

University of Pennsylvania Law School  
**Penn Law: Legal Scholarship Repository**

---

Faculty Scholarship

---


3-15-2014

## Catalogs

Gideon Parchomovsky  
*University of Pennsylvania*, [gparchom@law.upenn.edu](mailto:gparchom@law.upenn.edu)

Alex Stein  
*Cardozo Law School*, [astein1@yu.edu](mailto:astein1@yu.edu)

Follow this and additional works at: [http://scholarship.law.upenn.edu/faculty\\_scholarship](http://scholarship.law.upenn.edu/faculty_scholarship)

 Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [Evidence Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Theory Commons](#), [Legislation Commons](#), [Other Public Affairs, Public Policy and Public Administration Commons](#), [Policy Design, Analysis, and Evaluation Commons](#), [Public Law and Legal Theory Commons](#), [Tax Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Parchomovsky, Gideon and Stein, Alex, "Catalogs" (2014). *Faculty Scholarship*. Paper 1039.  
[http://scholarship.law.upenn.edu/faculty\\_scholarship/1039](http://scholarship.law.upenn.edu/faculty_scholarship/1039)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

# ESSAY

## CATALOGS

*Gideon Parchomovsky\* & Alex Stein\*\**

*It is a virtual axiom in the world of law that legal norms come in two prototypes: rules and standards. The accepted lore suggests that rules should be formulated to regulate recurrent and frequent behaviors, whose contours can be defined with sufficient precision. Standards, by contrast, should be employed to address complex, variegated behaviors that require the weighing of multiple variables. Rules rely on an ex ante perspective and are therefore considered the domain of the legislature; standards embody a preference for ex post, ad hoc analysis and are therefore considered the domain of courts. The rules/standards dichotomy has become a staple in economic analysis of the law, as well as in legal theory in general.*

*This Essay seeks to contribute to the jurisprudential literature by unveiling a new form of legal command: the catalog. A catalog, as we define it, is a legal command comprising a specific enumeration of behaviors, prohibitions, or items that share a salient common denominator and a residual category—often denoted by the words “and the like” or “such as”—that empowers courts to add other unenumerated instances. This Essay demonstrates that the catalog formation is often socially preferable to both rules and standards and can better enhance the foundational values of the legal system. In particular, catalogs are capable of providing certainty to actors at a lower cost than rules, while*

---

\* Robert G. Fuller, Jr. Professor of Law, University of Pennsylvania Law School and Professor of Law, Bar-Ilan University School of Law, Israel.

\*\* Joseph F. Cunningham Visiting Professor of Commercial and Insurance Law, Columbia Law School and Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. We thank Michael Abramowicz, Greg Alexander, Larry Alexander, Jill Anderson, Adi Ayal, Shyam Balganes, Ittai Bar-Siman-Tov, Avi Bell, Omri Ben-Shahar, Ariel Bendor, Eyal Benvenisti, Mitch Berman, Stephanos Bibas, Rick Bierschbach, Leora Bilsky, Michael Birnhack, Miriam Bitton, Bill Bratton, Sam Buell, Mike Burstein, Kevin Clermont, Hanoch Dagan, Brannon Denning, Shai Dotan, Jim Dwyer, Aaron Edlin, Mitch Engler, Lee Anne Fennell, Jean Galbraith, John Golden, Lisa Kern Griffin, Aeyal Gross, Sharon Hannes, Alon Harel, Ron Harris, Umberto Izzo, Ehud Kamar, Louis Kaplow, Amalia Kessler, Jon Klick, Seth Kreimer, Shahar Lifshitz, Greg Mitchell, Jacob Nussim, Orly Oren-Kolbinger, Eric Orts, Ariel Porat, Eric Posner, Richard Posner, Amit Pundik, Dorothy Roberts, Ed Rock, Hanoch Sheinman, Peter Siegelman, David Skeel, Endre Stavang, Tom Ulen, Polk Wagner, Amy Wax, Phil Weiser, Tobias Wolf, Ed Zelinsky, and participants in workshops and seminars at Bar-Ilan University; the University of Pennsylvania Law School; the Buchmann Faculty of Law, Tel-Aviv University; and Trento University Law School for useful comments and suggestions. Finally, we are grateful to Ananth Padmanabhan for outstanding research assistance.

*avoiding the costs of inconsistency and unbridled discretion inimical to standards. Moreover, the use of catalogs leads to a better institutional balance of powers between the legislature and the courts by preserving the integrity and autonomy of both institutions. This Essay shows that these results hold in a variety of legal contexts, including bankruptcy, intellectual property, criminal law, torts, constitutional law, and tax law.*

INTRODUCTION .....	166
I. THE JURISPRUDENCE OF RULES AND STANDARDS .....	172
II. THE MERITS OF CATALOGS.....	181
III. CATALOGS IN THE LAW .....	190
A. Criminal Law .....	191
B. Torts.....	196
C. Constitutional Law .....	201
D. Tax Law.....	205
CONCLUSION.....	208

#### INTRODUCTION

Conventional wisdom holds that legal commands come in two varieties: rules and standards.<sup>1</sup> Rules contain a precise formulation of the proscribed conduct, illustrated by the oft-cited prohibition on “driving [a car] in excess of 55 miles per hour on expressways.”<sup>2</sup> Standards, on the other hand, only provide a generalized description of the proscribed conduct, as in the case of the prohibition on “driving at an excessive speed on expressways.”<sup>3</sup> Rules come in handy for individuals trying to

---

1. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557, 559–62 (1992) (describing legal system as consisting of rules and standards); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1685–87 (1976) (referring to legal system’s rules and standards); Pierre Schlag, *Rules and Standards*, 33 *UCLA L. Rev.* 379, 379–81 (1985) (referencing rules and standards in legal system); see also Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 *Va. L. Rev.* 1217, 1221 (1982) (describing choice between “formal ‘rules’ [and] open-ended ‘standards’” as “fundamental question in jurisprudence”); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 *Yale L.J.* 65, 67–71 (1983) (identifying criteria for selecting rule over standard, or vice versa, in administrative law); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 *Or. L. Rev.* 23, 43–56 (2000) (using behavioral economics to analyze rules-versus-standards dichotomy); Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 *Vand. L. Rev.* 509, 527–37 (2012) (describing choice between rules and standards in federal-jurisdiction law).

2. Kaplow, *supra* note 1, at 560; see Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 *B.U. L. Rev.* 155, 155–56 (1999) (describing Montana adoption of “Basic Rule” of ‘reasonable and prudent’ daytime driving” as “choice between rules and standards”).

3. Kaplow, *supra* note 1, at 560; see King & Sunstein, *supra* note 2, at 156 (characterizing Montana’s Basic Rule as example of legal standard).

figure out whether their contemplated conduct is prohibited or permitted. The same kind of *ex ante* clarity is not readily available under standards, whose precise implications for a given course of action are determined by a court or an agency only after the fact.<sup>4</sup> Moreover, the *ex post* guidance provided by courts is often confined to the specifics of the case at hand and does little to clarify the realm of legitimate behavior for other actors. The unpredictability associated with standards affects not only wrongdoers, but also law-abiding citizens who wish to act in accordance with the law but cannot readily discern what acts are permissible. Hence, standards may exert a chilling effect on desirable behavior.<sup>5</sup>

Formulating rules that identify undesirable conduct with the requisite degree of precision is costly.<sup>6</sup> Consequently, rules are considered most suitable for regulating recurrent and relatively homogeneous conduct, such as driving a car<sup>7</sup> or mining coal.<sup>8</sup> When a socially undesirable conduct is homogeneous and recurrent, the cost of devising a rule that regulates it will be spread across multiple cases. In each case, actors will be able to easily find out whether their contemplated conduct is permitted (or prohibited); and the cost of applying the rule by courts will be low as well.<sup>9</sup> As a result, society will be able to recoup its investment in the formulation of the rule.<sup>10</sup> In cases featuring undesirable conduct that does not form a recurrent pattern, these economies of scale are not attainable. Hence, in such cases, it is more cost effective to adopt a broad standard notwithstanding the resulting unpredictability costs for actors and implementation costs for courts.<sup>11</sup>

The distinction between rules and standards has preoccupied scholars from different methodological persuasions, spawning a voluminous

---

4. See Kaplow, *supra* note 1, at 562–63 (underscoring standards’ meanings determined by courts *ex post*); Cass R. Sunstein, Problems with Rules, 83 Calif. L. Rev. 953, 965 (1995) [hereinafter Sunstein, Problems with Rules] (highlighting standards’ *ex post* guidance).

5. See John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance with Legal Standards, 70 Va. L. Rev. 965, 966–67 (1984) (attesting uncertainty associated with standards may chill desirable conduct).

6. See Kaplow, *supra* note 1, at 569 (“Because of [the cost of determining the appropriate content of the law *ex ante*], rules are more expensive to promulgate than standards.”).

7. *Id.* at 563–64 (showing rules are best suited to regulate recurrent conduct such as car driving).

8. *Cf. id.* (noting utility of rules in areas such as regulations governing health and safety).

9. *Id.* at 563 (discussing benefits of rule promulgation and positive effects of rules on actors’ conduct).

10. *Id.* (“If there will be many enforcement actions, the added cost from having resolved the issue on a wholesale basis at the promulgation stage will be outweighed by the benefit of having avoided additional costs repeatedly incurred in giving content to a standard on a retail basis.”).

11. *Id.* (“[W]hen frequency [of regulated conduct] is low, a standard tends to be preferable.”).

theoretical literature with many important insights.<sup>12</sup> As this Essay will show, however, the menu of policy tools consists of three, not two, categories of legal commands. Hidden from view, there exists a third category that has completely escaped the penetrating gaze of legal theorists: catalogs. A catalog, as it is defined in this Essay, consists of an outright ban on a detailed, but incomplete, list of specific activities and a general prohibition of all activities falling into the same category. Accordingly, a typical catalog would contain a specific enumeration of proscribed conduct and a general provision empowering courts to penalize or enjoin other similar activities. Importantly, although this Essay focuses predominantly on conduct, catalogs are not confined to conduct that the lawmaker permits or prohibits. Catalogs also may contain a list of rights, products, assets, defenses, privileges, or itemized deductions.<sup>13</sup>

Catalogs have a noble provenance. They can be traced back to the corpus juris of the eighteenth century, where they held pride of place.<sup>14</sup> Over time, however, this legal category fell into oblivion among theorists, and today it is all but forgotten. Yet conceptual categories do not die so easily, especially when they capture legal phenomena that have continued vitality and significance. So while catalogs disappeared from the scholarly canon, they did not disappear from the law.<sup>15</sup> In fact, their pres-

---

12. See, e.g., Baird & Weisberg, *supra* note 1, at 1221 (analyzing importance of choice between rules and standards in battle-of-the-forms provision); Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 *J.L. Econ. & Org.* 256, 256–59 (1995) (analyzing contracting parties' selection of rules over standards and vice versa); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 *Admin. L. Rev.* 807, 818–26 (2002) (analyzing rules-versus-standards dichotomy in administrative law); James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 *Calif. L. Rev.* 115, 130–43 (2012) (analyzing rules-versus-standards dichotomy in securities law); James D. Ridgway, *Changing Voices in a Familiar Conversation About Rules vs. Standards: Veterans Law at the Federal Circuit in 2011*, 61 *Am. U. L. Rev.* 1175, 1183–90 (2012) (using rules-versus-standards framework to analyze Federal Circuit's decisions on veterans' rights); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 22, 69–83 (1992) (examining Supreme Court Justices' divisions over rules and standards).

13. See *infra* Part III (illustrating various types of catalogs).

14. An early catalog had already appeared in English law in 1596. See *Archbishop of Canterbury's Case*, (1596) 76 *Eng. Rep.* 519 (K.B.) 519–21; 2 *Co. Rep.* 46 a, 46 a to 47 a (determining power granted to King by statute in question over lands of dissolved colleges). To the best of our knowledge, an American court first used a catalog in *Executors of Barracliff v. Administrator of Griscom*, 1 *N.J.L.* 193, 194–95 (1793) (interpreting statute to determine whether plaintiff was entitled to costs); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 200 (2012) (discussing early court decisions applying *eiusdem generis* rule to interpret general concepts appearing in statutes alongside specific concepts as belonging to same kind or category); Glanville L. Williams, *The Origin and Logical Implications of the Eiusdem Generis Rule*, 7 *Conv. & Prop. Law* (n.s.) 119, 119–24 (1943) (describing origins of *eiusdem generis* rule).

15. See, e.g., *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 599 P.2d 676, 686 n.10 (Cal. 1979) (“[T]he . . . *eiusdem generis* [rule] . . . states . . . where general words follow the enumeration of particular classes . . . , the general words will be . . . applicable . . . only to . . . things of the same general nature . . . [since] if the

ence in our laws is now more wide ranging and abundant than it was in the past.<sup>16</sup>

From a philosophical perspective, catalogs, as concepts and categories, are predicated on the principle that Ludwig Wittgenstein aptly called a “family resemblance.”<sup>17</sup> Specifically, the enumerated rights, prohibitions, or items in a catalog must have a common denominator or unifying characteristic that reflects people’s linguistic conventions (not just logic) and is discernible to individual actors and judges. Based on this common denominator, actors and judges alike ought to be able to construe the general provision that admits of other *unenumerated* conduct or items that bear a family resemblance to the enumerated ones. In deciding whether an unenumerated conduct (or item) comes within the aegis of the general provision of a catalog, actors and judges must consider the conduct’s (or item’s) proximity to the enumerated conduct (or items).<sup>18</sup>

As an illustration of the operation of the family-resemblance principle, consider the provision in the Bankruptcy Code that denies discharge to a person who perpetrates “fraud,” “embezzlement,” “larceny,” or, more generally, a “defalcation while acting in a fiduciary capacity.”<sup>19</sup> Back in 1877, the Supreme Court construed this provision’s predecessor<sup>20</sup> as a catalog of defaults that share a common denominator: bad-faith misappropriation of creditors’ money or property.<sup>21</sup> In keeping with precedent, in 2013 the Supreme Court reaffirmed the catalog status of the defaults provision in a case that centered on the meaning of the omnibus “defalcation” category.<sup>22</sup> In *Bullock v. BankChampaign*, the Court acknowl-

---

Legislature had intended . . . [an] unrestricted sense, it would not have mentioned the particular things . . . which would . . . become . . . surplusage.” (citing *Scally v. Pac. Gas & Elec. Co.*, 100 Cal. Rptr. 501, 509 (Ct. App. 1972))).

16. See *infra* Part III (discussing use of catalogs in different areas of law). Catalogs are a subset of analogical reasoning. See generally Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 742–43 (1993) (providing general account of analogical reasoning in law).

17. See Ludwig Wittgenstein, *Philosophical Investigations* §§ 65–71 (G.E.M. Anscombe trans., Basil Blackwell 3d ed. 1967) (1953) (explaining use of “family resemblances” descriptor because it encompasses “overlap and criss-cross” of features); see also Nicholas Griffin, *Wittgenstein, Universals and Family Resemblances*, 3 Canadian J. Phil. 635, 635–37 (1974) (analyzing “family resemblance” concept).

