
COGNITIVE JURISPRUDENCE

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I. INTRODUCTION

Our law has no mind of its own. In times past, we have fancied law a product of the Deity, and we are still apt to depict it as something transcendent, or even broodingly omnipresent, if not divine. Some of our lawmakers maintain a tradition of donning garments befitting oracles when they utter their pronouncements.¹ Needless to say, the reality is that rules flow out of the pens of mortal persons beneath the impressive robes, persons who must bend their mental efforts to many complex problems and tasks, all competing for their attention.

Half a century ago, the late Herbert Simon developed the theory of “bounded rationality” in connection with human decisionmaking. His insight was that the cognitive resources (like other resources) of human beings are *finite* and, accordingly, must be *rationed*. Whether consciously or unconsciously, we all have to make hard choices about how to allocate our intellectual energies.² We cope with cognitive deficits, Simon and his students elaborated, in a variety of ways—for example, by searching selectively through the exponential ramifications of our analysis; by settling

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1. For an eighteenth century assertion of the divine inspiration for English law, see, for example, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *42 (1765–69). For a secular encomium, see, for example, *Foster v. State*, 596 So.2d 1099, 1105 n.12 (Fla. Dist. Ct. App. 1992). For a discussion, and criticism, of judges’ tradition of “priestly trappings,” “clothing [their] wearer with the dignity that befits the augur,” see JEROME FRANK, COURTS ON TRIAL: MYTH & REALITY IN AMERICAN JUSTICE 254–61 (2d prtg 1950).

2. Simon’s theories are encapsulated in HERBERT A. SIMON, REASON IN HUMAN AFFAIRS (1983). Neurophysiologists have recently taken up the problem. See generally WALTER J. FREEMAN, HOW BRAINS MAKE UP THEIR MINDS (2000).

on decisions that we find sufficiently good, even if not necessarily best; and by developing mental short-cuts (dubbed heuristics) to simplify cognitive tasks, thereby allowing us to arrive at decisions in a more frugal manner.

All of this seems rather obvious—although, as the sociologists are wont to remind us, we frequently remain oblivious to the obvious until someone points it out to us.³ At any rate, Simon's vision contradicted the assumptions of orthodox economics, which presuppose limitless cognitive capacities and hence global rationality on the part of economic decisionmakers. Died-in-the-wool traditionalists continue to defend the usefulness of this paradigm,⁴ even as it shifts within the work of a younger generation of behavioral economists.⁵ In a parallel development, the adherents of law and economics—who imported the economic model of rational choice—now confront a growing body of scholarship that applies behavioral psychology to the analysis of rules regulating decisionmaking by legal actors, often to justify paternalistic intervention (disfavored by the economists) shielding citizens from the poor choices they might lean toward if left to their own mental devices.⁶

3. E.g., ANTHONY GIDDENS, IN DEFENSE OF SOCIOLOGY 3–4 (1996). In fact, this sensation reflects still another *cognitive* phenomenon known as the “hindsight bias,” which leads us to overestimate the predictability of events in retrospect. This psychological disposition has also been found to extend to scientific *results*, and hence makes all our scholarship appear more trivial. Paul Slovic & Baruch Fischhoff, *On the Psychology of Experimental Surprises*, 3 J. EXPERIMENTAL PSYCHOL. 544, 544 (1977).

4. E.g., Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 402 (1993) (“[N]o approach of comparable generality has yet been developed that offers serious competition to rational choice theory.”). This is hardly the only assumption of orthodox economics under attack today as bad psychology. Preference exogeneity is another. See generally Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. ECON. LIT. 75 (1998).

5. E.g., RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1994). Bounded rationality has to some degree been reflected in orthodox economics via the subterfuge of misrepresenting costly cognition as costly information-gathering. John Conlisk, *Why Bounded Rationality*, 34 J. ECON. LIT. 669, 690–91 (1996) (“It is curious that such similar . . . issues . . . have been treated so differently in standard economics, one avoided and the other embraced.”). See also GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 6–7 (1976). At least one law and economics scholar has conceived lawmaking as an “information product.” Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 585–86, 623 (1992).

6. For example, in connection with the discharge in bankruptcy, see THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 228–43 (1986); and Charles G. Hallinan, *The “Fresh Start” Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 109–18 (1986). For theoretical discussions of the paternalistic implications of behavioral analysis of law, see Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 17–22 (1995); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541–45 (1998); and Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 254–75 (1998). Cf. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1151, 1575 (1998). For recent survey articles, see generally Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and*

Thus far, behavioral analysis of law has provided a fruitful, if not uncontroversial,⁷ perspective on public policy. But thus far is only the beginning, for the revelations of cognitive psychology are universally applicable. Governors are no less constrained in their mental resources than are the governed, and each demands study. A cognitive theory of law will remain incomplete unless and until it includes a theory of *cognitive jurisprudence*.

In the pages following, we shall explore some of the ways in which bounded rationality affects lawmakers, and thereby law itself. This is not, to be sure, an entirely new inquiry. As early as the Realist movement, when Professor Simon was still in his swaddling cloths, Jerome Frank was reminding us (in the language of his day) that “judges are not a distinct race and . . . their judging processes must be substantially of like kind with those of other men,” which he urged us to inquire into with the tools of psychology.⁸ Frank continued to concede his humanity after he himself ascended to the bench of the Second Circuit Court of Appeals,⁹ a concession that other modern judges have also made readily.¹⁰ In more recent days, a host of scholars has applied cognitive theory to analyze the behavior of all the lead

Economics, 88 CAL. L. REV. 1051 (2000); and Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115 (1999).

7. For recent skeptical critiques, see generally Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717 (2000); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002); and Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973 (2000). For a response to the first of these critiques, see Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000). Finally, for an argument that, taken alone, cognitive theory provides an impoverished perspective on human psychology, see Anne C. Dailey, *The Hidden Economy of the Unconscious*, 74 CHI.-KENT L. REV. 1599 (2000).

8. JEROME FRANK, *LAW AND THE MODERN MIND* 105–06 (2d ptg. 1931); Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumptions that Judges Behave like Human Beings*, 80 U.P.A. L. REV. 17 (1931); Jerome Frank, *Are Judges Human? Part Two: As Through a Glass Darkly*, 80 U.P.A. L. REV. 233 (1931).

9. See *In re J.P. Linahan*, 138 F.2d 650, 652–54 (2d Cir. 1943) (Frank, J.); FRANK, *supra* note 1, at 255–56. Frank donned his robe in 1941. For a discussion of his judging, see ROBERT J. GLENNON, *THE ICONOCLAST AS REFORMER* 102–92 (1985).

