinking, not every fact pattern requires clarification or modification of existing rules. The new Rule 32.1(a) should hold no terrors for the circuits; on the contrary, it should encourage them to bring their generic dispositions into the light and to acknowledge them for what they are. Generic works, whether artistic or legal, are nothing to be ashamed of.

## APPENDIX 1: RULES FOR CONSTRUCTING COUNTRY SONGS

## 1) Structure

- (a) The structural elements shall be limited to Verse, Chorus, and Bridge, each of which shall consist of four or eight bars.
- (b) The form shall be (i) <Verse, Verse, Chorus, Verse, Chorus, Chorus>; or (ii) <Verse, Chorus, Verse, Bridge, Verse, Chorus, Chorus>; or a combination of (i) and (ii), such as the addition of a Bridge to (i). A spoken interlude is permissible, particularly in live performance.
- (c) The time signature shall be (i) 2/4, 3/4, 4/4, 6/8, or 12/8 (which is to say, no messing around with 5/4 or 7/4, or even 9/8); and (ii) consistent throughout the piece.

## 2) Harmony and Melody

- (a) Chords are limited to the tonic, dominant, subdominant, and submediant, with no extensions save the dominant seventh. The major or minor supertonic is permissible in a II-V transition. The use of other chords is strongly disfavored, except as permitted by subparagraph (d) of this section. Extended or altered chords other than the dominant seventh (for example, sixths and ninths, diminished chords,<sup>202</sup> sharp fifths, or flat ninths) are prohibited.
- (b) Minor chords are permitted only within the key. Minor resolutions are disfavored (in other words, a phrase should end on the major tonic).<sup>203</sup>
- (c) Dissonances (with the exception of the dominant seventh chord discussed in 2(a)) are prohibited (for example, major sevenths, sharp or flat fifths, or flat ninths) in chords or as stressed melodic elements.
- (d) Transposition within a song is restricted to one upward modulation (half step or whole step) for the repetition of the final chorus.<sup>204</sup> When modulating a whole step, a half-step transitional modulation may be employed.

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202. The use of diminished chords is a clear indicator that the Eagles' "Desperado," despite its title and subject matter, is not a country song. See EAGLES, *Desperado*, on *DESPERADO* (Asylum 1973).

203. Minor resolutions are disfavored rather than prohibited to accommodate the occasional minor-resolution hit. E.g., ALAN JACKSON, *Midnight in Montgomery*, on *DON'T ROCK THE JUKEBOX* (Arista Records 1991).

204. Or, as in, for example, Kenny Rogers' "The Gambler," at the song's midpoint. See KENNY ROGERS, *The Gambler*, on *THE GAMBLER* (United Artists 1978).

- (e) The melody must consist of short repeated phrases of no more than four bars each.
- 3) Instrumentation
- (a) Instrumentation is limited to some combination of guitar, mandolin, banjo, bass, violin (used as a solo instrument only), piano, and drums, with the following permissible substitutions, additions, or modifications:
    - (i) Accordion may be added or substituted for piano, but Hammond organ may not.<sup>205</sup>
    - (ii) Guitar may be electric (slide, steel, and dobro are encouraged), but distortion is strongly disfavored and may not dominate the mix.
    - (iii) Horns of any sort are disfavored, with the exception of mariachi trumpets in Mexican-themed songs.
    - (iv) Synthesizers and electronic effects and beats, identifiable as such, are prohibited.
  - (b) The vocalist should adopt an accent stereotypical of white residents of the former Confederate states.
- 4) Lyrics
- (a) The lyrics should be centered thematically around a single repeated phrase, which should include a play on words (though it does not have to be clever).
  - (b) The verses should be narrative, broadly construed but definitely excluding abstract imagery and metaphorical opacity.
  - (c) Permissible themes include, exclusively, (i) love and sex; (ii) family relationships; (iii) alcohol; (iv) work (including prison); (v) cars; (vi) patriotism; and (vii) religion.
  - (d) Love, family, alcohol, and work may be portrayed in a positive or negative light; cars, patriotism, and religion must be portrayed in a positive light.<sup>206</sup>