18. In Wittgenstein’s words, this investigation involves working through a “complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.” Wittgenstein, *supra* note 17, § 66.

19. 11 U.S.C. § 523(a)(4) (2012).

20. This predecessor is section 33 of the Bankruptcy Act of 1867, which provided that “no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under this act.” Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 517, 533 (repealed 1878).

21. See *Neal v. Clark*, 95 U.S. 704, 709 (1878) (interpreting common denominator of bad faith).

22. *Bullock v. BankChampaign*, N.A., 133 S. Ct. 1754, 1760 (2013).

edged that although linguistically the term “defalcation” is broad enough to encompass any default or failure to meet an obligation,<sup>23</sup> the meaning of the term in the Bankruptcy Code is confined to misdeeds that have the same traits of blameworthiness as the more specific misconduct—“fraud,” “embezzlement,” and “larceny”—that appears on the statutory list.<sup>24</sup> Hence, conduct that comes within the meaning of the “defalcation” category must be akin, although not identical, to its “linguistic neighbors”: “fraud,” “embezzlement,” and “larceny.”<sup>25</sup>

Catalogs differ from rules and standards both functionally and conceptually. Equally importantly, in a broad variety of cases, catalogs can advance social goals more effectively than either rules or standards. To illustrate, consider a statutory provision that prohibits “leaving an unattended dog, cat, or another pet” in a parked vehicle.<sup>26</sup> Assume that the goal of this provision is to prevent cruelty to animals. This statutory prohibition is evidently not a “rule” because “pets” are an open-ended category open to judicial interpretation. It is clear that “cats” and “dogs” are members of the protected group of pets. But the list is *not* closed. Many other animals, such as rabbits, gerbils, or hamsters, may come under the term “pets.” But it is impossible to know *ex ante* whether or not they do. The courts give an answer on a case-by-case basis. Rules give courts no such authorization.

Nor is the statute a standard. A standard typically bestows upon a decisionmaker nearly unfettered discretion, allowing her to consider the totality of circumstances in a particular case. For example, in construing the standard “drive at a reasonable speed,”<sup>27</sup> a court has the power to decide that even high-speed driving is reasonable under certain circumstances<sup>28</sup>—for example, when the driver must rush a dying person to the hospital. The statute we discuss here, however, gives the court no such power. No matter what the circumstances of the case are, the court is not authorized to exonerate a person who leaves a cat or a dog unattended in a parked car.

Nor can the court go in the other direction and expand the prohibition to any animal it deems deserving of protection. Consider the case of a person who decides to adopt an alligator and subsequently leaves it unattended in her car. Does the alligator owner violate the

---

23. *Id.* at 1758 (citing Black’s Law Dictionary 479 (9th ed. 2009)).

24. *Id.* at 1759–60.

25. *Id.* at 1760. The Court also clarified that “defalcation” involves “neither conversion” (unlike embezzlement), “nor taking and carrying away another’s property” (unlike larceny), “nor falsity” (unlike fraud). *Id.*

26. This example draws upon section 750.50(2)(e) of the Michigan Compiled Laws. Mich. Comp. Laws Ann. § 750.50(2)(e) (West 2011).

27. *Cf.* Kaplow, *supra* note 1, at 560 (describing “driving at an excessive speed on expressways” as standard).

28. *Cf. id.* at 562 (noting adjudicator can attach appropriate legal consequences to speeding in light of relevant norms or facts).

statute? The answer is no. Although the statutory language does not establish a closed list, its use of “cats” and “dogs” as representative examples restricts the ability of courts to expand the category of pets *ad infinitum*. It instructs the court that the category of pets is confined to animals that bear functional resemblance to cats and dogs—pets that people keep in their homes for company, entertainment, or protection and that fit into a normal household environment.<sup>29</sup>

The chosen wording only gives courts the weak discretion<sup>30</sup> to find out whether the animal in question is ordinarily used by people as a pet. Courts exercising this discretion are commanded to carry out a factual inquiry into people’s general pet usage. The statute does not authorize courts to base their decisions on normative considerations. In particular, courts are not allowed to consider whether extending the statutory protection to alligators would enhance animals’ protection against cruelty. This limitation of the courts’ power separates the statute from standards. By our lights, this statute is a catalog.

Our legal system uses catalogs when the cost of formulating a spot-on rule and the costs of the unpredictability associated with standards are prohibitively high. Under these conditions, adopting a catalog is socially optimal. Catalogs can combine the relative strengths of both rules and standards, while avoiding their respective weaknesses. Specifically, a catalog can ban outright recurrent behaviors that are readily identifiable and use those as a basis for establishing a more general prohibition on activities falling into the same family or genre. Consequently, catalogs can do better than standards at creating a zone of certainty for actors at much lower cost than fully specified rules.

Catalogs also offer a similarly important element of dynamism that is sorely lacking in rules. Rules are underinclusive or overinclusive by design.<sup>31</sup> No matter how hard legislatures try, they will fail to come up with fully specified rules that accurately represent every possible contingency in all future states of the world.<sup>32</sup> In theory, the list of rules can be updated to respond to changing conditions. In practice, such updates are very rare on account of administrative and political costs.<sup>33</sup> Fully spec-

---

29. Cf. Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 *Wis. L. Rev.* 1179, 1200–01 (using analogous example with pets to illustrate *eiusdem generis* rule). See generally Scalia & Garner, *supra* note 14, at 199–213 (explaining and illustrating *eiusdem generis* canon by which courts interpret statutory rules that this Essay identifies as “catalogs”).

30. See Ronald Dworkin, *Taking Rights Seriously* 31–32 (1977) [hereinafter Dworkin, *Rights*] (introducing concepts of “weak” and “strong” discretion).

31. See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 31–34 (1991) [hereinafter Schauer, *Playing by the Rules*] (explaining overinclusiveness and underinclusiveness of rules).

32. See *id.* at 31.

33. See Kaplow, *supra* note 1, at 569, 609 (attesting making rules is costly and may involve improper political influences and abuse of power).



ified rules may also be too voluminous and, consequently, too cumbersome to learn and to follow.<sup>34</sup> Catalogs, by virtue of their *limited* open-endedness, can be expeditiously and cheaply adapted to accommodate changes while reducing information costs for actors.<sup>35</sup>

To be sure, standards offer the same, if not greater, dynamism. Indeed, standards are so open-ended that they can respond to a broader spectrum of changes.<sup>36</sup> But from an institutional or political perspective, the malleability of standards is also their bane. Standards give a lot of power to courts. The more open-ended a standard is, the greater the risk that courts may construe it in a way that runs afoul of the legislative intent or fills it with new and unintended meanings as circumstances change.<sup>37</sup> Catalogs allow the legislature to keep the courts' power in check, thereby striking a more desirable balance between the legislature and the judiciary.<sup>38</sup>

Structurally, this Essay unfolds in three Parts. In Part I, this Essay reassesses the scholarly debates over rules versus standards and brings catalogs into play. In Part II, it carries out a comprehensive analysis of catalogs as compared to rules and standards. In Part III, the Essay examines the operation of catalogs in criminal law, tort law, constitutional law, and tax law. A short Conclusion ensues.

## I. THE JURISPRUDENCE OF RULES AND STANDARDS

The rules/standards dichotomy has captivated scholars' attention for many decades.<sup>39</sup> Theorists who studied legal commands have formulated their subject of inquiry as a choice between rules and standards.<sup>40</sup> Their analyses sought to determine the level of precision that legal commands should exhibit and the degree of discretion they should bestow upon courts in order to best promote the legislature's goals.<sup>41</sup>

34. See *id.* at 563–64 (observing rules covering every possible contingency are costly to promulgate); see also Ian Ayres, Preliminary Thoughts on Optimal Tailoring of Contractual Rules, 3 S. Cal. Interdisc. L.J. 1, 9 (1993) (“[T]he costs of learning complex rules may be especially onerous . . .”).

35. See *infra* Part II (providing examples of limited open endedness).

36. See Kaplow, *supra* note 1, at 563 (discussing advantage of standards where settings “vary substantially”).

37. *Id.* at 609 (“Rules may be preferred to standards in order to limit discretion, thereby minimizing abuses of power.”).

38. See *infra* notes 110–113, 116–118 and accompanying text (discussing how general provision in catalog structures court’s discretion).

39. See *supra* notes 1, 12 and accompanying text (illustrating examples of debate). For an early exploration of imprecise rules that function as standards, see Charles P. Curtis, A Better Theory of Legal Interpretation, 3 Vand. L. Rev. 407, 409–11 (1950).

40. See *supra* notes 1, 12 and accompanying text (discussing various examples of choice between rules and standards).

41. See Kennedy, *supra* note 1, at 1697–98 (arguing lawmakers “can enlist the energies of the parties in reducing the seriousness of the imprecision of rules”); Sullivan, *supra* note 12, at 58–59 (“Standards allow for the decrease of errors of underinclusiveness and

The conventional scholarly wisdom suggests that rules are commands that exhibit a high level of precision and, hence, give courts very limited discretion and, in some cases, no discretion at all.<sup>42</sup> Standards, by contrast, are formulated in general terms and give courts broad discretion.<sup>43</sup> The difference between the two categories of legal commands is often illustrated by reference to driving. An oft-cited example of a rule is “drive at a speed no higher than fifty-five miles per hour,” while a classic example of a standard is “drive at a reasonable speed.”<sup>44</sup>

Theorists who investigated the institutional implications of the choice between rules and standards have shown that rules are assumed, by hypothesis, to promote the goal of the legislature.<sup>45</sup> Rules operate as a nexus or functional intermediary between the policymaker’s goals and courts’ decisions.<sup>46</sup> In other words, rules are drafted to reflect the goals the legislature wishes to advance. Hence, courts are supposed to apply rules automatically without considering whether their decisions will promote the legislature’s goals.<sup>47</sup> Courts should be mindful of those goals in

---

overinclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances.” (footnote omitted)).

42. See Schlag, *supra* note 1, at 384 (“Rules draw a sharp line between forbidden and permissible conduct, allowing persons subject to the rule to determine whether their actual or contemplated conduct lies on one side of the line or the other.”); Sullivan, *supra* note 12, at 62 (noting rules could “reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties’ particular attractive or unattractive qualities into the decisionmaking calculus” (footnote omitted)); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1183 (1989) (associating bright-line rules giving courts no discretion with rule of law).

43. See, e.g., Schlag, *supra* note 1, at 386–87 (underscoring broad discretion courts have under standards); Sullivan, *supra* note 12, at 66 (noting standards grant broad discretion); cf. Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 Fordham L. Rev. 1287, 1288–90 (2006) (arguing rules are preferable to standards because standards are less definite and poorly suited for governing conduct of nonofficials).

44. Cf. Kaplow, *supra* note 1, at 560 (describing “driving [a car] in excess of 55 miles per hour on expressways” as rule and “driving at an excessive speed on expressways” as standard).

45. See Baird & Weisberg, *supra* note 1, at 1228 (explaining nexus between rules and lawmaker’s goals); Kaplow, *supra* note 1, at 585 (discussing rules as government’s information disseminating mechanism); see also Schauer, *Playing by the Rules*, *supra* note 31, at 218–21 (noting reasons for interpretive focus on legislative intent).

46. See Kaplow, *supra* note 1, at 585 (framing rules as disseminating information collected by legislature to judiciary).

47. See Schauer, *Playing by the Rules*, *supra* note 31, at 4 (“A rule taken by an agent (or an enforcer) as exerting normative pressure *qua* rule is therefore not for the agent wholly optional. The fact of the rule’s existence becomes a reason for action . . .”); Frederick Schauer, *Formalism*, 97 Yale L.J. 509, 537 (1988) [hereinafter Schauer, *Formalism*] (“What makes formalism formal is this very feature: the fact that taking rules seriously involves taking their mandates as reasons for decision independent of the reasons for decision lying *behind* the rule . . . Rules therefore supply reasons for action *qua* rules.”); see also Frederick Schauer, *The Tyranny of Choice and the Rulification of*

ascertaining the meaning of ambiguous rules that are open to more than one interpretation.<sup>48</sup> This decisional mode—systematic application of “rules qua rules”<sup>49</sup>—promotes the legislature’s goals.<sup>50</sup> For example, by routinely penalizing drivers who drive their cars at a speed greater than fifty-five miles per hour, courts will realize the legislature’s goal to deter dangerous driving.

The relationship between the legislature’s goals and courts’ applications of standards is more complex.<sup>51</sup> Standards specify the legislature’s ultimate or intermediate<sup>52</sup> goals that courts must promote. To properly apply a standard, courts need to take account of the specific circumstances of the case at hand in order to decide how best to promote the legislative goal.<sup>53</sup> For example, when the relevant standard prohibits “dangerous driving” and evidence shows that the defendant drove her car at fifty miles per hour on a dark, curvy road in snowy weather, the court will often do well to categorize the driving as dangerous.

If court procedures were inexpensive and error free, standards would always outperform rules. Under ideal conditions, standards would dominate even a most meticulously drafted set of rules. The reason is straightforward: Formulating a broad standard is cheap, whereas drafting a comprehensive set of rules is onerous and costly.<sup>54</sup> And since theoretically courts apply standards costlessly and in error-free ways, their decisions will always produce the result desired by the legislature. However, the assumption that court procedures are costless and error free does not obtain in the real world. Courts do make mistakes, and adjudication is expensive. Moreover, broad standards give rise to yet another concern: When courts are given a broad discretionary power, they might, at least in theory if not in practice, misuse it for purposes of personal gain, favoritism, and self-aggrandizement.<sup>55</sup>

---

Standards, 14 *J. Contemp. Legal Issues* 803, 803–04 (2005) (explaining mechanical application of rules qua rules).

48. See Frederick Schauer, *Thinking Like a Lawyer* 162–63 (2009) [hereinafter Schauer, *Thinking Like a Lawyer*] (listing legislative intent as potential aid in cases of indeterminate statutes).

49. *Id.* at 16–18.

50. *Id.* at 28.

51. *Cf.* Kennedy, *supra* note 1, at 1705–06 (identifying instances where judges may employ standards strategically to advance their own goals).

52. *Cf. id.* (arguing reformers, including judges, might support standard because they lacked power to implement “their ideal solution”).

53. See Adam I. Muchmore, *Jurisdictional Standards (and Rules)*, 46 *Vand. J. Transnat’l L.* 171, 178–79 (2013) (describing factual circumstances judges must take into account when evaluating standards).

54. See Kaplow, *supra* note 1, at 595 (explaining when *ex ante* analysis needed for rule formulation would be poor investment).

55. See Korobkin, *supra* note 1, at 39 (highlighting potential for court abuse under grant of broad discretion); see also Schauer, *Thinking Like a Lawyer*, *supra* note 48, at 192–93 (noting standards can lead to abuse of courts’ discretion).