10. Among them is William H. Rehnquist, the current Chief Justice of the U.S. Supreme Court: “Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.” *Quotes*, A.B.A. J., Aug. 1989, at 30. See also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921) (“Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”); RICHARD A. POSNER, *THE FEDERAL COURTS* 366 (rev. ed. 1996) (“Judges are not that different from people of the same class in the society from which they come. The unruliness of American judiciaries is the unruliness of American culture.”).

players in the drama of the trial: litigants,¹¹ attorneys,¹² witnesses,¹³ juries,¹⁴ and trial court judges.¹⁵ As of yet, however, few scholars have trained a cognitive spotlight on the playwrights who hand judges their dramatic lines.¹⁶

11. For recent discussions, citing in turn to earlier ones, see generally Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1 (2000); Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43; Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000); and Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265 (2002).

12. See generally Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498 (1996).

13. See Phoebe C. Ellsworth & Robert Mauro, *Psychology and Law*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 684, 702–17 (Daniel T. Gilbert et al. eds., 1998) (surveying the literature). For other recent discussions, see Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, in JUDGMENT AND DECISION MAKING 199 (Terry Connolly et al. eds., 2d ed. 2000); and William Meadow & Cass R. Sunstein, *Statistics, Not Experts*, 51 DUKE L.J. 629 (2001).

14. E.g., Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519 (1996); David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000). For surveys of the capacious literature, see Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmey Seying & Jennifer Pryce, *Jury Decision Making: Forty-Five Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001); and Ellsworth & Mauro, *supra* note 13, at 693–02. For an earlier survey, see Robin MacCoun, *Experimental Research on Jury Decision Making*, 244 SCI. 1046 (1989). On the related psychological problem of jury nullification, see Mark Pingle, *Submitting to Authority: Its Effect on Decision Making*, 18 J. ECON. PSYCHOL. 45 (1997).

15. C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 152–73 (1996). See also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (examining judges' susceptibility to cognitive illusions and biases); Arthur J. Lurigio, John S. Carroll & Loretta J. Stalans, *Understanding Judges' Sentencing Decisions: Attributions of Responsibility and Story Construction*, in APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES 91 (Linda Heath et al. eds., 1994); Richard L. Wiener & Christine C. Pritchard, *Negligence Law and Mental Mutation: A Social Inference Model of Apportioning Fault*, in APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES, *supra*, at 117; W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26 (1999).

The most fundamental manifestation of bounded rationality at the level of judgment is the occasional occurrence of *legal error*, which cognitive theory predicts is more likely, the more complicated the rule a judge has to apply. Thus, the notoriously complicated Rule Against Perpetuities has frequently resulted in legal error. Even the Rule's all-time master described it as "a constant school of modesty"—by which, of course, he meant intellectual modesty. JOHN C. GRAY, THE RULE AGAINST PERPETUITIES at xi (Roland Gray ed., 4th ed. 1942) (1886). Within a cognitive model of judging, then, an old maxim turns upside-down: *Hard law makes bad cases* when the judge who applies it is boundedly rational!

16. For a suggestion of the general dearth of psychological studies of judging, see LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 137–38, 141 (1997).

My own explorations of the effects of bounded rationality on lawmaking began in 1996. See Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1145–62 (1996) [hereinafter Hirsch, *Inconsistency*]; Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 567–68, 573 (2000). One can find occasional stabs at the problem scattered through the literature of jurisprudence. For an early suggestion that the phenomenon of *legal fictions* traced to the conceptual limitations of the "human mind[s]" of judges, see L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 513, 524–25 (1931). For several recent contributions to the literature, see Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903 (2002); Mark Seidenfeld, *Cognitive*

appellate justices, legislators, restators, and commissioners. Each of these contributes rules, as distinct from the settlements, verdicts, holdings, sentences, and damage awards that follow at trial. And each of these, once again, is inescapably human—including, incidentally, that cerebral subspecies, *homo academicus*, which dominates the private lawmaking bodies that promulgate model codes. However intellectually formidable, even law faculties have limited faculties.¹⁷

Scholars examining evidence from trials claim that cognitive frailties have a noticeable impact on the verdicts and awards handed down by juries and judges.¹⁸ And if our frailties betray themselves at this level, within the realm of *jus dicere*, then it stands to reason they will do the same within *jus dare*. If anything, we might anticipate bounded rationality to distort rules more severely than it distorts rulings. The task environment in which lawmakers craft rules appears in certain respects more challenging—and hence should devour more cognitive resources—than does the task environment of the trial bench and jury box. Issuing a verdict, typically, requires a quantal choice (guilty or not guilty) or perhaps a linear choice (damages in a certain amount), whereas lawmakers face a complex choice from among an array of alternative rules, informed by any number of criteria.¹⁹ What is more, at least some areas of law comprise a competitive environment: Lawmakers pit their wits against other parties, each striving to outsmart the other. That is true, for instance, in the tax realm, where lawmakers and accountants lock horns (and minds).²⁰ It is also true indirectly

Loafing, Social Conformity, and Judicial Review of Agency Rulemaking, 87 CORNELL L. REV. 486 (2002); and Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002).

17. Doubtless, academics enjoy more ample time for reflection than any other mortal lawmaker (“the leisure of the theory class”). But compare Grant Gilmore’s (playful?) assertion that “the academic mind is usually a generation or so behind the judicial mind in catching on to . . . things.” GRANT GILMORE, *THE DEATH OF CONTRACT* 90 (1974).

18. E.g., Guthrie et al., *supra* note 15, at 829 (“Our study demonstrates that [trial] judges rely on the same cognitive decision-making process as laypersons, which . . . can produce poor judgments.”).

19. For a theoretical discussion citing to earlier works on the same subject, see Craig D. Parks & Rebecca Cowlin, *Group Discussion as Affected by the Number of Alternatives and by a Time Limit*, 62 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 267 (1995).

20. See generally DAVID LUBAN, *LAWYERS AND JUSTICE* 47–49 (1988) (observing the exploitation of “loopholes” in law). To a degree, election-finance law and criminal law likewise comprise competitive task environments. These games of cat-and-mouse have gone on since the dawn of law. For example, Britain’s Parliament proved no match for medieval estate planners, who quickly succeeded in thwarting the Statute of Uses. Blackstone commented dryly: “[T]hus . . . a statute made upon great deliberation . . . has had little other effect than to make a slight alteration in the formal words of a conveyance.” 2 BLACKSTONE, *supra* note 1, at * 336. Likewise, the church “ever had of their counsel the best learned men that they could get,” and these “found many means to creep out of th[e mortmain] statute.” 2 *id.* at * 270.

in the corporate realm, where lawmakers in different states vie to provide the most appealing situs for business charters.²¹

Finally, and perhaps most significantly, our legal landscape is a busy place, cultivated by busy persons. Juries typically face a single task, and they have some flexibility in allocating time toward its accomplishment. By contrast, lawmakers must attend to multiple tasks in a limited time. In *The Path of the Law*, Justice Oliver Wendell Holmes told of “a very eminent judge” who claimed “he never let a decision go until he was absolutely sure that he was right.”²² If such behavior, or anything like it, was ever truly possible, it is assuredly not so today. Dockets (and legislative agendas) are too crowded to permit it. As we would expect, term and session deadlines—occasioning the proverbial *rush to judgment*—put added pressure on scarce cognitive resources.²³

None of this is to suggest that bounded rationality exercises a dominant influence on patterns of lawmaking; human nature is too complicated for that. But the part that it does play, alongside so many others,²⁴ merits investigation.