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205. I concede that you might hear a Hammond organ now and then on country radio, but I do not think it happens enough to change the rule, which reflects the unchallenged proposition that the Hammond is a rock instrument (subsequently imported into jazz). The status of the Hammond in country music is quite fraught, even among lawyers. See, e.g., Posting of Silicon Valley Jim to the Volokh Conspiracy, <http://www.volokh.com/posts/1149197032.shtml> (June 1, 2006, 18:09 PST) (protesting the use of the Hammond in the Dixie Chicks' latest album).

206. The Dixie Chicks do not provide an appropriate counterexample to this rule. The Chicks themselves strenuously insist on their absolute fidelity to the rule. The conflict is instead a definitional dispute over the meaning of some of the terms in 4(c). (Alternatively, one might argue that the Chicks have moved out of the country genre altogether. As to their recent album, tour, and Grammy triumph, this argument probably has merit.)

I think these rules work both descriptively and prescriptively. That is, one could listen all day to mainstream country radio and not hear a song that violates any of these rules, and a song constructed according to these rules would be recognizable as a mainstream country song.<sup>207</sup>

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207. This is a principle not lost on country artists themselves. *E.g.*, DAVID ALLAN COE, *You Never Even Called Me by My Name*, on 17 GREATEST HITS (Sony 1990).

## APPENDIX 2: GENERIC FORM FOR UNPUBLISHED DISPOSITIONS

- 1) Caption
  - 2) Issue
  - 3) Rule (in the form of a quotation from a precedential case)
  - 4) Relevant facts (in the form of a numbered list)
  - 5) Result
  - 6) Order
- Numbers 2–4 may be repeated, as 2a, 2b, and so on, for multiple issues.

This form has three principal virtues. First, and most importantly, is its heuristic value: It forces the panel to precisely identify the governing rule and the facts that implicate that rule. If the panel cannot agree on the applicable rule and facts, then it will be evident that the case is not appropriate for an unpublished disposition, and a full opinion is required. Second, it allows the parties, the public, and the bar to see precisely what legal rule the court thought governed the dispute. Third, it eliminates the possibility of inexact and misleading paraphrases of legal rules—the quasi-precedential verbiage that so worries judges. There would be no jurisprudential danger in releasing these forms to the public and allowing their citation because they contain no verbiage at all and their statements of legal rules must be in the form of quotations. Finally, as a practical matter, the use of a form will greatly ease the chambers' workloads, because even the most routine NPO must be composed, proofread, and nitpicked, all of which would be enormously simplified by use of the form.

The following example illustrates how the form could be applied to an actual case, an asylum claim based on the 1998 Indonesian riots<sup>208</sup>:

- 1) Caption: *Yulianty v. Att'y Gen.*, No. 05-3398
- 2) Issue: Was Petitioner persecuted in Indonesia on account of her ethnicity and religion?
- 3) Rule: “[V]iolence or other harm perpetrated by civilians against the petitioner’s group does not constitute persecution unless such acts are committed by the government or forces the government is either unable or unwilling to control.” *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005).
- 4) Relevant facts:
  - (a) Petitioner is an Indonesian citizen of ethnic Chinese descent.

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208. *Yulianty v. Att'y Gen.*, 186 F. App'x 331 (3d Cir. 2006).

- (b) Petitioner attended Christian churches and a Christian college in Indonesia.
  - (c) Petitioner, on various occasions, heard ethnic slurs shouted at her on the streets.
  - (d) On one occasion, rocks were thrown at Petitioner's house.
  - (e) During street riots in 1998, there was an attempted break-in of Petitioner's house.
  - (f) On one occasion, a boy riding a bike grabbed Petitioner's breasts while riding by her on the street.
  - (g) On one occasion, Petitioner's purse was snatched by a thief riding a motorcycle.
- 5) Result: These facts do not establish persecution because there was no government involvement in the incidents described.
- 6) Order: Petition denied.