Hence, the scholarly consensus is that under realistic conditions, as opposed to ideal ones, rules are superior to standards in guiding individual behavior, as well as in enhancing social welfare, since rules reduce adjudicative costs and minimize the twin risks of judicial error and misuse.<sup>56</sup> To formulate a rule properly, however, the legislature must identify every set of facts that calls for the imposition of the relevant duty or liability. This is a costly and onerous endeavor that legislatures often cannot undertake.

Consequently, the legislature must often suffice itself with a second-best solution: It must find the desired tradeoff between precision and generality and formulate a rule reflecting this tradeoff. Any such rule will either be too narrow (underinclusive) or too broad (overinclusive).<sup>57</sup> The rule will be underinclusive when it fails to cover each and every contingency pertaining to the targeted activity.<sup>58</sup> Conversely, the rule will be overinclusive when it covers activities or circumstances that should ideally remain unregulated.<sup>59</sup> Both scenarios represent a loss to society. When a rule is underinclusive, some actors who should have been liable for harms they caused under optimal tailoring would walk away scot free. When a rule is overinclusive, some actors would be liable for socially benign (and even beneficial) behaviors that should not have given rise to liability.

A social planner must, therefore, estimate the total social cost of excessive and insufficient liability and formulate a rule that minimizes this cost.<sup>60</sup> This cost must aggregate the combined cost of drafting a rule and implementing it, and the rule's distortionary effect on actors' behavior. For example, when driving a car on a highway at a speed that exceeds fifty-five miles per hour is typically dangerous, and driving at a lower speed is generally safe, the legislature will do well to formulate a rule that prohibits driving in excess of fifty-five miles per hour. Yet, and it is critical to acknowledge this fact, even a well-drafted bright-line rule will invari-

---

56. See Schauer, *Playing by the Rules*, supra note 31, at 145–49 (arguing rules minimize adjudicative errors, opportunity for misuse, and costs of adjudication); Kaplow, supra note 1, at 621–23 (arguing rules are economically efficient when law governs frequent conduct); cf. Kennedy, supra note 1, at 1776–78 (noting how standards can render “barbarous body of law” acceptable).

57. See Schauer, *Playing by the Rules*, supra note 31, at 31–34 (showing rules are either underinclusive or overinclusive); Kaplow, supra note 1, at 590–91 (same); see also Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 *Harv. L. Rev.* 1521, 1522–35 (2014) (using linguistic theory to demonstrate courts and attorneys frequently misinterpret opaque verbs).

58. See Kaplow, supra note 1, at 591 (explaining underinclusiveness of rules).

59. See *id.* (explaining overinclusiveness of rules).

60. See Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 *J. Legal Stud.* 257, 272 (1974) (associating optimal formulation of rules with smallest cost resulting from rules' overinclusiveness or underinclusiveness); Barbara Luppi & Francesco Parisi, *Rules Versus Standards*, in *Production of Legal Rules* 43, 45–46 (Francesco Parisi ed., 2d ed. 2011) (same).

ably give rise to the following two costs (or imperfections). First, it will allow a relatively small number of unsafe drivers who stay within the speed limit to proceed with impunity.<sup>61</sup> Second, it will penalize a small group of fast but safe drivers and drivers who have a good cause to speed, for example, because they need to rush an ailing relative to the hospital. Any time a legislature enacts a rule, it sanctions—albeit unintentionally—certain socially undesirable acts, and it penalizes—again, unintentionally—certain justifiable behaviors.<sup>62</sup>

Nonetheless, these twin costs of rules are often dwarfed by the imperfections of standards and the social disutility associated with their use in place of rules.<sup>63</sup> Consequently, adopting a bright-line rule often represents the best available option.

Critically, the analysis so far has ignored the cost of enacting well-functioning rules. Rules require precision. In enacting rules, the legislature must accurately identify the circumstances under which the chosen rule will achieve the desired results. This task is easy to articulate but difficult to carry out. To succeed in this task, the legislature must gather, analyze, and categorize an enormous amount of information—a process requiring the expenditure of substantial resources.<sup>64</sup> Such an expenditure is only justified when it is smaller than the cost of implementing the chosen policy in courts on a case-by-case basis.

Designing a bright-line rule will thus be cost effective only when it relieves courts from the duty to make multiple individualized decisions implementing the policy. The savings in adjudicative expenses increase as the number of cases that courts can resolve by applying the rule grows.<sup>65</sup> The intuition behind this result is simple: The initial cost of adopting a rule is a fixed cost, while the benefit represented by the cost savings in every case increases with each additional decision.<sup>66</sup> For that reason, rules work best when they regulate conduct that is recurrent and homogeneous, such as driving a car. Rules regulating such conduct generate economies of scale through their multiple applications.<sup>67</sup>

When the regulated conduct is heterogeneous or infrequent, standards will generally do a much better job than rules in accomplishing a

---

61. Note, however, that lawmakers can address this problem by regulating other dangerous aspects of driving.

62. This problem tracks the famous distinction between rule- and act-utilitarianism. See generally John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3 (1955).

63. See Kaplow, *supra* note 1, at 621 (detailing advantages of rules relative to standards for laws governing frequent conduct).

64. See *id.* at 568–69 (discussing promulgation costs).

65. See *id.* at 577 (“[T]he greater the frequency with which a legal command will apply, the more desirable rules tend to be relative to standards.”).

66. See *id.* (“[P]romulgation costs are borne only once, whereas efforts to comply with and action to enforce the law may occur rarely or often.”).

67. See *id.* at 583, 585 (explaining economies of scale associated with rules); Korobkin, *supra* note 1, at 33 (same).

chosen policy goal.<sup>68</sup> For an example, consider a wide variety of business contracts involving many contingencies that the contracting parties cannot fully anticipate. For such contracts, setting up a broad standard that requires parties to act in “good faith” is a particularly appropriate “gap filler.”<sup>69</sup> Formulating multiple rules as an alternative to this standard would either be impossible or prohibitively expensive. The same is true about abatement of property hazards. Property hazards come in many varieties that depend on the specific conditions of the land and the premises. An omnibus provision categorizing landowner “negligence” as an actionable tort will consequently work better than rules in this context.<sup>70</sup>

As already mentioned, the initial cost of formulating broad standards is much lower than that of drafting rules. But standards have a serious downside in the form of substantial adjudicative expenses and an increased risk of judicial misapplication.<sup>71</sup> For a small number of cases, this downside does not represent a big problem since the aggregate cost is tolerable. However, as the number of cases grows, the welfare calculus changes, and it may not always be socially beneficial to enact standards even when the conduct in question is heterogeneous. Under a rules regime, for example, it is much easier to identify errant adjudicators.<sup>72</sup> More generally, by enacting rules, the legislature can simplify adjudication and dramatically lower the cost of judicial errors. This strategy is particularly attractive when the available standard uses a complex multi-factor test for determining the relevant duty or liability. To illustrate this point, consider the multiple criteria for “consumer confusion” under

---

68. See Kaplow, *supra* note 1, at 595 (discussing advantages of standards).

69. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *Yale L.J.* 814, 852–53 (2006) (arguing good faith and fair dealing should be used in contract interpretation); see also Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 *Or. L. Rev.* 227, 236–41 (2005) (same); Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 *St. John’s L. Rev.* 559, 571–72 (2006) (same); Mariana Pargendler, *Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered*, 82 *Tul. L. Rev.* 1315, 1317–19 (2007) (same).

70. See Kaplow, *supra* note 1, at 564 (“[Standards should] govern more heterogeneous behavior, in which each relevant type of act may be rare. For example, the law of negligence applies to a wide array of complex accident scenarios, many of which are materially different from each other and, when considered in isolation, are unlikely to occur.”).

71. See Schauer, *Playing by the Rules*, *supra* note 31, at 149–50 (noting higher prospect for judicial errors under standards); Kaplow, *supra* note 1, at 621–23 (noting increased cost of adjudication and risk of error under standards); Schlag, *supra* note 1, at 387 (noting increased risk of adjudicative error under standards).

72. See Schauer, *Formalism*, *supra* note 47, at 541–42 (noting errors are more easily detectable under rules); Schlag, *supra* note 1, at 386 (same).

trademark law<sup>73</sup>—criteria that are widely acknowledged to be complex and costly to administer.<sup>74</sup> Replacing these criteria with rules that will lay down irrebuttable presumptions of consumer confusion, or lack thereof, could make litigation over trademarks cheaper than it presently is.<sup>75</sup>

As far as individuals' primary behavior is concerned, rules vastly outperform standards at informing actors about what they are and are not permitted to do. Our criminal law often capitalizes on this advantage by formulating prohibitions almost exclusively as rules.<sup>76</sup> But notice to actors is not the only reason that explains criminal law's unequivocal preference for rules.<sup>77</sup> An additional, and perhaps more important, reason is our mistrust of the government as a law enforcer and protector of freedoms.<sup>78</sup> Standards would give the government too much power to brand and punish people as criminals.<sup>79</sup> For that reason, our constitutional law has adopted a doctrine that voids criminal prohibitions for

---

73. See generally Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 *Calif. L. Rev.* 1581, 1582–84 (2006) (explaining how courts identify consumer confusion in trademark cases).

74. See Robert G. Bone, *Taking the Confusion out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 *Nw. U. L. Rev.* 1307, 1336–37 (2012) (attesting "consumer confusion" standard is costly to administer); William McGeeveran, *Rethinking Trademark Fair Use*, 94 *Iowa L. Rev.* 49, 70 (2008) (attributing high cost of trademark litigation to complexity of confusion inquiry).

75. See Bone, *supra* note 74, at 1351–53, 1365 (arguing bright-line rules can serve trademark litigation more effectively than "consumer confusion" standard).

76. See Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 *Va. L. Rev.* 1011, 1024 (1987) (citing reasons for reliance on bright-line rules rather than standards to govern criminal sanctions); Kaplow, *supra* note 1, at 576 n.43 (noting criminal prohibitions are formulated as rules). But see Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 *Yale L.J.* 405, 407–09 (1959) (showing 18 U.S.C. § 371 (1952), criminalizing conspiracy "to defraud the United States . . . in any manner or for any purpose," comes close to a standard); *infra* note 185 and accompanying text (arguing general prohibition of conspiracy "to defraud the United States" is open to challenge under rule of lenity and "void for vagueness" doctrine).

77. The notice requirement is fundamental. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 588 (2001) ("A necessary condition of any free society is the ability to avoid going to prison; one has that ability only if one can know what behavior will lead to prosecution and punishment.").

78. See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("[T]he void for vagueness doctrine addresses . . . two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they . . . act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972))); *United States v. Williams*, 553 U.S. 285, 304 (2008) ("Vagueness doctrine is an outgrowth . . . of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute . . . fails to provide . . . fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000))).

79. See Sunstein, *Problems with Rules*, *supra* note 4, at 968–69 (arguing rules are necessary to prevent arbitrary enforcement).

being vague,<sup>80</sup> which precludes legislatures from criminalizing behaviors formulated as “public mischief” or in similarly broad terms.<sup>81</sup> As a corollary of that doctrine, the rule of lenity requires courts to narrow the scope of criminal prohibitions that can be interpreted in more than one way.<sup>82</sup>

Other advantages of rules go beyond the realm of criminal law. Rules reduce individuals’ cost of learning the law and planning their actions.<sup>83</sup> Rules also reliably inform individuals about legal penalties, or lack thereof, pertaining to their endeavors.<sup>84</sup> Under standards, individuals’ cost of learning the law—both directly and through legal advice—is much higher than under rules.<sup>85</sup> Worse yet, the unpredictability of how courts will interpret and apply a standard induces individuals, especially those who are risk averse, to steer clear of the realm of potential liability.<sup>86</sup> Consequently, standards may exert a chilling effect on socially desirable activities by causing individual actors to abandon endeavors whose net effect is beneficial.<sup>87</sup>

The downside of rules as guides of primary activities is closely associated with Holmes’ famous parable of the “bad man,” who “want[s] to know the law and nothing else . . . [and] cares only for the material consequences which such knowledge enables him to predict.”<sup>88</sup> Rules allow self-seeking individuals to “walk the line” by engaging in conduct that runs against society’s interest and would be prohibited by a standard.<sup>89</sup> More fundamentally, as Duncan Kennedy perceptively argues in

---

80. See *Williams*, 553 U.S. at 304 (explaining vagueness doctrine); Sunstein, *Problems with Rules*, supra note 4, at 968 (discussing “void for vagueness” doctrine requiring state to set forth clear guidance before punishing private conduct); see also John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 *Denv. U. L. Rev.* 241, 244–45 (2002) (providing overview of vagueness doctrine).

81. See Decker, supra note 80, at 266 (explaining operation of “void for vagueness” doctrine); Stuntz, supra note 77, at 559–61 (explaining, illustrating, and criticizing “void for vagueness” doctrine).

82. See generally Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *Fordham L. Rev.* 885, 889–906 (2004) (describing and analyzing rule of lenity); Note, *The New Rule of Lenity*, 119 *Harv. L. Rev.* 2420, 2421–27 (2006) (discussing and critiquing rule of lenity).

83. See Kaplow, supra note 1, at 571 (arguing advice is more costly under standards than under rules).

84. See *id.* at 585 (commenting rules provide individuals information before they act); see also Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *Stan. L. Rev.* 591, 652 (1981) (underscoring rules’ predictability).

85. See Kaplow, supra note 1, at 571 (“[A]dvice is more costly under a standard.”).

86. See Calfee & Craswell, supra note 5, at 966–67 (arguing vague standards create overdeterrence).

87. See *id.* (detailing drawbacks of overcompliance).

88. O.W. Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 459 (1897).

89. See Kennedy, supra note 1, at 1695–96 (detailing how rules lead individuals to take advantage of underinclusion); see also Kelman, supra note 84, at 599 (arguing rules



his analysis of rules versus standards in the transactional context, rules foment the culture of self-reliance, alienation, isolation, conformity, rigidity, indifference, and punitiveness, which is detrimental to people's individual and collective well being.<sup>90</sup> Standards, on the other hand, help promote communitarian values that include reciprocity, flexibility, contextualization, tolerance, generosity, and empathy.<sup>91</sup>

As Kennedy explains, however, standards also pose a threat to people's well being. They give individuals no rights that could trump the government's power.<sup>92</sup> They also make the law indeterminable and expand the government's opportunities for corruption and tyranny.<sup>93</sup> Ultimately, as he and other critical legal scholars have argued, the rules-versus-standards dilemma is one of several manifestations of society's unsettled vision of well being.<sup>94</sup> This vision, so goes the argument, is unsettled because it hopelessly tries to accommodate society's individualistic and communal goals.<sup>95</sup>

Conceptually, rules and standards form a dichotomous relationship. In reality, however, our legal system has a broad spectrum of rules that exhibit different levels of specificity. On that spectrum, fully specified rules that give courts no discretion whatsoever occupy a relatively small space. Examples of such rules include speed limits and the constitutional provision that "neither shall any Person be eligible to [the Office of President] who shall not have attained to the Age of thirty five Years."<sup>96</sup> Far more common are rules exemplified by the Lanham Act's prohibition of "dilution": acts that diminish a famous trademark's selling power or dim its allure.<sup>97</sup> The Lanham Act defines two types of dilution for which tort damages are recoverable: blurring and tarnishment. Blurring consists of acts that "impair[] the distinctiveness of . . . famous

---

allow individuals to calculate optimal levels of undesirable behavior still within confines of law).