21. See generally Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (positing a general theory of legal competition among states).

22. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

23. For an early recognition, see ARISTOTLE, THE “ART” OF RHETORIC 5–7 (John Henry Freese trans., G.P. Putnam’s Sons 1926) (c. 330 B.C.) (observing that “judgments are delivered on the spur of the moment, so that it is difficult for the judges properly to decide questions of justice or expediency”). On the theoretical significance of time pressure, see TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING (Ola Svenson & A. John Maule eds., 1993); JOHN W. PAYNE, JAMES R. BETTMAN & ERIC J. JOHNSON, THE ADAPTIVE DECISION MAKER 37–40 (1993); and A. John Maule & Anne C. Edland, *The Effects of Time Pressure on Human Judgment and Decision Making*, in DECISION MAKING: COGNITIVE MODELS AND EXPLANATIONS 189 (Rob Ranyard et al. eds., 1997); Mieneke W.H. Weenig & Marleen Maarleveld, *The Impact of Time Constraints on Information Search Strategies in Complex Choice Tasks*, 23 J. ECON. PSYCHOL. 689 (2002). For suggestions by judges that time pressure has adversely affected the quality of their opinions, see EDWARD LAZARUS, CLOSED CHAMBERS 285–86 (1998); Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D.L. REV. 371, 374 (1988); and Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 9–10. By analogy, the scramble that occurs near the end of a legislative session or when a bill is on the floor is notoriously inauspicious for the quality of legislation. E.g., Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 873 (1992). Crowded agendas also diminish the intensity of review of private legislation. Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALA. L. REV. 891, 905 n.63 (1992); Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 179 n.324 (2001).

24. Not least, of course, the substantive policy concerns of lawmakers. For a range of perspectives, see generally BAUM, *supra* note 16; DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 12–33 (1991); RICHARD A. POSNER, OVERCOMING LAW 109–44 (1995); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 186–96 (1990); ROWLAND & CARP, *supra* note 15, at 10–17; LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? (1999); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); Frederick Schauer, *Incentives, Reputation, and the*

This Article makes a preliminary foray into the field. The question that it poses is a simple one: In what respects do legal rules reflect their authors' limited capacities for productive thinking?

II. SELECTIVE SEARCH

One ubiquitous device human decisionmakers employ to conserve cognitive energy is to search selectively the potential pathways of analysis of any given problem. A chess player,²⁵ for example, examines only what appear the most promising lines of play while omitting to analyze others—not because they are irrelevant, but because of the limited effort that can be devoted to any one game.²⁶

Selective search is cognitively efficient—but it is nevertheless imperfect. The most fundamental consequence is simply the variety of games that result, as different players explore different analytical branches and hence make different moves. The same is true of lawmakers. Each state's legal system has evolved differently, in part, of course, because of different local conditions and cultural norms, but also because lawmakers have pursued different paths of analysis.

Within a single state's legal landscape, selective search contributes to the *contingency* of rules. Participants in the process of drafting codes often come to appreciate the point. As a codifier of penal law related, "there can be an almost unending variety of alternatives to consider, so much so that the need to get on with the work has often dictated that somewhat arbitrary choices [have] to be made."²⁷ In similar terms, the reporter for the original Uniform Probate Code warned:

The field is so large and the variety of rules . . . is so wide that the energies of even the most unusual of talented and dedicated researchers will be dissipated. . . . [R]eviewing committees . . . [cannot] be expected

Inglorious Determinants of Judicial Behavior, 68 U. CIN. L. REV. 615 (2000); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998); and Gregory C. Sisk, Michael Heise & Andrew P. Morris, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

25. Professor Simon offered this illustration in his seminal essay. Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 106–07 (1955).

26. "What a person *cannot* do he or she *will not* do, no matter how strong the urge to do it." HERBERT A. SIMON, *THE SCIENCES OF THE ARTIFICIAL* 28 (3d ed. 1996). On selective search, see *id.* at 55–59.

27. Sanford J. Fox, *Reflection on the Law Reforming Process*, 4 U. MICH. J.L. REFORM 443, 452 (1971).

to act intelligently when they must sift through hundreds of pages of technical distinctions and niceties in search of the best answer.²⁸

In practice, as a theory of cognitive jurisprudence predicts, the (quixotic) quest for the best answer is abandoned for the (realistic) good-enough answer—and that answer varies, depending upon which analytical course the lawmaker happens to travel. Some scholars have conjectured that the common law tends in the direction of efficiency,²⁹ but bounded rationality, afflicting judges no less than codifiers, simultaneously injects an element of randomness into the lawmaking process.

A closely related consequence of selective search is structural inconsistency between rules. One way lawmakers narrow their inquiries, typically, is by exploring problems discretely. Lawmakers tend to confine their search to the rule at issue, expending little effort on how structurally similar problems have been dealt with in other segments of the legal landscape. This form of myopia can cause one lawmaker to overlook policies reflected within rules that other lawmakers have crafted in cognate spheres.³⁰ As a result, different patches of the legal landscape are often developed inconsistently—just as cognitive theorists would have predicted.³¹ The phenomenon can be equally observed within common law, statutory law, and the model codes promulgated by private lawmaking bodies.³²

One illustration, drawn from the realm of inheritance law, is the conceptual distinction between two doctrines known as lapse and ademption. Both involve the core problem of how to interpret a testamentary provision that cannot be implemented literally due to a change of circumstances after the will was executed. If a testator bequeaths to someone who turns out to predecease her and then fails to amend her will in response to that

28. Richard V. Wellman, *Law Teachers and the Uniform Probate Code*, 24 J. LEGAL EDUC. 180, 182 (1972).

29. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.5, at 614 & n.7 (citing to prior discussions).

30. This phenomenon may also have to do with mechanisms of long-term memory retrieval. “Associationist” theories of memory posit that knowledge is stored in interconnected mental compartments. Those interconnections operate like an analytical search tree, and, absent a close connection, a lawmaker (let us say) might fail to associate legal knowledge in one compartment with that located in another. Steven A. Sloman, *Rational Versus Arational Models of Thought*, in *THE NATURE OF COGNITION* 557, 573–74, 578 (Robert J. Sternberg ed., 1999) (citing to memory studies).