90. See Kennedy, *supra* note 1, at 1710 (listing bad aspects of rules); see also Carol M. Rose, *Crystals and Mud in Property Law*, 40 *Stan. L. Rev.* 577, 592 (1988) ("[Under rules,] all parties are presumed . . . clear-sighted overseers of their own best interests; . . . [they] tie up all the loose ends that they can, and . . . courts should let the advantages and disadvantages fall where they may . . . [b]ecause this will encourage people to plan and to act carefully . . .").

91. See Kennedy, *supra* note 1, at 1710 (naming advantages to standards).

92. See *id.* at 1777 (explaining informality can lead to oppression).

93. See *id.* (discussing informality's impact on corruption).

94. See *id.* at 1766–76 (establishing fundamentals of two world visions and social orders).

95. See *id.* at 1766–67 (describing effect of competing ideologies of individualism and altruism). But see Schlag, *supra* note 1, at 420 ("[B]oth altruism and individualism can generate arguments for *both* rules and standards." (emphasis added)).

96. U.S. Const. art. II, § 1. But see Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 *Nw. U. L. Rev.* 250, 251, 255–56 (1990) (arguing it is legally plausible to defend election of underage president).

97. See Clarisa Long, *Dilution*, 106 *Colum. L. Rev.* 1029, 1034–35 (2006) (discussing definition of trademark's "dilution").

mark[s].”<sup>98</sup> Tarnishment consists of acts that “harm[] the reputation of [a] famous mark.”<sup>99</sup> Application of these rules is far from being as mechanical and discretion free as a juxtaposition of an elected President’s age against the constitutional minimum or a comparison between the statutory speed limit and the speed with which the defendant drove his car. To apply these rules properly, courts must evaluate whether the alleged infringer’s actions have diminished the selling power of the plaintiff’s trademark.<sup>100</sup> This evaluation calls for judgment that may go in either direction—exactly as under standards—but the discretion of the courts is structured rather than open ended: It is cabined by the presence and amount of the trademark owner’s harm, actual or anticipated.<sup>101</sup> This discretion is much narrower than the courts’ power under quintessential legal standards: “good faith,” “fairness,” “due care,” and the like.<sup>102</sup> Consistent with this understanding, scholars have acknowledged that rules and standards form a continuum that embodies different tradeoffs between precision and generality.<sup>103</sup>

The rules-versus-standards debate is important and insightful. But it is incomplete. Scholars participating in this debate have failed to explore the possibility of devising legal commands that integrate the advantages of rules and standards while minimizing their shortcomings. None of them has considered whether a legal command can be precise, dependable, and yet flexible enough to accommodate case-specific adjustments. Worse yet, the rules-versus-standards debate has paid no attention to catalogs despite their ample presence in the law. As the remainder of this Essay demonstrates, catalogs combine the virtues of rules with the benefits of standards. They are sufficiently precise, dependable, and flexible in application. As such, they form a conceptually distinct and socially useful category of legal commands.

## II. THE MERITS OF CATALOGS

This Part commences a discussion of catalogs by defining their structure and subject matter. Catalogs have a uniform structure: two or more enumerated instances (or items) followed by a general provision

---

98. 15 U.S.C. § 1125(c)(2)(B) (2012).

99. *Id.* § 1125(c)(2)(C).

100. See Long, *supra* note 97, at 1034–35 (“Dilution law’s underlying assumption is that the unauthorized use of a famous mark by third parties . . . can diminish the mark’s selling power and value because the mark is no longer associated with a single source.”).

101. See *id.* at 1057–59 (discussing exemptions from actionable harm under statute).

102. See Kennedy, *supra* note 1, at 1688 (providing examples of standards and stating how judges apply them).

103. See Sullivan, *supra* note 12, at 61 (“These distinctions between rules and standards, categorization and balancing, mark a continuum, not a divide.”); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line–Balancing Test Continuum*, 27 *Ariz. St. L.J.* 773, 778 (1995) (describing multiple “forms of doctrine that co-exist along the rules/standard continuum”).

that empowers courts to recognize other *unenumerated* instances (or items) that have the same key characteristics as the enumerated ones.<sup>104</sup> As far as their subject matter is concerned, catalogs run the full gamut of legal subjects and concepts. Catalogs may refer to actors, behaviors, prohibitions, rights, duties, powers, immunities, privileges, assets, and expenditures.

The enumerated section of a catalog operates as a rule. For example, in making a decision under the Bankruptcy Code provision that denies discharge to a debtor who perpetrates “larceny,”<sup>105</sup> the court needs to determine whether the debtor’s misconduct falls under the definition of larceny. Specifically, the court needs to determine whether the debtor took “another’s property, with the intent to steal and carry it away.”<sup>106</sup> Under the same statutory provision, the court must follow a similar procedure in verifying whether the debtor committed “embezzlement” or “fraud.”<sup>107</sup> To this end, the court must juxtapose the debtor’s conduct against the definitions of “embezzlement” and “fraud” under applicable state or federal laws.<sup>108</sup> At first glance, the general category of “defalcation” resembles a standard, but in fact it operates in a completely different fashion. As explained earlier in Part I, standards require courts to identify the policy goal the legislature sought to promote and then apply the standard to the case at hand in a way that is consistent with the relevant policy goal.<sup>109</sup>

The general provision of a catalog poses a very different task. In construing the general provision of a catalog, courts must confine their analysis to the specific enumeration that precedes this provision. Furthermore, the courts’ task is not to identify some broad policy goal, but rather to discern the common denominator of the enumerated items. Once the common denominator has been established, all that is left for the courts to do is to determine whether the particular case confronting them comes within (or falls outside) the category of the enumerated items.

---

104. Typically, the catchall category follows the enumerated settings, entitlements, and duties, but this need not always be the case. See Scalia & Garner, *supra* note 14, at 204–05 (discussing variations in *eiusdem generis* sequencing).

105. See 11 U.S.C. § 523(a)(4) (2012) (prohibiting discharge of individual debtor from debt for “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny”).

106. *People v. Williams*, 305 P.3d 1241, 1247 (Cal. 2013) (quoting *People v. Gomez*, 179 P.3d 917, 920 (Cal. 2008)) (internal quotation marks omitted).

107. See 11 U.S.C. § 523(a)(4) (prohibiting discharge of individual debtor from debt for “fraud . . . while acting in a fiduciary setting [or] embezzlement”).

108. See 18 U.S.C. § 641 (2012) (specifying penalties for embezzlement); *id.* § 1001 (specifying penalties for fraud).

109. See *supra* notes 51–55 and accompanying text (discussing how standards accomplish legislative policy goals).

In other words, the construction of the general provision of a catalog involves comparative analysis rather than a general policy implementation. For example, in deciding whether the debtor's misconduct falls into the catchall "defalcation" category under the Bankruptcy Code,<sup>110</sup> the court is neither authorized to expand this category in a way that best deters debtor defaults, nor does it have the power to interpret "defalcation" narrowly so as to allow as many debtors as possible to get the coveted discharge and start managing their finances from a clean slate.<sup>111</sup> Under a standard, the court would have had the power to promote one of those policies or, alternatively, strike a balance between deterrence and discharge. However, the statute we are dealing with is a catalog and not a standard.<sup>112</sup> For that reason, the "defalcation" category can encompass only misconduct that is equivalent to "larceny," "embezzlement," or "fraud." Each misconduct consequently must involve bad-faith misappropriation of another person's money or assets.<sup>113</sup>

Occasionally, the enumerated items in a catalog will have more than one common characteristic. In such cases, context plays a pivotal role. The linguistic meaning of words or terms may vary in different contexts, as well as among communities and institutions.<sup>114</sup> Therefore, judges must be sensitive to the context of the catalog and its underlying legislative purpose. For example, in the case of the Bankruptcy Code's debtor-default provision, one might argue that the concepts of "larceny," "embezzlement," and "fraud" coalesce around the victim's harm rather than the wrongdoer's scienter or guilty mind. Under this understanding, the general "defalcation" category should include both malicious and nonmalicious misappropriation of another person's money or assets. Although linguistically possible, this understanding pays no regard to the provision's punitive goal and the inherently malicious nature of larceny, embezzlement, and fraud.<sup>115</sup> These factors set up the context for eliciting

---

110. For the Supreme Court's interpretation of "defalcation" as a catchall category under the Bankruptcy Code, see *supra* notes 19–25 and accompanying text.

111. Cf. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915))).

112. See *supra* notes 19–25 and accompanying text.

113. See, e.g., *Neal v. Clark*, 95 U.S. 704, 709 (1877) (requiring fraud and embezzlement "involving moral turpitude or intentional wrong"); *In re Sokol*, 170 B.R. 556, 560–61 (Bankr. S.D.N.Y. 1994) (requiring fraudulent intent in commission of larceny that makes debt).

114. See, e.g., *Deal v. United States*, 508 U.S. 129, 132 (1993) (acknowledging "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").

115. See, e.g., *In re Dauterman*, 156 B.R. 976, 981 (Bankr. N.D. Ohio 1993) ("[T]he exceptions to discharge tend to punish the dishonest debtor, requiring recompense in accordance with the actual loss sustained."); see also *Latman v. Burdette*, 366 F.3d 774, 782

the common characteristic of the enumerated defaults and the corresponding meaning of “defalcation” as involving the debtor’s bad faith.

Following Dworkin’s taxonomy, the general provision in a catalog can be described as giving courts a weak (or limited) discretion.<sup>116</sup> The discretion here is weak—rather than strong, as is the case under a standard<sup>117</sup>—because courts’ decisions must stay within the perimeter demarcated by the catalog’s enumerated instances and their common denominator. As under rules, courts need to stay within that perimeter. Save for exceptional cases that involve insufficiently specified catalogs, courts need not consider the effect of their decisions on the legislature’s policies. In filling the general or residual provision of a catalog, by contrast, a court must engage in a series of interpretive moves from conjunction to categorization to commonality.<sup>118</sup> Via this interpretive process, the court categorizes the catalog’s enumerated instances by their common characteristic and then employs this characteristic as a unifier by reading it into the general provision. This process creates conceptual coherence between the general provision and the enumerated instances, ensuring that the general provision is interpreted to include *unenumerated* instances of the same legal family as the enumerated ones. The enumerated core instances simultaneously guide the court as to how to expand the catalog and constitute an important constraint on the court’s interpretive power.

Unlike rules, catalogs do not stay frozen in time. Rather, they grow and develop through a process of accretion. In this sense, catalogs share the dynamism that characterizes standards. When a court decides that an unenumerated case or instance comes within the general provision, it puts it on equal footing with the instances that were expressly specified by the legislature. Every time a court expands the list of cases in a catalog, it provides further guidance to future courts that must go through the same interpretive process. And as the list of cases grows, it becomes easier for future courts to decipher the conceptual commonality that underlies the catalog.

Importantly, this interpretive process can never be driven by logic alone.<sup>119</sup> Consider again the term “defalcation” in the discharge-denial provision of the Bankruptcy Code.<sup>120</sup> As far as logic is concerned, this

---

(9th Cir. 2004) (“The remedy of denial of discharge punishes debtors for misconduct in the bankruptcy process.”).

116. See Dworkin, *Rights*, supra note 30, at 31–32 (coining and explaining concept of “weak discretion”).

117. See *id.* (coining and explaining concept of “strong discretion”).

118. See George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* 5 (1987) (explaining categorization as move from conjunction to commonality).

119. See *infra* notes 128–135 and accompanying text (describing use of experience and prototyping rather than merely logic).

120. See 11 U.S.C. § 523 (2012) (enumerating exceptions to debt discharge).

term can be understood as including negligent mismanagement of another's assets.<sup>121</sup> The dictionary meaning of "defalcation" includes not only embezzlement, but also any default or "failure to meet a promise or an expectation."<sup>122</sup> The fact that all other misdeeds listed in the statute—fraud, larceny, and embezzlement—include a scienter element does not *logically* require that this element be transposed into "defalcation" as well. Negligent mismanagement of a trust is bad enough to deny bankruptcy discharge to the defaulting trustee. For purposes of bankruptcy-discharge policies, it could certainly be put on the same footing with fraud, larceny, and embezzlement.

Attaching scienter to the "defalcation" default, however, is dictated by the catalog's rationale. Unintentional mismanagement of another's assets does not belong to the same category of misdeeds that includes fraud, larceny, and embezzlement. Fraud, larceny, and embezzlement form the same category because all of them involve ill will or scienter. For that reason, "defalcation" must also incorporate ill will or scienter in order not to become an outlier within the statutory catalog. Fraud, larceny, and embezzlement have "family resemblance" that must be shared by the "defalcation" misdeed as well.

We use the "family resemblance" concept following Ludwig Wittgenstein's classic idea in the philosophy of language.<sup>123</sup> Wittgenstein recognized that categories can be linguistically meaningful without having clear boundaries defined by common characteristics.<sup>124</sup> His core example was the "game" category that encompasses amusement games that have no winners or losers ("ring-around-the-rosy") and competitive games that involve only luck (roulette), or only skill (chess), or luck and skill (backgammon).<sup>125</sup> There is no single common denominator—a unifying combination of properties—that connects those games together, and yet all of them are properly called "games." "Games" and all other categories are formed by family resemblances.<sup>126</sup> As George Lakoff puts it, "Members of a family resemble one another in various ways: they may share the same build or the same facial features, the same hair color, eye color, or temperament, and the like. But there need be no single collection of properties shared by everyone in a family."<sup>127</sup>

This insight is not merely philosophical: It also represents the mainstream of cognitive science. Multiple studies of human cognition,

---

121. See *Bullock v. BankChampaign, N.A.* (In re *Bullock*), 670 F.3d 1160, 1165–66 (11th Cir. 2012) (noting circuit split regarding scienter requirement for defalcation), *rev'd*, 133 S. Ct. 1754 (2013).

122. Webster's Third New International Dictionary 590 (1993).

123. See Wittgenstein, *supra* note 17, §§ 65–71 (establishing family-resemblance concept).

124. *Id.* § 65.

125. *Id.* § 66 (using games example to illustrate family resemblances).