31. “[P]articular decision domains will evoke particular values, and great inconsistencies in choice may result from fluctuating attention.” SIMON, *supra* note 2, at 18. For an early recognition of the phenomenon in connection with one branch of lawmaking, see JOHN CHIPMAN GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* § 7 (2d ed. 1895).

32. For an extended discussion and a great number of examples, see Hirsch, *Inconsistency*, *supra* note 16.

development, lawmakers attempt to divine the typical preference of the testator for an alternative disposition of the property, depending upon a set of contingencies. If, however, a testator bequeaths property that is sold or destroyed prior to death, again without response by codicil, lawmakers traditionally have disregarded the question of probable intent, applying the simple principle that if a thing no longer exists it cannot be bequeathed; the possibility that the testator might, under some conditions, wish the beneficiary to receive an alternative bequest has not entered into the analysis.

Note well that the two circumstances raised here are conceptually similar, for both involve the problem better known in contract law as “impossibility.” In one case, the demise of the beneficiary frustrates the literal terms of the will; in the other, the demise of the property does the same. Arguably, the public policies applicable to the two cases are analogous—and if they are not, they need to be distinguished by analysis. Yet no such equation or analytical differentiation has occurred. Lawmakers have rarely thought to relate the doctrine of ademption to the doctrine of lapse, much less to the categorically distinct, but still corresponding, doctrine of contract impossibility. Rather, each of these doctrines has evolved in virtual—or even splendid—isolation.³³

Apart from these abstract attributes of rules, selectivity of search also affects the form that rules take. Some of the concrete attributes of rules may trace to bounded rationality.

Return to our game-playing analogy. Chess players analyze selectively but as a consequence often miss preferable moves if they select the wrong lines to explore or abandon prematurely their search down a path. When they fail to consider an immediate or subsequent response to a move because they have overlooked a significant line of analysis, chess players experience the mental phenomenon of *surprise*.³⁴ Even the greatest player who ever lived has succumbed to it on occasion.³⁵ At such moments, chess players wish in

33. Hirsch, *Inconsistency*, *supra* note 16, at 1125–35. It is tempting to posit at this juncture something akin to an “inverse square law” in cognitive jurisprudence: The greater the “distance” between two points along the legal landscape, the lesser the likelihood that a lawmaker will think to compare them when crafting a rule at one of the two points. But as a science of human nature, cognitive psychology cannot so easily be reduced to the austerity of equations.

34. Or to use Simon’s phraseology, they suffer “unanticipated consequences.” Simon, *supra* note 25, at 103; Herbert A. Simon, *Rationality in Political Behavior*, 16 *POL. PSYCHOL.* 45, 46–47 (1995). Of course, this is not the only circumstance that can occasion what is commonly meant by surprise, but it does constitute one distinct variant of the phenomenon. See generally G.L.S. SHACKLE, *DECISION ORDER AND TIME IN HUMAN AFFAIRS* (2d ed. 1969) (discussing surprise in the context of economic theory).

35. See BOBBY FISCHER, *MY 60 MEMORABLE GAMES* 28 (1969) (“This [p]awn sac[r]ifice caught me completely by surprise.”); *id.* at 114 (“Having overlooked [black’s] last move, I was somewhat shaken!”); *id.* at 193 (“This [move] looked like a shot—but instead it’s a shock.”).

retrospect that they had paid greater attention to other dimensions of the problem, realizing too late that they have made a bad move.

Lawmakers, too, are susceptible to surprise. Occasionally, lawmakers miscalculate the social repercussions of rules they craft.³⁶ More typically, however, lawmakers fail to contemplate circumstances that call for refining general rules. Had lawmakers searched down neglected pathways, they would have announced more discriminate, or more limited, rules a priori.

Persons crafting rules have one unparalleled advantage over persons playing chess: Judges and legislators are allowed to take their moves back. Lawmakers reverse ill-conceived (as well as timeworn) rules. Likewise, and more commonly, the development of *exceptions* to rules, “an omnipresent feature of the legal terrain,”³⁷ must trace substantially to selective search and resulting surprise on the part of lawmaking bodies.³⁸

However reluctantly, lawmakers have had to own up to their periodic miscalculations. In the well-known case of *Riggs v. Palmer*,³⁹ the high court of New York confronted the troubling spectacle of a will beneficiary due to inherit because he had slain the testator. Here, as cognitive theory predicts can happen,⁴⁰ the testator failed to envisage this remote contingency and to provide for it under the terms of the will itself. *But so, too, had lawmakers*: the statutes regulating wills likewise included no qualification to disinherit slayers. The court corrected the legislators’ oversight:

If such a case had been present to their minds . . . it cannot be doubted that they would have provided for it. . . . The writers of laws do not

36. A striking historical example of legal miscalculation was Great Britain’s “bloody code” of the eighteenth century: the vast expansion of the list of capital offenses, on the erroneous assumption that increasing the severity of punishment would control the incidence of crime. When members of Parliament came to the realization that “extreme severity, instead of operating as prevention to crimes, rather tended to inflame and promote them, by adding desperation to villainy,” they set about reforming the code. 1 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 343 (1948) (quoting Sir Archibald Macdonald). *See also* ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENTS IN EARLY AMERICA* 40–43 (1992).

37. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 872 (1991).

38. *Cf. id.* at 872–73, 875 (suggesting that exceptions are typically the product of “fortuitous circumstances” of the inadequacy of language to express exceptions to rules within the singular wording of the rules themselves). *See also supra* note 20 and accompanying text (noting legal actors’ exploitation of imperfect rules, or “loopholes” in rules, that can prompt lawmakers to undertake to refine them).

39. 22 N.E. 188 (N.Y. 1889).

40. “If the parties [to a contract] are boundedly rational, they may be unable to anticipate every eventuality,” irrespective of the transaction costs involved. Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 *ECONOMETRICA* 755, 757 (1988). Of course, wills would not be expected to differ from contracts in this respect.

always express their intention perfectly, but either exceed it or fall short of it. . . . [L]aw-makers could not set down every case in express terms.⁴¹

Perhaps to save face—as well as to bolster the propriety of this act of judicial legislation—the court portrayed the error as a failure of expression. In the same breath (and more candidly), the court also conceded the legislators’ failure of expectation. Lawmakers, like chess players, make inaccurate moves.⁴²

The court in *Riggs* is (in)famous within jurisprudence for having laid claim to the power to carve judicial exceptions out of a statute.⁴³ What is significant for our purposes, however, is the court’s thinly veiled cognitive justification for wielding that power. Through less controversial legal process, legislators in some forty-five states have since acknowledged their want of thoughtfulness and have carved the same exception out of their previously overbroad inheritance statutes.⁴⁴

Lawmakers have come to appreciate their potential for inaccuracy not merely in hindsight. They have met with surprise often enough to be capable of anticipating it. Knowing that they do not know how broadly or narrowly to frame a particular rule, and fearing that successors may be hard put to revise whatever rule they impose, lawmakers sometimes prefer to adopt a *standard* instead of a rule.⁴⁵ By maintaining flexibility, a standard (assessing legality

41. *Riggs*, 22 N.E. at 189. See also, e.g., *In re Estate of Kolacy*, 753 A.2d 1257, 1261 (N.J. Super. Ct. Ch. Div. 2000).