126. *Id.*

127. Lakoff, *supra* note 118, at 16.

empirical and experimental alike, have shown that categories do not exist “in the world independent of people and defined only by characteristics of their members and not in terms of any characteristics of the human.”<sup>128</sup> Rather, human categorization and the formation of language in general are matters of experience, imagination, perception, and repeated motor activities.<sup>129</sup> When people construct and interpret categories, they do not use reason as a disembodied logical “manipulation of abstract symbols.”<sup>130</sup> Instead, they use their cognition and imprecise language to grasp and communicate about their physical and social environment.<sup>131</sup> For that reason, logic is merely one of the factors that make categories intelligible.<sup>132</sup> Other factors, functionally far more critical than logic, are family resemblances and prototypes: the core members of a given category that form catalogs as well.<sup>133</sup> As a result, human categories have no fixed boundaries.<sup>134</sup> As under Wittgenstein’s theory, those categories are extendable: They can be refined and modified as people’s experience and goals undergo evolution.<sup>135</sup>

This insight has three important implications for legal catalogs. First and most importantly, catalogs can integrate the advantages of rules and standards while minimizing their shortcomings. The Bankruptcy Code’s discharge-denial provision once again provides a pertinent example. Formulating a similar provision as a rule would be detrimental to the Bankruptcy Code’s goals, which include prevention of frauds and timely discharge of deserving debtors.<sup>136</sup> The rules framework cannot accommodate such open-textured concepts as “defalcation” nor can it feasibly

---

128. *Id.* at 8; see also Eleanor Rosch, *Principles of Categorization*, in *Cognition and Categorization* 27, 36–37 (Barbara B. Lloyd & Eleanor Rosch eds., 1978) (discussing empirical studies supporting theory that boundaries between categories depend on human perceiver).

129. See Lakoff, *supra* note 118, at 8 (“[H]uman categorization is essentially a matter of both human experience and imagination . . .”).

130. *Id.*

131. See *id.* at 12 (suggesting properties of categories arise from human experience in physical and social environments).

132. See *id.* at 8 (discussing multifarious sources of human categorization).

133. *Id.* at 12 (discussing roles of family resemblances and prototypes in categorization); cf. Lawrence B. Solum, *The Unity of Interpretation*, 90 *B.U. L. Rev.* 551, 552 (2010) (“The family resemblance thesis is the claim that the diversity of interpretive phenomena is structured by a series of common features, no one of which is shared by all of the activities that we call ‘interpretation.’”).

134. See Lakoff, *supra* note 118, at 16–17 (discussing extendibility of boundaries for certain categorizations such as “game”).

135. See *id.* (illustrating expansion of boundaries using videogames and expansion of numbers).

136. See Andrea Johnson, Note, *Bankruptcy—The Defalcation Exception to Discharge: Should a Fiduciary’s Mistake Prohibit a Discharge from Debt?*, 27 *W. New Eng. L. Rev.* 93, 99–102 (2005) (discussing Bankruptcy Code’s goals of relieving “honest but unfortunate debtor[s]” who have not committed fraud (internal quotation marks omitted)).

itemize each and every instance of intentional misappropriation.<sup>137</sup> Any rule that the legislature may decide to set up would therefore systematically miss the mark. Courts applying this rule would either grant discharge to fraudulent debtors (when the rule is too narrow) or deny it to deserving debtors (when the rule is too broad).

The legislature would do no better if it set up a broad “defalcation” standard instead of a rule. This standard would give courts a free hand to grant or deny a bankruptcy discharge. Inconsistent application of the standard might breed uncertainty and undermine public trust in the judicial system. Favoritism and other forms of judicial misuse may also arise. Moreover, along with the risk of bankruptcy that accompanies legitimate businesses, any such standard could chill entrepreneurship.<sup>138</sup> Financial risk is strong enough a factor in and of itself to discourage new business. Combining it with a reduced prospect of bankruptcy discharge might stifle entrepreneurial activities that could benefit the economy.

Adopting a catalog provision largely sidesteps these problems. The catalog’s enumerated defaults—fraud, larceny, and embezzlement—function similarly to rules. The accompanying general provision—defalcation—attenuates the overinclusiveness and underinclusiveness problems associated with rules. Critically, it attenuates these problems without bringing back the shortcomings of standards. As already explained, the general “defalcation” category will not be determined by broad legislative policies, as it would have been under a standard.<sup>139</sup> Rather, it will be filled in by the “family resemblances” of fraud, larceny, and embezzlement.<sup>140</sup>

Second, the “family resemblance” predicate allows the legislature to set up catalogs in a wide variety of contexts as a viable substitute for rules and standards. The legislature can devise a catalog for virtually any purpose so long as it can formulate two or more prototypical instances that have a salient common characteristic that judges and jurists can discern and understand, and more importantly, that the courts can use to imbue the general provision with additional content by recognizing unenumerated items, or cases, as belonging to the same conceptual category.<sup>141</sup>

Take evidence law for example. Evidence law contains a fundamental principle that prohibits plaintiffs, defendants, and prosecutors from portraying their adversaries as bad persons who act in accordance

---

137. See *supra* notes 119–122 and accompanying text (discussing impossibility of using bright-line rules to determine defalcation).

138. See *supra* notes 85–87 and accompanying text (detailing potential high costs of standards and potential chilling effects).

139. See *supra* notes 111–113 and accompanying text (discussing goals that standards advance and catalogs do not).

140. See *supra* notes 123–127 and accompanying text (explaining family-resemblance method).

141. For illustrations, see *infra* Part III.



with their bad character.<sup>142</sup> At the same time, a person's prior bad acts often provide information that factfinders can properly use without stereotyping the person as bad or ill disposed.<sup>143</sup> To make this information admissible as evidence, the lawmaker created a catalog: Federal Rule of Evidence 404(b)(2). It provides that "[character evidence] may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."<sup>144</sup> This provision is a catalog for an obvious reason: The words "such as" indicate that "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" are not the only facts that bad acts can properly prove.<sup>145</sup> Rather, "motive" and so forth are the paradigmatic scenarios in which bad-act evidence will be admissible.<sup>146</sup> These scenarios are the prototypical components of the catalog that help courts identify the analogous, but unlisted, scenarios in which bad-act evidence should be admitted as well.<sup>147</sup> These scenarios include any facts that are propensity free.<sup>148</sup> In Part III below, we provide many other real-world examples that illustrate the workings of catalogs in different areas of the law.

The third implication has to do with catalogs' extendibility or openness. Catalogs have open textures, just as rules and standards. Hence, similarly to rules and standards, which sometimes overlap with each other, catalogs sometimes overlap with rules and with standards. Catalogs overlap with rules when they have a well-articulated list of instances that courts can supplement in a more or less technical way through application of logic or calculation. Under such catalogs, courts can fill in the catchall provision while carrying out a limited "family resemblance"

---

142. See Fed. R. Evid. 404(a)(1), (b)(1) (stating character and prior-bad-conduct evidence not admissible to prove action in conformity); see also Alex Stein, *Foundations of Evidence Law* 184–85 (2005) [hereinafter Stein, *Foundations*] ("The generalization underlying character evidence—'bad people are prone to commit crimes'—is exceedingly general. It purports to prove too much and, therefore, proves nothing."); Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 *Yale L.J.* 1912, 1950–55 (2012) (developing scheme for identifying and suppressing dispositional and moralized character evidence).

143. See Stein, *Foundations*, *supra* note 142, at 185–86 (explaining evidence of prior conduct should be admitted when it proves case-specific and propensity-free fact).

144. Fed. R. Evid. 404(b)(2).

145. *Id.*

146. Stein, *Foundations*, *supra* note 142, at 185–86.

147. See, e.g., *United States v. Scarfo*, 850 F.2d 1015, 1018–20 (3d Cir. 1988) (mentioning paradigmatic admissibility cases listed in Federal Rule of Evidence 404(b)(2) and allowing prosecution to prove mafia boss's extortionary activities by his involvement in murders showing his "tight control over an organization capable of executing those who incurred his displeasure").

148. See Stein, *Foundations*, *supra* note 142, at 185–86 (contrasting character evidence with case-specific proof, which involves no generalizations about how bad people act).

analysis.<sup>149</sup> A vivid illustration of such a catalog can be found in the Clean Air Act provision that identifies as hazardous nearly 200 air pollutants, while adding that “any unique chemical substance that contains the named chemical . . . as part of that chemical’s infrastructure” shall be deemed hazardous as well.<sup>150</sup> Under this catalog, an expert’s identification of the banned chemical in the unenumerated compound can fill in the catchall provision. This catalog therefore comes close to a bright-line rule.

Catalogs’ overlap with standards, which occurs when catalogs fill in the general category by reference to “family resemblance,” is possible only in some cases but not in others. This will often happen when courts are required to make complicated multistage determinations. In such cases, a catalog may govern one determination, while a broad standard may govern another.

Consider the “fair use” defense in copyright law:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>151</sup>

This provision requires courts to carry out a two-step analysis.<sup>152</sup> The first step consists of the determination of whether a certain category of uses qualifies, in principle, as fair. This threshold determination, embodied in the preamble of section 107, has the defining characteristics of a catalog. The preamble contains an open list of six illustrative uses—criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research—that are presumptively fair.<sup>153</sup> All

---

149. See *supra* notes 123–127 and accompanying text (defining and explaining “family resemblance”).

150. 42 U.S.C. § 7412(b) (2012).

151. 17 U.S.C. § 107 (2012).

152. See Lloyd L. Weinreb, *Fair Use*, 67 *Fordham L. Rev.* 1291, 1298–99 (1998) (describing two-layer structure of § 107 while arguing statutory words here are not being taken seriously by courts).

153. 17 U.S.C. § 107.

enumerated uses are referential in the sense that they rely on access to preexisting expressive materials. Courts are at liberty to add to the list of presumptively fair uses. In exercising this power, however, they ought to ensure that the new uses, too, are referential,<sup>154</sup> and they cannot add uses willy-nilly.

At the second step, the courts address the specific nature and circumstances of the borrowing done for one of the purposes specified in the catalog in the preamble of the section or for an equivalent unenumerated purpose. This decision categorizes the borrowing as decidedly fair or impermissible.<sup>155</sup>

Fairness, of course, is a paradigmatic example of a standard. However, to structure the inquiry and guide courts in the difficult task of deciding which particular acts of copying are fair, the statute specifies four tests or questions that frame the fairness analysis. Within this framework of a structured standard, the court will balance the copyright owners' property interest against society's interest in the optimal use of expressive works.<sup>156</sup>

The upshot of the preceding discussion is that catalogs offer the legal system the certainty and predictability of rules and the flexibility of standards. Moreover, catalogs also can attenuate the overinclusiveness and underinclusiveness problems engendered by rules and the problems of abuse and malleability associated with standards. These features make catalogs attractive on the general theoretical level. The extent to which catalogs can improve the functioning of the legal system in its specific areas is a separate question. We now turn to examining this question.

### III. CATALOGS IN THE LAW

This Part shows that catalogs are a common feature of our legal system. Within the limited scope of this Essay, this Part is unable to provide an exhaustive list of all legal catalogs.<sup>157</sup> Instead, it sets forth a few representative examples chosen from four broad legal fields: criminal law, tort law, constitutional law, and tax law. This Part also identifies real-

---

154. Cf. Weinreb, *supra* note 152, at 1298–99 (asking whether uses in statute are presumptively fair use or require factor analysis).

155. Cf. *id.* (stating interpretation of § 107 depends on reading of presumptive factors as exclusive catalog or interpretive tools with factor analysis).

156. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31 (1984) (“[S]ection 107 offers some guidance . . . . However, the endless variety of situations . . . precludes the formulation of exact rules . . . . The bill endorses the . . . general scope of . . . fair use, but there is no disposition to freeze the doctrine . . . [since] courts must be free to adapt the doctrine to particular situations . . . .” (quoting H.R. Rep. No. 94-1476, at 65–66 (1976))); see also Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 Va. L. Rev. 1483, 1484 (2007) (explaining fair-use defense).

157. For additional examples, see *supra* notes 19–25, 136–140, 142–150 and accompanying text (bankruptcy, evidence, and environmental law).

world cases in which catalogs provide a superior alternative to rules and standards.

### A. *Criminal Law*

Criminal law is a natural starting point for the discussion of catalogs in the law.<sup>158</sup> Catalogs pervade the criminal law. They predominantly appear in statutes that prohibit possession and manufacture of weapons, intoxicants, and other contraband.

Begin with a common catalog of criminally prohibited dangerous weapons that includes “any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles).”<sup>159</sup> The District of Columbia Court of Appeals used the catalog form of the prohibition to resolve the following question: Is a defendant who cruelly hit his wife’s head against a stationary toilet bowl guilty of assault with a dangerous weapon and/or malicious disfigurement while armed?<sup>160</sup> The court gave this question a negative answer.<sup>161</sup> Drawing on the interpretive maxim that “[a] word is known by the company it keeps,”<sup>162</sup> the court determined that a toilet bowl does not belong in the family of dangerous weapons because the enumerated prototypical examples “do not include stationary objects or anything resembling them.”<sup>163</sup> The court reasoned that the defendant’s crime falls outside the catalog notwithstanding the fact that it was no less life threatening than assault with a dangerous weapon.<sup>164</sup> This reasoning, as explained in Part II, distinguishes catalogs from standards:<sup>165</sup> Pure policy analysis, the hallmark of standards, would have led to the opposite result in this case.

---

158. For insightful analysis of the rules-versus-standards problem in criminal law, see Samuel W. Buell, *Good Faith and Law Evasion*, 58 *UCLA L. Rev.* 611, 636–47 (2011) (addressing tension between need for both flexibility and rigidity in law of white-collar crime).

159. D.C. Code § 22-4502(a) (Supp. 2014).

160. See *Edwards v. United States*, 583 A.2d 661, 663–68 (D.C. 1990) (analyzing statutory language and precedent from District of Columbia and other jurisdictions).

161. See *id.* at 668 (“[W]e hold that the government failed as a matter of law to prove that [the defendant] committed his crimes with a dangerous weapon.”).

162. *Id.* at 664 (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

163. *Id.*

164. See *id.* at 667–68 (“The question before us is not whether [the victim] could be injured as seriously by having her head slammed against a stationary toilet bowl as she could if she were bludgeoned with a detached one; she obviously could.”).

165. For a similar decision, see *State v. Rackle*, 523 P.2d 299, 303 (Haw. 1974) (holding “other deadly or dangerous weapon” appearing in dangerous-weapons catalog includes only “instruments closely associated with criminal activity whose sole design and purpose is to inflict bodily injury or death,” and does not include flare guns carried aboard boats to expedite rescue efforts); see also *State v. Patterson*, 200 S.E.2d 68, 69 (S.C. 1973) (interpreting statutory catalog prohibiting possession of “engine, machine, tool . . . or other

Consider next the Hawaii Penal Code's provision, which states that "[a] person commits the offense of promoting intoxicating compounds [when she] knowingly" commits acts such as:

Breath[ing], inhal[ing], or drink[ing] any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other substance for the purpose of inducing a condition of intoxication, stupefaction, depression, giddiness, paralysis or irrational behavior, or in any manner changing, distorting or disturbing the auditory, visual or mental processes . . . . A person also commits the offense of promoting intoxicating compounds when she sells, delivers or gives any such substance to a minor.<sup>166</sup>

A question arose as to whether the selling of alcohol and tobacco constitutes a violation of the provision. The Hawaii Supreme Court interpreted the general term "any such substance" as referring to "any other substance similar to the enumerated specific compounds."<sup>167</sup> Based on this understanding, the court decided that "any such substance" includes only volatile organic liquids that are used as industrial solvents and does not include alcoholic beverages and tobacco.<sup>168</sup>

We posit that this decision is correct. One could easily think of policy reasons that favor the inclusion of alcoholic beverages and tobacco on the list of prohibited intoxicants, given that the statute criminalizes the delivery of those intoxicants to minors. However, the provision in question is a catalog, not a standard. Therefore, in filling in the general "any such substance" category, courts should use the "family resemblance" criterion rather than policy.<sup>169</sup> The Hawaii Supreme Court did exactly that.