42. Commissioners are equally vulnerable to surprise. For an example in the Uniform Laws, see *infra* note 102. The overarching problem was identified long ago by Aristotle:

[I]t is plainly impossible to pronounce with complete accuracy upon such a subject-matter as human action. Whenever then the terms of the law are general, but the particular case is an exception to the general law, it is right, where the legislator’s rule is inadequate or erroneous in virtue of its generality, to rectify the defect.

ARISTOTLE, *THE NICOMACHEAN ETHICS* 179–80 (J.E.C. Welldon trans., Prometheus Books 1987)(c. 334–23 B.C.) (citation omitted).

43. See generally John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (discussing the propriety of judicial legislation). Other jurists have spilled drums of ink over *Riggs*. See, e.g., RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14, 23–45 (1977).

44. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.8 note (1983) (Statutory Note to Section 34.8).

45. Compare a related observation by Judge Frank Easterbrook:

What happens when you turn a generalist [judge] loose in a complex world? An ignorant or unwise judge will be unaware of his limits and is apt to do something foolish. A sophisticated judge understands that he is not knowledgeable and so tries to limit the potential damage. How is this done? By and large, it is done by constructing “five-part balancing tests.” Not only judges but also the leaders of the bar find this approach congenial. The American Law Institute’s *Restatements* teem with multi-factor approaches.

Frank H. Easterbrook, *What’s So Special About Judges?*, 61 U. COLO. L. REV. 773, 779–80 (1990). Legislators have also chosen on occasion to adopt standards instead of rules, sometimes declaring their intention of allowing gradual refinement of the law. For instances of intentional indefiniteness within the

under a test of, say, “fairness” or “reasonability”) immunizes lawmakers against surprise, allowing them to refine the rule case-by-case. Traditionally, jurists have conceived a tension between standards and rules: Whereas rules provide certainty and predictability, better enabling legal actors to plan their affairs, standards ensure that justice will be done.⁴⁶ Under a theory of global rationality, however, this tension dissolves. By hypothesis, a preternatural lawmaker could craft a detailed, bright-line rule covering every eventuality, foreseeing every relevant variation on the facts. It is bounded rationality that creates the tension. And within a theory of cognitive jurisprudence, lawmakers’ resort to a standard represents nothing other than *an implicit admission of fallibility*.

III. TASK INTERFERENCE

Yet, the fundamental difficulty is that, however blinkered their vision, and however much they separate their tasks, human lawmakers *have much to do*. In this, of course, they are not alone. The experience of having one’s hands full is familiar to all of us as part and parcel of daily life. An inevitable byproduct, as we know, is that the overall quality of our performance of any one task suffers—a phenomenon referred to in the argot of psychology as *task interference*.⁴⁷ Once more, nothing could be more central to the quotidian rhythms of our lives. Like Homer, we nod when, time and again, we become distracted.

All of this forces us to make implicit judgments about the relative priority (and ease) of the tasks set before us, given the time and attention span available—just as, by analogy to economics, we make consumption choices between differently priced goods within a market environment of budget

federal Bankruptcy Code, for example, see 11 U.S.C.A. § 1113(c)(3), § 361 & Historical and Revision Notes, § 525 & Historical and Revision Notes (2000). For a famous example in the Uniform Laws, see U.C.C. § 2-302 & cmt. (1987).

46. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590–93 (1988). Compare economic models of the optimal level of generality or specificity of law. See Kaplow, *supra* note 5, at 585–86 (exploring the efficiency of expending resources to craft rules as a whole, as compared to piecemeal, ex post refinement of a standard, and citing to earlier economic analyses). See generally Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000) (providing a behavioral analysis of the virtues of rules versus standards from the perspective of legal actors and adjudicators, but not from the perspective of lawmakers).

47. See, e.g., DANIEL KAHNEMAN, ATTENTION AND EFFORT 178–202 (1973); HAROLD E. PASHLER, THE PSYCHOLOGY OF ATTENTION 265–317 (1998); David Navon & Daniel Gopher, *On the Economy of the Human-Processing System*, 86 PSYCHOL. REV. 214, 218–22 (1979); Christopher D. Wickens, *Processing Resources in Attention*, in VARIETIES OF ATTENTION 63 (Raja Parasuraman & D. R. Davies eds., 1984).

constraints. Thus conceived, as a matter of “attentional economics,”⁴⁸ we maximize “expected attentional revenues”⁴⁹ by agonizing over issues we deem to be momentous, while breezing through others that we rate as inconsequential.⁵⁰ It is a formula we all grasp intuitively, even if we rarely think about it consciously.⁵¹ Hence, when we misapply the formula, say, by squandering cognitive energy on a trivial decision, we are likely to be chided (or to chide ourselves) for making a mountain out of a molehill.⁵² And *visa versa*, when we invest insufficient cognitive energy in important tasks, we are again likely to hear about it (“Honey, concentrate on your driving!”).

Task interference must also weigh upon our law.⁵³ The result, a theory of cognitive jurisprudence predicts, is that law follows *the principle of unevenness*: The workmanship of rules varies in quality, at least in part⁵⁴ as a function of the disparate amounts of effort that lawmakers choose to devote to different rules. Depending upon how much importance they place on the issue before them, lawmakers either rise—or *sink*—to the occasion.

Disproportionate effort in lawmaking, and the principle of unevenness that it engenders, should manifest itself at different levels. On a macroscopic scale, lawmakers may discriminate between cases, and between statutes or codes. And on a microscopic scale, lawmakers may also discriminate *within* a case and *within* a statute or code, so long as multiple issues of law are implicated.

48. Warren Thorngate, *On Paying Attention*, in RECENT TRENDS IN THEORETICAL PSYCHOLOGY 247, 249 (Wm J. Baker et al. eds., 1988).

49. *Id.* at 250.

50. The same conclusion derives from the closely allied field of informational economics: “The economic approach . . . implies . . . greater investment in information when undertaking major than minor decisions—the purchase of a house or entrance into marriage versus the purchase of a sofa or bread.” BECKER, *supra* note 5, at 6–7.

51. To give just one example, the phenomenon has been observed within the field of psycholinguistics: studies indicate that persons engaged in the task of *reading* employ comprehension strategies that ration attention, expending greater effort on passages deemed important while skimming over trivial passages. Christine J. Gordon & Carl Braun, *Metacognitive Processes: Reading and Writing Narrative Discourse*, in 2 METACOGNITION, COGNITION, AND HUMAN PERFORMANCE 1, 3–6 (D.L. Forrest-Pressley et al. eds., 1985) (citing and summarizing prior studies).

52. In a similar vein, abstract thinkers have ever been the butt of derision for misdirecting their cognitive energies—beginning with Socrates, whom his contemporary Eupolis mocked as a “poverty-stricken windbag . . . who *contemplates* everything in the world but does not know where his next meal is coming from.” I. F. STONE, THE TRIAL OF SOCRATES 135 (1988).

53. Professor Simon associated the phenomenon with legislative behavior and with government decisionmaking in general. SIMON, *supra* note 2, at 79–83; Herbert A. Simon, *Rationality as Process and as Product of Thought*, in DECISION MAKING 58, 72–74 (David E. Bell et al. eds., 1988).

54. Another factor, obviously, is variations in the raw talent of different lawmakers. In what state would we find commercial law today, had Karl Llewellyn and Grant Gilmore decided to become constitutional lawyers?

Lawmakers can economize on the effort they put into a less significant rule in a number of different ways. The most parsimonious strategy is simply to abstain from touching the rule at all—decision by default, a kind of heuristic that cognitive psychologists have observed in other social contexts.⁵⁵ In connection with statutory law, the bottleneck of the agenda is well known.⁵⁶ Barring distortions of the legislative process stemming from interest group politics,⁵⁷ statutes situated in back-alleys of the legal landscape—exempt property law, for example—are frequently left to gather dust. Forgotten but not gone, these laws tend ineluctably toward obsolescence.⁵⁸

In connection with case law, the abstention heuristic translates into blind adherence to precedent—or, in the vernacular of jurisprudence, *formalism*—with the same result that rules become stranded in the past.⁵⁹ With respect to judicial lawmaking, however, patterns of abstention are less often conceived in cognitive terms. According to orthodox jurisprudence, repeated in Supreme Court decisions, precedent is supposed to have greater weight in those areas where the reliance interest of individuals is higher—for instance, in the areas of property law and commercial law. In areas where fewer persons rely on the stability of rules, such as constitutional law, fidelity to the principle of *stare decisis* drops correspondingly.⁶⁰

55. See, e.g., Steffen Huck & Jorg Oechssler, *Informational Cascades in the Laboratory: Do They Occur for the Right Reasons?*, 21 J. ECON. PSYCHOL. 661 (2000); Amos Tversky & Eldar Shafir, *Choice Under Conflict: The Dynamics of Deferred Decision*, 3 PSYCHOL. SCI. 358 (1992).

56. See, e.g., Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561 (1977).

57. See generally FARBER & FRICKEY, *supra* note 24, at 12–33.

58. “The . . . notable characteristics of state exemption laws are their extreme variety and, in many instances, their extreme obsolescence. . . . [T]hey are not typically subject to periodic legislative revision,” due to “neglect.” Vern Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678, 681–84 (1960). See also Richard E. Mendales, *Rethinking Exemptions in Bankruptcy*, 40 B.C. L. REV. 851, 855–56 (1999). Likewise, the law of donative transfers suffers notoriously from “[g]eneral legislative disinterest.” Edward C. Halbach, Jr., *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CAL. L. REV. 921, 921 (1964). A recent court has bemoaned the failure of Wyoming’s legislature to update the state’s obscure intestacy statute in over 130 years. See *In re Estate of Fosler*, 13 P.3d 686, 689–90 (Wyo. 2000). And in Massachusetts, a court has had to wrestle of late with a 165 year old intestacy statute! *Woodward v. Comm’r of Soc. Sec.*, 760 N.E. 2d 257, 264 (Mass. 2002).

59. Adherence to precedent also effectively results when an appeal is denied, and the two mechanisms can be conceived as functionally similar. See generally H.W.P. EERRY, JR., *DECIDING TO DECIDE* (1991). There are other possible jurisprudential applications of the abstention heuristic. Another, far larger (but less common) one is the legal reception. See generally ALAN WATSON, *LEGAL TRANSPLANTS* (1974).

60. For recent discussions, see *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854–55 (1992). For recent law and economics analyses of *stare decisis*, citing in turn to earlier ones, see generally Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court’s Doctrine of Precedent*, 78 N.C. L. REV. 643 (2000); and Erin

Cognitive jurisprudence suggests a different rationale for, and offers different predictions concerning, disparities in devotion to precedent. Formalism enjoys the cognitive virtue of relieving mental effort.⁶¹ Instead of thinking creatively about the rule, the court has only to discover it. As a dissenting judge recently complained, this approach constitutes “the line of least resistance[, t]he easy, most convenient” way to proceed.⁶² Once again, the theory prophesies that judges will have greater recourse to convenient, effort-saving devices, and hence will demonstrate less creativity, when deciding cases that they deem less important (or simply duller).⁶³ The legist becomes the legalist in order to promote not the interests of parties operating under *that* law, but rather parties operating under *other* laws, to which cognitive energy is diverted.

Of course, both theories may hold true in part. And they may also be complementary, in that some areas of law commonly viewed as mundane place a simultaneous premium on predictability. On the entire face of the legal landscape, no region is so notoriously subservient to precedent as future interests law.⁶⁴ Taking note of the fact, Dean Ashbel Gulliver offered a

O’Hara, *Social Constraint or Implicit Collusion? Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736 (1993).

61. This much, at least, has been recognized for some time. Justice Holmes described formalism as the “uninstructive and indolent use of phrases to save the trouble of thinking closely.” Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 461 (1899). Although he appreciated the legal certainty that formalism provides, Holmes insisted that “repose is not the destiny of man.” Holmes, *supra* note 22, at 465–68 (quotation at 466); Oliver Wendell Holmes, Jr., Address at the Banquet of Middlesex Bar Association (Dec. 3, 1902), in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 535, 536 (Sheldon M. Novick ed., 1995). In a less pejorative vein, Judge Cardozo pointed out that “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case.” CARDOZO, *supra* note 10, at 149. For more recent observations, see, for example, BAUM, *supra* note 16, at 72; and Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 599 (1987). On the possibility that precedent constitutes a form of herd behavior, see Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87 (1999).

62. *Stevens v. Casdorph*, 508 S.E.2d 610, 615 (W. Va. 1998) (Workman, J., dissenting).