For another illustration, consider the federal statute that prohibits possession of child pornography. Under this statute, whoever "knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction [of minors engaging in sexually explicit conduct]" is

---

implement or thing adapted, designed or commonly used for the commission of burglary, larceny, safecracking or other crime" as not encompassing forged checks, I.D. cards, and credit cards (citation omitted).

166. Haw. Rev. Stat. Ann. § 712-1250(1) (LexisNexis 2007).

167. *State v. Kahalewai*, 541 P.2d 1020, 1026 (Haw. 1975) (emphasis omitted).

168. See *id.* (noting specific terms described volatile organic solvents commonly used "in gasoline, glues, cleaning fluid, and various types of paint"—certainly not "food or beverage").

169. For an example of policy reasoning resorted to under standards, see *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396–97 (2006) (Kennedy, J., concurring) (reasoning courts should use broad discretionary standard for granting injunctive relief in patent-infringement suits to deny that remedy to firms using patents solely to extort "exorbitant" licensing fees from others).

guilty of a crime.<sup>170</sup> Nearly eighteen years ago, the United States Court of Appeals for the Ninth Circuit determined the meaning of the general term “other matter” that appears in the statute.<sup>171</sup> It held that “other matter” includes computer disks and drives and all other physical media capable of containing images.<sup>172</sup> The court’s reasoning properly used the “family resemblance” method, as opposed to the antipornography policy that supported the same result in the case at bar.<sup>173</sup>

Catalogs can be put to a broader use. Indeed, we anticipate greater recourse to catalogs following the virtual disappearance of standards from our criminal law for reasons specified below.<sup>174</sup> The shortcomings of rules and the unavailability of standards will drive legislatures toward catalogs as a form of choice.

In criminal law, the form of prohibitions and punishments matters nearly as much as their substance. This centrality of form is a consequence of the rule of lenity and the constitutional “void for vagueness” doctrine. The rule of lenity holds that, when a criminal prohibition has two or more plausible meanings, courts should adopt the narrowest meaning that minimizes the prohibition’s effect.<sup>175</sup> The “void for vagueness” doctrine, in turn, provides that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”<sup>176</sup> These provisions constrain the government’s power to criminalize individuals’ conduct along two critical dimensions: notice and power.<sup>177</sup>

---

170. 18 U.S.C. § 2252 (a)(4)(B) (2012).

171. See *United States v. Lacy*, 119 F.3d 742, 747–48 (9th Cir. 1997) (analyzing whether “other matter” means computer hard drives containing image files or image files themselves).

172. See *id.* at 748 (“The statute indicates that at a minimum, a ‘matter’ must be capable of containing a visual depiction.”).

173. For explanation of “family resemblance,” see *supra* notes 17–18 and accompanying text (discussing relevance to catalogs).

174. See *infra* note 185 and accompanying text (describing application of “void for vagueness” doctrine and rule of lenity to criminal-law standards).

175. See *Skilling v. United States*, 130 S. Ct. 2896, 2932–33 (2010) (explaining and employing rule of lenity); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406–07 (1999) (adopting narrow meaning of “any official act” in bribery statute to avoid prohibiting benign behavior, such as gifting of jerseys from championship sports teams to President); see also *supra* note 82 (providing background material on rule of lenity).

176. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); see *supra* notes 78–81 (providing background material on “void for vagueness” doctrine).

177. See Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest-Services Fraud*, 75 *Law & Contemp. Probs.*, no. 2, 2012, at 61, 78 [hereinafter Stein, *Corrupt Intentions*] (discussing lenity rule and “void for vagueness” doctrine working in concert to inform statutory interpretation).

The Due Process Clause in the Constitution obligates the government to give individuals clear notice as to what conduct it prohibits<sup>178</sup> and voids legal setups that allow the government to prosecute and punish people at will.<sup>179</sup> As a corollary of this constitutional injunction, when the government prosecutes a defendant under a statutory provision open to more than one interpretation, the court should interpret the provision in the defendant's favor.<sup>180</sup> Based on these interconnected provisions, the Supreme Court's recent decision, *Skilling v. United States*,<sup>181</sup> forced into virtual redundancy the honest-services-fraud offense, which is formulated as a "scheme or artifice to deprive another of the intangible right of honest services."<sup>182</sup> The Court ruled that a defendant can only be convicted of honest-services fraud when he receives a bribe or a kickback payment as part of the "scheme or artifice."<sup>183</sup> As a result, the offense now almost completely overlaps the crimes of bribery and illegal gratuity.<sup>184</sup>

This construction of the rule of lenity and of the "void for vagueness" doctrine makes it virtually impossible for legislatures to lay down criminal prohibitions in the form of standards.<sup>185</sup> Standards are likely to run afoul of the constitutional protections granted to defendants on account of their breadth and the almost unfettered discretion they grant to courts and prosecutors, which makes standards liable to invalidation. As a result, rules become the form of choice for most criminal prohibitions. But, as explained in Part I, rules are invariably overinclusive or underinclusive.<sup>186</sup> Consequently, drafting criminal prohibitions as rules makes those prohibitions too broad or too narrow. Consider again the

---

178. See *Connally*, 269 U.S. at 391 (noting statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties"); see also Stuntz, *supra* note 77, at 588 ("[N]o one may be convicted of a crime without fair notice.").

179. See Stein, *Corrupt Intentions*, *supra* note 177, at 78 (noting "void for vagueness" doctrine "invalidates criminal statutes . . . allowing the government to prosecute individuals almost at will").

180. See *Skilling*, 130 S. Ct. at 2932–34 (explaining function of rule of lenity).

181. 130 S. Ct. 2896.

182. 18 U.S.C. § 1346 (2012).

183. *Skilling*, 130 S. Ct. at 2930–31. But see Stein, *Corrupt Intentions*, *supra* note 177, at 80 (arguing definition of honest-services fraud was not actually vague).

184. See Stein, *Corrupt Intentions*, *supra* note 177, at 62 ("This interpretation created an overlap between bribery and unlawful gratuity on the one hand, and honest-services fraud on the other."). But this overlap is not absolute. See *Skilling*, 130 S. Ct. at 2934 n.45 ("Overlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example, generally applies only to federal public officials, so § 1346's application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.").

185. Some criminal prohibitions are still formulated as standards. See, e.g., 18 U.S.C. § 371 (criminalizing conspiracy "to defraud the United States . . . in any manner or for any purpose"). Any such provision is open to challenge under the lenity and "void for vagueness" rules.

186. See *supra* notes 57–59 and accompanying text.

honest-services-fraud statute.<sup>187</sup> This statute is formulated as a standard, but the Supreme Court narrowed it down to a rule by interpreting “scheme or artifice” as requiring bribery.<sup>188</sup> The resulting rule, however, is too narrow. Under this rule, courts had to acquit a mayor who used his control over the city’s redevelopment plan to secure discounted acquisition of city-owned properties for his girlfriend<sup>189</sup> and a state senator who entered into a profitable consultancy agreement with a medical center that had an interest in his official activities.<sup>190</sup> As an alternative to that rule, Congress could legislate a broad prohibition penalizing any unreported agreement or arrangement that promotes a public official’s private benefit. This rule, however, would be too broad. Criminalizing every concealed conflict of interest might discourage talented people from joining the public service.

This legislative problem can be resolved by formulating a catalog that prohibits all kinds of bribery and similar behavior. This catalog would prohibit public officials from “receiving any pecuniary benefit in exchange for acting or making a decision in his or her official capacity” and from “making any similar transaction or arrangement.” Under this catalog, courts would interpret the residual prohibition of “similar transaction or arrangement” as criminalizing conduct analogous to bribery. This interpretation would cast a broader net and deter officials’ misconduct better than the Supreme Court’s construction of the honest-services-fraud offense. For example, under the proposed catalog’s interpretation, courts would have to convict the mayor and the senator who managed to quash their convictions in the two cases mentioned in the previous paragraph.<sup>191</sup> Critically, courts’ decisions on whether the defendant’s behavior constitutes a “similar transaction or arrangement” would involve no policy analysis. Instead, courts would fill in the residual category of bribery-like misconduct by using the “family resemblance” method.<sup>192</sup> The availability of this method would mute any complaint about vagueness that defendants might raise. An adequately drafted catalog is neither vague nor malleable. Hence, it would be immune against challenges that can be raised against criminal standards under the lenity and “void for vagueness” provisions.

---

187. 18 U.S.C. § 1346.

188. *Skilling*, 130 S. Ct. at 2932–33.

189. See *United States v. Riley*, 621 F.3d 312, 321–24, 339 (3d Cir. 2010) (“[T]he Government did not prove that fraud occurred by means of bribes or kickback as is now required by *Skilling*.”).

190. See *United States v. Coniglio*, 417 F. App’x 146, 148–49 (3d Cir. 2011) (overturning guilty verdict under *Skilling* because jury instructions suggested defendant’s concealment of conflict of interest met definition under § 1346).

191. See *id.* (quashing conviction of honest-services fraud under *Skilling*); *Riley*, 621 F.3d at 339 (same).

192. See *supra* notes 123–126 and accompanying text (detailing family-resemblance doctrine and extendibility of boundaries).



## B. Torts

The American torts system consists predominantly of standards. The best known example is probably negligence—the touchstone of liability for accidents that cause harm to another person.<sup>193</sup> The negligence standard is commonly defined as failure to take precautionary measures commensurate with the magnitude of the expected harm.<sup>194</sup>

Accidents caused by defective products are governed by a system of strict liability. For liability to attach, however, a plaintiff must prove that the product was *defective*, i.e., that the product's safety fell below the "state of the art"<sup>195</sup> or was inconsistent with "rational consumers' expectations."<sup>196</sup> Breach of the applicable standard establishes a *prima facie* case of liability. The victim, for her part, must avoid unreasonable self-endangerment. Whether she endangered herself unreasonably is determined under a negligence standard. Unreasonable self-endangerment by the victim (labeled as comparative or contributory negligence) reduces, and sometimes altogether eliminates, the tortfeasor's duty to redress the harm.<sup>197</sup> These general standards do not govern the entire realm of torts. They are supplemented by a few harm-specific standards that define battery, assault, false imprisonment, infliction of emotional distress, libel, and some other intentional torts.<sup>198</sup>

For reasons articulated in Part I, the tort system does not have many bright-line rules.<sup>199</sup> The legislature cannot identify in advance all damaging incidents that call for an imposition of the compensation duty and specify them in a statute that actors can easily learn. Certain risky activities, however, are best regulated by rules, and the system consequently uses rules to regulate those activities. These rules lay down detailed safety requirements for pharmaceuticals, medical devices, cars, and some other products and services.<sup>200</sup>

---

193. See Dan B. Dobbs, *The Law of Torts* § 112, at 263–66 (2000) (describing negligence as foundational requirement for tort liability).

194. See *id.* § 115, at 270–71 (discussing judicial definition of negligence as "unreasonably risky conduct").

195. See, e.g., Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, the Third Restatement, and the Reinstatement of Liability Without Fault*, 70 *Brook. L. Rev.* 889, 917 (2005) (describing "state of the art" standard).

196. See *id.* at 897–98 (describing "consumer expectation" standard).

197. See David G. Owen, *Products Liability: User Misconduct Defenses*, 52 *S.C. L. Rev.* 1, 18–20 (2000) (describing user-misconduct defenses as grounded on self-endangerment rationale).

198. See Dobbs, *supra* note 193, §§ 24–27, at 47–52, § 28, at 52–54, § 33, at 63–64, § 36, at 67–69, § 303, at 824–26, § 400, at 1117–19 (discussing elements of battery, assault, false imprisonment, intentional infliction of emotional distress, libel, and intentional torts generally).

199. See *supra* notes 68–70 and accompanying text (articulating costs of formulating rules for heterogeneous conduct and benefits of use of standards).

200. See generally Dobbs, *supra* note 193, §§ 133–136, at 311–22 (outlining effects of state and federal statutes on tort liability); Michelle M. Mello, *Of Swords and Shields: The*

But the tort system employs catalogs as well. Consistent with our theory, the system uses catalogs when it cannot realize its goals effectively enough by setting up a rule or a standard. We exemplify this pivotal point with the help of the Equine Activities Liability Acts, which have been adopted by many states.<sup>201</sup> A typical version of the Act provides, *inter alia*: “No equine activity sponsor, equine professional, doctor of veterinary medicine, or any other person, is liable for an injury to or the death of a participant resulting from the inherent risks of equine activities.”<sup>202</sup> Under this Essay’s taxonomy, this provision constitutes a catalog: It enumerates the specific actors who receive immunity against liability for horse-riding accidents and adds a general clause granting the immunity to other actors with equivalent characteristics.

This catalog substitutes for a general “assumption of risk” standard that courts previously used in allocating the responsibility for horse-riding accidents.<sup>203</sup> Courts used this standard to deny redress to horse riders who sustained injuries from participating in equestrian competitions and shows.<sup>204</sup> This standard is substantively correct, but it also has a serious vice: It is too general and unspecified. As such, it gives courts a very broad power that opens up a possibility for error and abuse, while providing little guidance to equine professionals, entrepreneurs, and riders.

In theory, the tort system could fix these twin problems of unpredictability and excessively broad discretion by substituting the standard with fine-grained rules.<sup>205</sup> But the cost of doing so would swamp the benefits. To devise well-functioning rules, the legislature would have to identify in advance every set of circumstances that justifies the denial of compensation to an injured horse-rider. This task is too onerous. It is equally hard to identify all actors who should be able to defend against the rider’s suit by successfully asserting assumption of risk, as so many different categories of actors affect the terrain and conditions in equestrian competitions (as shown in the ensuing paragraph). For these reasons, the system formulated the needed immunity as a catalog.

---

Role of Clinical Practice Guidelines in Medical Malpractice Litigation, 149 U. Pa. L. Rev. 645, 649–51, 664–65 (2001) (describing promulgation of clinical guidelines and outlining growing use of these guidelines as benchmark for determining medical malpractice).

201. See Sharlene A. McEvoy, *The Rise of Equine Activity Liability Acts*, 3 *Animal L.* 201, 215 (1997) (reporting widespread adoption of Equine Activity Liability Acts).

202. S.D. Codified Laws § 42-11-2 (2004).

203. See *Nielson v. AT&T Corp.*, 597 N.W.2d 434, 439–40 (S.D. 1999) (explaining Equine Activity Liability Act allocates damages from horse-riding accidents to rider on assumption-of-risk grounds).

204. See *Culver v. Samuels*, 37 P.3d 535, 537 (Colo. App. 2001) (denying redress to injured horse rider); *Muller v. English*, 472 S.E.2d 448, 454 (Ga. Ct. App. 1996) (same).

205. See *supra* notes 51–56 and accompanying text (discussing twin risks to standards and ability of rules to avoid such risks).

In 1999, the South Dakota Supreme Court issued an important decision that illustrates the operation of catalogs. The case arose from a tragic accident. A young woman rode a horse across her club's riding pasture, when suddenly, the horse tripped, somersaulted, and crushed the woman beneath it to her death.<sup>206</sup> An investigation had indicated that the horse tripped because it stepped into a cable trench dug by a telecommunications company, AT&T.<sup>207</sup> The woman's parents filed a wrongful death suit against AT&T. AT&T invoked the equestrian immunity, arguing that it was covered by the general clause "any other person" and hence it could not be held accountable for the rider's death.<sup>208</sup>

The court disagreed. The expression "any other person," it explained, does not refer to all people.<sup>209</sup> Had the legislature intended to grant the immunity to all people, it would not have expressly enumerated equine-activity sponsors, equine professionals, and veterinarians among its recipients.<sup>210</sup> Actors falling into the category of "any other person" must therefore share some common characteristic with the enumerated prototypical immunity holders.<sup>211</sup> This characteristic, according to the court, is the actor's involvement in equestrian sports and entertainment.<sup>212</sup> Because AT&T was lacking this characteristic, it fell outside the scope of "any other person."<sup>213</sup>

The court's interpretation of the catalog of immunity holders vividly illustrates Wittgenstein's "family resemblance" principle.<sup>214</sup> By extending the equestrian immunity to "any other person" on top of equine entrepreneurs and professionals, the legislature made the immunity very broad. However, as the court rightly decided, this immunity is not all-encompassing.<sup>215</sup> Specifically, it is not broad enough to encompass AT&T and other telecommunication companies that install their infrastructure on riding pastures and have no other connection with equestrian sports

---

206. See *Nielson*, 597 N.W.2d at 436–37.

207. *Id.* at 437.

208. *Id.* at 439.

209. See *id.* ("Therefore, the meaning of 'any other person' is discerned by considering the context in which it is used.").

210. *Id.*

211. See *id.* (noting general words "will be construed as applying only to things of the same general class as those enumerated" (quoting *In re Grievance of Wendell*, 587 N.W.2d 595, 597 (S.D. 1998))).

212. See *id.* (defining common characteristic as "involve[ment] in equine activities").

213. *Id.* at 440.

214. See *supra* notes 123–127 and accompanying text (defining and explaining "family resemblance").

215. See *Nielson*, 597 N.W.2d at 439 ("Applying the principle of *eiusdem generis*, 'any other person' is limited to other people involved in equine activities and does not extend blanket immunity.").

and entertainment.<sup>216</sup> There is no “family resemblance” between those companies and the prototypical immunity holders listed in the catalog.

On the other hand, actors who can prove the relevant family resemblance can fend off suits by successfully asserting the equestrian immunity. For example, spectators who cause a horse to run by blowing a trumpet or a security company that services the premises and mistakenly allows its alarm to go off and spook horses into panic should have immunity under the section. These actors fall into the “any other person” category because they are associated with equine activities through patronage and business. Spectators who come to enjoy the show and root for specific horses and riders, and who oftentimes pay for their admission to the show, are an integral part of the equestrian entertainment business. The provider of security services to the club and its riding facilities is part of the equine entrepreneur’s operation. The rider consequently assumes full responsibility for the accident risks they create.

Importantly, the court had no need to account for policy implications in order to deny the immunity to AT&T.<sup>217</sup> All it needed to do is ascertain—as a factual matter—that there is no “family resemblance” between telecommunication companies and the prototypical holders of the immunity: equine entrepreneurs and professionals. As explained in Part II, this policy-free decision is the core virtue of legal catalogs, as contrasted with standards.<sup>218</sup>

To illustrate a different torts catalog, consider the Texas statute that limits the state’s liability for road hazards to cases in which authorized officials had actual knowledge of the unabated hazard, while stipulating that this limitation does not affect the state’s “duty to warn of special defects such as excavations or obstructions on highways, roads, or streets.”<sup>219</sup> The Texas Supreme Court applied this catalog to a case involving a motorist who lost control of her vehicle while crossing a patch of loose gravel, collided with an oncoming truck, and died at the scene.<sup>220</sup> In the ensuing tort suit against the Department of Transportation, the deceased’s husband alleged that the defendant failed to issue the requi-

---

216. See *id.* at 439–40 (“[I]t is clear that the legislature intended to encourage equine activities by providing to those involved immunity from liability for injuries arising out of the unavoidable risks of equine activities. That purpose is not advanced by allowing AT & T to take refuge under the statutes . . .”).

217. See *supra* text accompanying notes 109–111 (discussing how catalogs block policy rationales).

218. See *supra* notes 136–150 and accompanying text (articulating benefits of catalogs compared to rules and standards).

219. Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b) (West 2011).

220. Tex. Dep’t of Transp. v. York, 284 S.W.3d 844, 845 (Tex. 2009).

site “special defect” warning.<sup>221</sup> He claimed that loose gravel on a road was a “special defect” within the meaning of the statute.<sup>222</sup>

The Texas Supreme Court disagreed. It ruled that the “special defects” category includes road hazards equivalent to the enumerated prototypical hazards: excavations and obstructions.<sup>223</sup> The court explained that “[a] layer of loose gravel on a road does not . . . fit within the same class as an obstruction or excavation”<sup>224</sup> because it “does not form a hole in the road or physically block the road like an obstruction or excavation.”<sup>225</sup> That is, there is no “family resemblance” between loose gravel, on the one hand, and obstructions and excavations, on the other hand. Based on this reasoning, the court reversed the lower court’s judgment for the plaintiff and dismissed the suit.<sup>226</sup>

We agree with the court’s decision. The court was correct to carry out a conceptual comparison of the relevant hazards—enumerated and unenumerated—and to base its decision on the hazards’ commonalities and differences. This is precisely what courts ought to do when faced with a catalog, as opposed to a rule or a standard.

The foregoing discussion has an important normative implication for tort policy. The tort system would do well to increase its use of catalogs as a substitute for the negligence<sup>227</sup> and strict-liability standards. To this end, it could develop a list of precautions capable of preventing a particular type of accident and supplement this list with a catchall provision permitting actors to take “any equivalent or similar precaution.”<sup>228</sup> To properly formulate such a catalog, the legislature would have to determine which precautions are most suitable for the given type of accident. Safety experts from different industries and disciplines should

---

221. See *id.* at 846 (describing wrongful-death suit against Texas Department of Transportation).

222. See *id.* at 848 (observing plaintiff submitted jury instruction containing standard of care associated with special defect). It appears that the plaintiff was unable to prove that the defendant had actual knowledge of the gravel hazard. See *id.* (noting plaintiff declined to seek jury findings on issue of actual knowledge).

223. See *id.* at 847 (“[T]he central inquiry is whether the condition is of the same kind or falls within the same class as an excavation or obstruction.”).

224. *Id.*

225. *Id.*

226. *Id.* at 848.

227. See *supra* notes 70, 193 and accompanying text (describing negligence as standard used in tort law).

228. See, e.g., N.Y. Veh. & Traf. Law § 381(1)(a) (McKinney 2005) (“Every motorcycle, driven upon the public highways of this state, shall be provided with . . . a suitable and adequate bell, horn or other device for signaling . . . .”); U.S. Dep’t of Transp., Federal Motor Vehicle Safety Standards and Regulations, Standard No. 201, available at <http://www.nhtsa.gov/cars/rules/import/FMVSS/> (on file with the *Columbia Law Review*) (last visited Sept. 24, 2014) (requiring specified types of vehicles “meet phase-in requirements for vehicle upper interior components, including, but not limited to, pillars, side rails, roof headers and the roof”).

be able to assist the legislature with these determinations. Catalogs formulated in this way would allow the system to realize the benefits of both rules and standards, while minimizing their shortcomings.<sup>229</sup>

### C. *Constitutional Law*

Catalogs are part and parcel of constitutional law as well. At the beginning of the twentieth century, they played an important role in shaping the contours of states' power to invest public funds. On a number of occasions, citizens came to court to challenge the authority of local irrigation districts to raise capital by issuing bonds and to buy shares in private companies.<sup>230</sup> The basis for those challenges was a state constitution provision:

Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law.<sup>231</sup>

The citizens argued that their local irrigation districts should be considered "other subdivision[s] of the state," and hence have no auth-

229. For additional examples of torts catalogs, see, e.g., *Massachi v. City of Newark Police Dep't*, 2 A.3d 1117, 1125, 1134 (N.J. Super. Ct. App. Div. 2010) (interpreting protection of "telephone [companies] . . . or any employee, director, officer, or agent of any such entity" in state's immunity statute for 911 service, N.J. Stat. Ann. § 52:17C-10(d) (West 2010), as fending off tort suits regarding "mechanical or logistical failures . . . and not [suits handling or dispatching of calls]"); *Lucero v. Richardson & Richardson, Inc.*, 39 P.3d 739, 745-47 (N.M. Ct. App. 2001) (interpreting "or any other recreational purpose" in state's statute, N.M. Stat. Ann. § 17-4-7 (1978), to limit liability of landowners allowing use of their land for "hunting, fishing, trapping . . . or any other recreational use" as excluding competitive team sports in public schools, and holding schools are not immune); *Hise v. City of North Bend*, 6 P.2d 30, 32-34 (Or. 1931) (interpreting municipality's charter provision precluding city's tort liability in connection with defective maintenance of "any sidewalk, street, avenue, boulevard, alley, court or place" as not extending to a municipal wharf).

230. See *Day v. Buckeye Water Conservation & Drainage Dist.*, 237 P. 636, 638-39 (Ariz. 1925) (holding irrigation districts are not "subdivision[s] of the state"); *Thaanum v. Bynum Irrigation Dist.*, 232 P. 528, 530-31 (Mont. 1925) (same).

231. See *Ariz. Const. art. 9, § 7* (amended 1998), available at <http://azmemory.azlibrary.gov/cdm/fullbrowser/collection/statepubs/id/19452/rv/compoundobject/cpd/19456> (on file with the *Columbia Law Review*); *Mont. Const. of 1889, art. 13, § 1*, available at <http://courts.mt.gov/content/library/docs/1889cons.pdf> (on file with the *Columbia Law Review*). The state's investment power under the Arizona Constitution underwent no changes until today (subject to a minor linguistic revision). See *Ariz. Const. art. 9, § 7*. The parallel Montana Constitution provision was reformulated into a rule that prohibits the state from investing public money other than retirement funds in private corporate capital stock. See *Mont. Const. art. 8, § 13(1)*.

ority to engage in the disputed transactional activities.<sup>232</sup> This argument was unsuccessful. Two supreme courts—Arizona’s<sup>233</sup> and Montana’s<sup>234</sup>—have rejected it. The Montana Supreme Court explained that the phrase “other subdivision of the state” does not encompass all subdivisions of the state.<sup>235</sup> Rather, it “means other subdivision of the state of the same general character as a county, city, town, or municipality.”<sup>236</sup> The common denominator of the enumerated members of the catalog—county, city, town, and municipality—is the power to levy general taxes.<sup>237</sup> Because irrigation districts had no such power and could only impose special assessments on landowners in order to pay for the irrigation system’s construction and maintenance, the court held that they are excluded from the catalog and hence not prohibited from making private market investments.<sup>238</sup>

The Arizona Supreme Court agreed with that reasoning,<sup>239</sup> while adding a more generalized distinction between irrigation districts and the enumerated state actors. The majority explained that “[c]ounties, cities, towns, and municipalities all belong to a class of subdivisions of the state primarily established for what are commonly called political and governmental, as aside from business purposes[,]” whereas “irrigation districts and similar public corporations, while in some senses subdivisions of the state, are in a very different class . . . [whose] function is purely business and economic, and not political and governmental.”<sup>240</sup>

Our second example is more contemporary. In 1995, Oregon passed a statute imposing mandatory limits on contributions to state political campaigns.<sup>241</sup> Residents, including a lobbyist, corporations, and a political action committee petitioned to the Oregon Supreme Court asking it to void the statute for violating their constitutionally protected freedom of political expression.<sup>242</sup> The Secretary of State defended the statute’s

232. See *Day*, 237 P. at 638 (noting objection to funding plan because irrigation districts should be considered “other subdivision[s] of the state”); *Thaanum*, 232 P. at 529–30 (same).

233. *Day*, 237 P. at 638–39.

234. *Thaanum*, 232 P. at 530–31.

235. *Id.* at 530.

236. *Id.*

237. *Id.* at 530–31.

238. *Id.* (“[The] irrigation district has not . . . the authority to impose general taxes . . . [because] an irrigation district was not in the contemplation of the framers of our Constitution . . .”).

239. See *Day v. Buckeye Water Conservation & Drainage Dist.*, 237 P. 636, 638 (citing with approval analysis of constitutional provision in *Thaanum*, 232 P. at 528).

240. *Id.*

241. See *Vannatta v. Keisling*, 931 P.2d 770, 773–74 (Or. 1997) (describing measure and challenges to it).

242. See *id.* at 774 & n.3 (“Petitioners . . . assert . . . [the statute] limits[s] or ban[s] certain political campaign contributions and coerce[s] political candidates to agree to limit their campaign expenditures.”); see also Or. Const. art. I, § 8 (“No law shall be

constitutionality based on the legislative assembly's power under article II, section 8, of the Oregon Constitution to "enact laws . . . prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct."<sup>243</sup> He argued that the words "other improper conduct" should be read to allow the legislature "to enact laws that restrict campaign contributions and expenditures."<sup>244</sup>

The court disagreed. After finding that "many—probably most—" contributions to political campaigns and candidates are a form of expression protected by Oregon's Constitution,<sup>245</sup> it went on to determine the meaning of "other improper conduct" in elections.<sup>246</sup> The court decided that misconduct captured by this general phrase must be similar to the enumerated election misconduct: "power," "bribery," or "tumult" that exert undue influence on the voter.<sup>247</sup> This enumerated misconduct, it explained, "interferes with the . . . act of voting itself, rather than with the far broader concept of political campaigning"; and thus, "other improper conduct" includes only those actions that have the effect of hindering or preventing the voting process.<sup>248</sup> Campaign financing consequently falls outside the constitutional catalog of election misconduct.

Our third and final illustration is the "open fields" doctrine that removes an individual's Fourth Amendment protection against unreasonable searches and seizures.<sup>249</sup> The Fourth Amendment grants this protection to people's "persons, houses, papers, and effects."<sup>250</sup> The term "effects" that appears in this constitutional provision is not general. As the Supreme Court explained, "effects" that the government cannot search or seize without a warrant or probable cause include only personal, as opposed to real, property.<sup>251</sup> Consequently, the government is free

---

passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.").