63. For evidence that such considerations can affect a higher court’s decision to grant an appeal, see PERRY, *supra* note 59, at 253–65. For the suggestion that decision on the basis of *procedural technicality*, avoiding the substantive merits of a case, can likewise operate as a mechanism for agenda control, enabling the court to dispose of “undesirable” cases “quickly and cheaply,” and thereby to devote “more energy to cases in which they are interested,” see Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 632–41, 645–46 (1994) (quotations at 646).

64. See, e.g., Halbach, *supra* note 58, at 921. The titles tell the story. See generally W. BARTON LEACH, PROPERTY LAW INDICTED! OR THE PEOPLE VS. BLACKSTONE, KENT, GRAY, AND STARE DECISIS (ACCESSORIES: PONTIUS PILATE AND THE LAWS OF THE MEDES AND THE PERSIANS) (1967); William F. Fratcher, *Exorcise the Curse of Reversionary Possibilities*, 28 MO. B. J. 34 (1972); Wythe Holt, *The Testator Who Gave Away Less Than All He or She Had: Perversions in the Law of Future Interests*, 32 ALA. L. REV. 69 (1980); Taylor Mattis & David Schellenberg, *The Doctrine of Worthier Title in Illinois: Burying the Dead*, 23 J. MAR. L. REV. 81 (1989); Ronald Maudsley, *Escaping the Tyranny of Common Law Estates*, 42 MO. L. REV. 355 (1977); Nicholas L. White, *Bringing Tennessee into the Twentieth Century: Re*

conventional explanation: “[T]his branch of the law . . . usually involves honest action apt to have been taken in reliance on previous precedents.”⁶⁵ But that was not all. Gulliver added, with intuitive insight:

Another factor contributing in a negative way to adherence to precedent is the absence in most future interest cases of any indication of equities that might induce ad hoc deviation from custom; . . . the question of whether the largesse is to go to Cousin Lena or Aunt Minnie is not calculated to engender a white heat of emotional prejudice in favor of either; and it’s simpler to stick with the familiar routine.⁶⁶

Quite possibly, economic and cognitive forces have conspired to give future interest law its remarkably static quality.

In addition, and more fundamentally, lawmakers may simply reflect more deeply about important problems and scrimp on others. Because greater attention tends to translate into superior decisions,⁶⁷ a theory of cognitive jurisprudence predicts that major rules are likely to display better craftsmanship, whereas minor rules are liable to exhibit poorer qualities of design.

At least for some lawmakers, this process of sorting is reported to go on purposefully. Two judges have even likened it to “triage.”⁶⁸ Appellate Judge

Possibilities of Reverter, Powers of Termination and Executory Interests When Used as Land Control Devices, 15 MEM. ST. U. L. REV. 555 (1985); Robert R. Wright, *Medieval Law in the Age of Space: Some “Rules of Property” in Arkansas* 22 ARK. L. REV. 248 (1968); Charles M. Agee, Jr., Note, *Has Tennessee Abolished Its Ancient Class Gift Doctrine or Only Modified It?*, 7 MEM. ST. U. L. REV. 129 (1976).

65. ASHBEL G. GULLIVER, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 11 (1959).

66. *Id.* at 12.

67. See, e.g., PAYNE ET AL., *supra* note 23, at 72–75 (suggesting that reflection is positively correlated with decision quality). For an early observation, see JEREMY BENTHAM, *The Principles of Penal Law*, in 1 WORKS OF JEREMY BENTHAM 365, 402 (John Bowring ed., 1842) (ms. 1775–1802). According to Bentham, “[i]n matters of importance, everyone calculates. Each individual calculates with more or less correctness, according to . . . the power of the motives which actuate him.” *Id.* But see Timothy D. Wilson & Jonathan W. Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions*, 60 J. PERSONALITY & SOC. PSYCHOL. 181 (1991) (finding that when one’s spontaneous decision happens to be superior, reflection can prompt one to switch to an inferior decision because one will often perceive additional advantages and disadvantages in alternative choices, hence making the alternatives more difficult to distinguish); Timothy D. Wilson, Douglas J. Lisle, Jonathan W. Schooler, Sara D. Hodges, Kristen J. Klaaren & Suzanne J. LaFleur, *Introspecting About Reasons Can Reduce Post-Choice Satisfaction*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 331 (1993) (related finding).

68. FRANK M. COFFIN, ON APPEAL 175–76 (1994); Robel, *supra* note 23, at 9. For two other appellate judges’ acknowledgment of case sorting (but without this nomenclature), see Markey, *supra* note 23, at 380–81; Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings* 62 U. CHI. L. REV. 1371, 1374 (1995) (“Time does not allow for the same careful, thoughtful analysis and writing to be poured into all cases . . .”). See also William M. Richman & William L. Reynolds, *Appellate Justice, Bureaucracy, and Scholarship*, 21 U. MICH. J.L. REFORM 623, 629, 642–43 (1988).

Frank Coffin, author of several works on the ways of his profession, insisted that some such process has become a veritable necessity:

Without a sense of the relative importance of cases, both I and my clerks will be tempted to lavish time and care on every case, whether routine or significant We would soon find ourselves falling behind and working on older and older cases. And the older the cases, the harder it is to recall what we have . . . discussed . . . , and the cycle becomes vicious.⁶⁹

Because “sustained writing time is a rare and precious commodity,”⁷⁰ Coffin recognized that he had to guard it jealously.

When inclined to cut intellectual corners, a judge can do so in another way: to wit, by delegating some of the work to law clerks or staff attorneys. Once again, participants report, a certain degree of delegation of judges’ workloads is inevitable.⁷¹ And as a theory of cognitive jurisprudence would predict, observers also report that judges pass along greater opinion-writing responsibilities in some cases than in others.⁷² Because inexperienced clerks may wind up exercising significant influence on cast-off cases, the result once again is to degrade the quality of lawmaking in the regions they cover, relative to those that the more experienced judges reserve for themselves.⁷³

Whether as a result of greater delegation or simple indifference, judges’ opinions in moribund areas of the law have drawn criticism for their propensity for sloppiness. In a deliciously irreverent essay, Professor John Langbein sliced to bits the Supreme Court’s analysis in an obscure 1989 ERISA opinion.⁷⁴ He concludes insightfully:

[The opinion] is such a crude piece of work that one may well question whether it had the full attention of the Court. I do not believe that either Justice O’Connor or her colleagues who joined this unanimous opinion

69. COFFIN, *supra* note 68, at 175–76. *See also* Wald, *supra* note 68, at 1374 (“But what is the alternative?”).

70. FRANK M. COFFIN, *THE WAYS OF A JUDGE* 163 (1980).

71. “[C]aseload pressure . . . leaves no alternative, in most instances, to . . . intensive utilization of law clerks.” *Id.* at 69–70. *See also*, Robel, *supra* note 23, at 10. According to one estimate, “well over half of the text the [Supreme] Court now produces was generated by law clerks.” Sean Donahue, *Behind the Pillars of Justice: Remarks on Law Clerks*, 3 *LONG TERM VIEW*, Spring 1995, at 77, 81.