243. *Vannatta*, 931 P.2d at 779 (quoting Or. Const. art. II, § 8).

244. *Id.*

245. *Id.* at 776–78. This holding aligns with the recent United States Supreme Court decision, *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010), which held that the First Amendment prohibits the government from restricting political contributions by corporations, associations, and labor unions.

246. *Vannatta*, 931 P.2d at 781–84.

247. *Id.* at 782.

248. *Id.*

249. *Oliver v. United States*, 466 U.S. 170, 176–77 (1984) (holding Fourth Amendment protection does not extend to open fields).

250. *Id.* at 176 (quoting *Hester v. United States*, 265 U.S. 57, 59 (1924)).

251. *Id.* at 177 n.7 ("The Framers would have understood the term 'effects' to be limited to personal, rather than real, property." (citing *Doe v. Dring*, (1814) 105 Eng. Rep. 447 (K.B.) 449; 2 M. & S. 448, 454; 2 William Blackstone, *Commentaries* \*16, \*384–\*385)).



to trespass on any open fields and gather evidence incriminating their owner.<sup>252</sup>

The Court's holding that "effects" do not include land<sup>253</sup> made the "open fields" doctrine potentially inapplicable under state constitutions that protect people's property or "possessions" against unreasonable searches and seizures.<sup>254</sup> When a person owns open fields, those fields are part of her property and possessions. Arguably, this characteristic leaves open fields with the same protection against searches and seizures as persons, houses, and papers.

The Pennsylvania Supreme Court confronted this argument in a case involving a hunter who set up an unlawful bait to hunt a bear.<sup>255</sup> Evidence proving this accusation was collected from the hunter's camp by Wildlife Conservation Officers, who acted without a warrant.<sup>256</sup> The camp was unoccupied but "posted with 'No Trespassing' signs."<sup>257</sup> The defendant argued that the trial court ought to have suppressed this evidence because it had been obtained in violation of his right to privacy under Article I, section 8 of the Pennsylvania Constitution.<sup>258</sup> This constitutional provision protects people against warrantless searches and seizures "in their persons, houses, papers and possessions."<sup>259</sup> The defendant claimed that this formulation rejects the federal doctrine of "open fields" because the term "possessions," unlike "effects," is broad enough to include land.<sup>260</sup>

The court sided with the government.<sup>261</sup> The court ruled that the general term "possessions" is not a free-standing concept.<sup>262</sup> Rather, it is part of a list—or catalog, according to this Essay's taxonomy—that itemizes three specific areas of protection that belong to an individual's

---

252. *Id.* at 177; see also *Hester*, 265 U.S. at 59 ("[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." (quoting U.S. Const. amend. IV)).

253. *Oliver*, 466 U.S. at 177.

254. See Pa. Const. art. I, § 8 (extending Fourth Amendment protections to "possessions").

255. See *Commonwealth v. Russo*, 934 A.2d 1199, 1200 (Pa. 2007) (explaining defendant violated Pennsylvania's Game Code, 34 Pa. Cons. Stat. Ann. § 2308(a) (West 1997)).

256. See *id.* at 1200–01 (discussing investigation).

257. *Id.* at 1201.

258. *Id.* at 1202–03.

259. Pa. Const. art. I, § 8.

260. *Russo*, 934 A.2d at 1202–05.

261. See *id.* at 1213 ("[W]e hold that the guarantees of Article I, Section 8 of the Pennsylvania Constitution do not extend to open fields; federal and state law, in this area, are coextensive.").

262. See *id.* at 1205–06 ("Like the word 'effects' in the Fourth Amendment, 'possessions' appears as the last among four objects in which the people have a right to be secure, the others being their 'persons,' 'houses,' and 'papers.' (quoting Pa. Const. art. I, § 8)).

intimate space: “persons,” “houses,” and “papers.”<sup>263</sup> The term “possessions” therefore also belongs to that space.<sup>264</sup> “If ‘possessions’ had been intended to refer to everything one owned, such as open fields,” explained the court, “then there would have been no need to specify the other three objects.”<sup>265</sup>

Constitutional law does not use catalogs as often as does criminal law. As explained in Part III.A above, criminal law uses catalogs to fix the failings of rules within the constitutional framework inimical to standards.<sup>266</sup> By the same token, constitutional law will do well to intensify its use of catalogs in a sociolegal climate that promotes dynamism while retaining the centrality of the text and the nexus between the Framers’ project and our current system of governance.<sup>267</sup> Catalogs are well suited to prevent the overinclusiveness and underinclusiveness of constitutional rules while avoiding the legitimacy problem associated with judges’ interpretations of broad standards.<sup>268</sup>

#### D. *Tax Law*

Catalogs play an important role in tax law as well. They close loopholes while preventing taxes from becoming unpredictable (as under standards) or excessive (as under rules).<sup>269</sup> To see how tax catalogs work, consider the deductible casualty loss under § 165(c)(3) of the Internal Revenue Code.<sup>270</sup> This provision allows a taxpayer to deduct from her taxable income losses from theft, as well as “losses of property not connected with a trade or business or a transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other casualty.”<sup>271</sup> This provision constitutes a catalog under our definition: The general category of “other casualty” encompasses casualties that belong in the same family as the three enumerated casualties—fire, storm, and shipwreck.

263. *Id.*

264. *Id.* at 1206.

265. *Id.*

266. See *supra* notes 175–192 and accompanying text.

267. To see how this legal climate is envisioned, see Jack M. Balkin, *Living Originalism* 3 (2011) (“The method of text and principle is both originalist and living constitutionalist.”).

268. See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *Fordham L. Rev.* 375, 391 (2013) (“Excessive judicial discretion has been a recurring concern in American political history.”); cf. Balkin, *supra* note 267, at 6 (“The text of our Constitution contains different kinds of language. It contains determinate rules . . . . It contains standards . . . . And it contains principles . . . .”). As shown in this subpart of the Essay, constitutional law also includes catalogs.

269. See, e.g., *Estate of Herrmann v. Comm’r*, 85 F.3d 1032, 1040 (2d Cir. 1996) (explaining chosen interpretation of tax catalog by need to close loophole).

270. I.R.C. § 165(c)(3) (2012).

271. *Id.*

This understanding guided the Eleventh Circuit's precedential decision *Maher v. Commissioner*, which involved taxpayers who lost twenty-two coconut palm trees that grew on their property due to a lethal yellowing disease.<sup>272</sup> The Tax Commissioner denied the taxpayers' request to reduce their taxable income on account of this loss.<sup>273</sup> The tax court agreed with the Commissioner, and the taxpayers appealed.<sup>274</sup> The Eleventh Circuit dismissed the appeal, ruling that the "other casualty" category only includes the same kind of losses as fire, storm, and shipwreck.<sup>275</sup> The common denominator of these enumerated losses, the court explained, is "a sudden, unexpected, or unusual event."<sup>276</sup> Hence, losses resulting from "progressive deterioration of property through a steadily operating cause or by normal depreciation" are not included in the casualties catalog.<sup>277</sup>

Another illustration of the operation of this catalog can be found in the tax-court decision that dealt with taxpayers' property adjacent to the house of the celebrity football player O.J. Simpson, who faced murder charges.<sup>278</sup> The lucrative neighborhood surrounding O.J. Simpson's house had received unprecedented public attention: It became inundated for many months "with media personnel [and celebrity-enthralled sightseers]" who "blocked streets, trespassed on neighboring residential property, and flew overhead in helicopters in their attempts to get close to the Simpson home."<sup>279</sup> According to the taxpayers, this unwelcome invasion constituted "other casualty" that permanently devalued their property.<sup>280</sup>

The court disagreed. The "other casualty" category, it explained, does not encompass any casualty.<sup>281</sup> Rather, casualties that fall into this general category must share the characteristics of "the specifically enum-

---

272. 680 F.2d 91, 91 (11th Cir. 1982).

273. *Id.*

274. *Id.*

275. *Id.* at 92-93.

276. *Id.* at 92.

277. *Id.* To support this interpretation of § 165(c)(3), the court also compiled a list of eighteen court decisions that followed the distinction between sudden and gradual losses. *Id.* at 93-94. These decisions included a case featuring a sudden and unexpected, and hence deductible, loss of trees. See *Black v. Comm'r*, 36 T.C.M. (CCH) 1347, 1351 (1977) (recognizing loss of pine trees caused by sudden beetle infestation as deductible casualty).

278. See *Chamales v. Comm'r*, 79 T.C.M. (CCH) 1428, 1429 (2000) (describing location of property). For information on O.J. Simpson's murder trial, see Douglas O. Linder, *The O.J. Simpson Trial: 1995, Famous American Trials*, <http://law2.umkc.edu/faculty/projects/ftrials/Simpson/simpson.htm> (on file with the *Columbia Law Review*) (last visited Sept. 24, 2014) (providing account of trial and access to transcripts and related documents).

279. *Chamales*, 79 T.C.M. (CCH) at 1429.

280. *Id.* at 1430.

281. See *id.* at 1431 (explaining characteristics necessary for inclusion in "other casualty" category).

erated casualties of fire, storm, and shipwreck.”<sup>282</sup> The unspecified casualties must be as sudden, unexpected, and unusual as fires, storms, and shipwrecks.<sup>283</sup> The court then went on to explain that, although “the stabbing of Nicole Brown Simpson and Ronald Goldman was a sudden and unexpected exertion of force,” this force was irrelevant to the taxpayers’ case because it “was not exerted upon and did not damage [their] property.”<sup>284</sup> As for the influx of media, onlookers, and trespassers, the court decided that this casualty falls outside the catalog because it brought about a gradual, rather than instant, depreciation of the property in question.<sup>285</sup>

Both of these decisions illustrate the difference between catalogs, on the one hand, and rules and standards, on the other hand. The “other casualty” category has an unlimited potential for being filled in with casualties that bear family resemblance to fires, storms, and shipwrecks. Hence, it cannot be considered a rule. This category is also not a standard because it sets up a framework for factual, policy-free categorizations of alleged casualties as sudden, unexpected, and unusual. If “other casualty” were a standard, the taxpayers in the two examples could possibly convince the court to recognize their misfortunes as deductible casualties.

Another example of a catalog is provided by § 2043(b)(1) of the Internal Revenue Code, which prohibits deduction in the case of “a relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent’s property or estate.”<sup>286</sup> In other words, the estate cannot deduct the decedent’s obligation to his or her spouse if all he received in return was the relinquishment of dower, curtesy, statutory estate, or other marital right. “Dower” and “curtesy” are common-law rights in the decedent’s land that move to his or her widow or widower,<sup>287</sup> unless they are substituted statutorily by a different entitlement (“statutory estate”).

Given the catalog formulation of the provision, the residual “other marital rights” category cannot be construed to encompass any marital

---

282. Id.

283. Id.

284. Id.

285. Id.

286. I.R.C. § 2043(b)(1) (2012). This rule must be read together with I.R.C. § 2053(c)(1)(A).

287. The court in *Herrmann v. Commissioner* described the history of the rights:

At common law, “dower” entitled a widow to a life interest in one-third of the land of which her husband had been seised at any time during marriage and which was inheritable by the issue of husband and wife. “Curtesy” entitled a widower to a life estate in all lands so held by his wife, but only if children were born of the marriage.

85 F.3d 1032, 1034 n.1 (2d Cir. 1996) (citing Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts, and Estates* 375–76 (4th ed. 1990)).

entitlement. Rather, it ought to be interpreted as covering only those entitlements that are substantively equivalent to dower, curtesy, or a statutory estate.

This is precisely what Judge Guido Calabresi did in *Herrmann v. Commissioner*.<sup>288</sup> He explained that dower, curtesy, and statutory estates have a common denominator: All of them are contingent entitlements that ripen upon dissolution of the marriage by death or divorce.<sup>289</sup> When a spouse relinquishes any such entitlement prior to its ripening, she adds nothing to the estate's economic value.<sup>290</sup> Recognizing the decedent's parallel obligation to his spouse as deductible would therefore diminish his taxable estate "by the full amount of what he gave up, in exchange for a waiver that added nothing to it."<sup>291</sup> Based on this understanding, Judge Calabresi ruled that "other marital rights" encompass only those entitlements that the spouse will acquire upon becoming a widow or divorcee.<sup>292</sup>

Section 2043(b)(1), too, illustrates the advantage of catalogs over standards and rules. To prevent easy depletion of taxable estates,<sup>293</sup> the lawmaker could set up a standard that would disallow any deduction of the deceased's obligations to his spouse that remove assets from, while adding no value to, his estate. Any such standard, however, would make the law manipulable and unpredictable. As an alternative, the lawmaker could lay down a rule rendering the deceased's obligations to his spouse nondeductible when they are reciprocated solely by the relinquishment of a contingent marital right that accrues upon dissolution of the marriage. Such a rule would suffer from lack of clarity, which would increase actors' costs of learning the law and litigating. The chosen catalog reduces those costs by providing paradigmatic examples of nondeductible obligations while avoiding the twin vice of unpredictability and misuse.

#### CONCLUSION

All legal scholars owe a great intellectual debt to the rules/standards dichotomy. It has spawned an important body of scholarship and greatly enriched our understanding of the law and its operation. Furthermore, it has become the organizing principle for legal theory. Notwithstanding these important accomplishments, the vantage point offered by the

---

288. See *id.* at 1032 (comparing nature of disputed right to dower and curtesy to demonstrate granting deduction would undermine § 2043(b)(1)).

289. *Id.* at 1035.

290. See, e.g., *id.* at 1039 ("Had they divorced, [the relinquished] right would have ripened. But no divorce took place and the couple was still married when Herbert died. Harriet's waiver, therefore, did not add a penny to Herbert's estate.").

291. *Id.*

292. *Id.* at 1039–41.

293. See *id.* (explaining § 2043(b)(1) aims at preventing husbands and wives from making contracts with sole purpose of depleting estate and reducing its tax).

rules/standards dichotomy is incomplete. As this Essay showed, the rules/standards dichotomy disregards the existence of a third category of legal commands: catalogs. Catalogs are legal concepts that are structured around an expressed enumeration of examples followed by a general category that includes other unenumerated items that have a Wittgensteinian family resemblance to the specified ones.

In addition to unveiling the presence of catalogs, this Essay aspired to make three discrete contributions to the canon of legal jurisprudence. First, as a positive matter, it demonstrated the ubiquity of catalogs in the legal system. Specifically, it showed that catalogs are at work in many areas of the law including bankruptcy, evidence, environmental law, copyright, criminal law, torts, constitutional law, and taxation. Second, as a conceptual matter, this Essay explained that catalogs constitute an independent legal concept. Concretely, it argued that catalogs require courts to engage in a very different interpretive exercise than under either rules or standards and that the use of catalogs effects a different division of powers between the courts and the legislature. Finally, from a normative perspective, this Essay has shown that in many cases catalogs can outperform rules and standards in promoting legislative goals and societal values. This Essay's hope is that the unveiling of catalogs will generate future work that will transcend the boundaries of the extant rules-versus-standards debate.