72. Markey, *supra* note 23, at 380–81; Richman & Reynolds, *supra* note 68, at 629, 642–43; Robel, *supra* note 23, at 47.

73. For suggestions of this effect, see POSNER, *supra* note 10, at 149–51, 157; Erwin N. Griswold, *The Federal Courts Today and Tomorrow: A Summary and Survey*, 38 *S.C. L. REV.* 393, 398 (1987); and Markey, *supra* note 23, at 382. *But see* WILLIAM H. REHNQUIST, *THE SUPREME COURT* 262–63 (Pat Hass ed., Alfred Knopf 2001) (1989) (insisting that clerks always operate under the judge’s close supervision).

74. John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 *SUP. CT. REV.* 207, 217–28.

would have uttered such doctrinal hash if they had been seriously engaged in the enterprise.

Unfortunately, [this] is not the first instance in which the Supreme Court has discharged ERISA business shoddily. I understand why a Court wrestling with the grandest issues of public law may feel that its mission is distant from ERISA. . . . If the Court is bored with the detail of supervising complex bodies of statutory law, thought should be given to having the job done by a court that would take it seriously.⁷⁵

Others have made similar observations about judicial output in other fields, such as taxation and securities regulation, also seemingly starved for attention.⁷⁶

Along with agenda-limiting, legislators similarly relieve pressure on their attentional resources by delegating drafting responsibilities *ex ante* to their professional staffs and *ex post* to administrative agencies. Here, however, delegation doubtless yields happier results, for staffs and agencies bring to lawmaking a substantive and technical expertise that most representatives lack.⁷⁷ The striking difference in quality between *statutory* law in areas like taxation and judicial opinions *construing* those statutes cannot but trace to this disparity of specialization, mitigating in the first instance, and not in the second, the effects of task interference.

Apart from differences in quality, lawmaking might be expected to display differences in complexity by virtue of uneven distributions of attention. Rules within remote fields, a theory of cognitive jurisprudence

75. *Id.* at 228–29 (citations omitted).

76. Professor Frederick Schauer suggests that the apparent indifference of the Justices of the Supreme Court toward an array of AFDC, ERISA, and tax cases decided in one term resulted in their being “decided early in the Term, by 7-2, 8-1, or 9-0 opinions, and with comparatively brief opinions. . . . given the enormous complexity of the issues” involved. Frederick Schauer, *Statutory Construction and the Coordination Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 247–48. *See also* BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 89 (1996) (remarking Earl Warren’s disinterest in tax cases); Bainbridge & Gulati, *supra* note 16, at 138–39 (securities cases); Erwin N. Griswold, *Forward to* BERNARD WOLFMAN, JONATHAN L.F. SILVER & MARJORIE A. SILVER, DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES xii (1975) (“One conclusion to draw from this study is that Justice Douglas, like many others, finds no intellectual interest or challenge in tax cases—or, to put it more directly, he dislikes tax cases and does not regard them as worthy of his careful attention.”); Erik M. Jensen, *Of Crud and Dogs: An Updated Collection of Quotations in Support of the Proposition that the Supreme Court Does Not Devote the Greatest Care and Attention to Our Exciting Area of the Law; or Something the Tax Notes Editors Might Use to Fill Up a Little Space in that Odd Week when Calvin Johnson Has Nothing to Print* 58 TAX NOTES 1257, 1257 (1993); Sale, *supra* note 16, at 909–10 (securities cases).

77. HARRISON W. FOX, JR. & SUSAN W. HAMMOND, CONGRESSIONAL STAFFS 144, 151–53 (1977); MALCOLM E. JEWELL & SAMUEL C. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 156–60 (4th ed. 1986); TOMMY NEAL, LAWMAKING AND THE LEGISLATIVE PROCESS 25–26 (1996); KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 44, 50–62 (3d ed. 1997).

might predict, should evidence greater simplicity of design, in light of the relative paucity of attention devoted to those fields. Yet no such pattern is broadly apparent. Legal excrescences appear more or less equally prevalent in all regions of the legal landscape, including such attention-deprived fields as future interests law, with its “numerous highly refined and technical distinctions.”⁷⁸ Apparently, apathy fails to translate into austerity within the process of lawmaking. In some instances, apathy may even aggravate complexity over time, in a process having more to do with the legal nervous system than the legal mind.⁷⁹

Switching to a microscopic lens, we may discover more subtle manifestations of task interference *within* discrete units of lawmaking output, including legislation. When courts or other lawmaking bodies have no choice but to deal with multiple issues simultaneously, a theory of cognitive jurisprudence again anticipates that they will apply themselves unevenly, the lion’s share of attention going to primary tasks. Because any given case—or statute—may or may not implicate multiple issues, task interference at this level affects the production of rules more or less at random. This random

78. *In re Dulles’ Estate*, 67 A. 49, 50 (Pa. 1907). Within future interests law, the Rule Against Perpetuities—whose dissection required of Professor John Chipman Gray no fewer than 833 mind-numbing pages—is doubtless the mother of all legal excrescences, despite its distance from law’s center of gravity. GRAY, *supra* note 15. For observations (both modern and historical) of the prevalence of legal excrescences within the legal landscape, see FRED RODELL, *WOE UNTO YOU, LAWYERS!* 41 (1939); and Hirsch, *Inconsistency*, *supra* note 16, at 1146–47 nn.270, 273.

79. In a recent article, Professor Andrew Kull draws the opposite conclusion. He argues that apathy on the part of judges tends systematically toward legal simplification:

[T]he elaboration and maintenance of legal doctrine requires cultivation. Issues that form a significant and rewarding part of professional life will justify finer distinctions and more elaborate legal structures. . . . [T]he common law (or equity) itself needs nourishment, the way a tree needs to take moisture from the ground. When judges . . . begin to spend most of their time working on other problems, an old tree that grew to enormous size when moisture was plentiful will start to die back and to lose some of its branches.

Andrew Kull, *The Simplification of Private Law*, 51 J. LEGAL EDUC. 284, 291 (2001). Yet, to continue Professor Kull’s metaphor, we know that neglect of vegetation can cause it to wither or, just as easily, to become overgrown. So long as lawmakers lavish attention on a rule, we would expect its degree of complexity (or lushness) to correspond more closely with perceptions of public policy. When lawmakers become inattentive, however, that correspondence may cease in either direction. The “nervous” response of over-refinement (or over-cultivation) of law follows from lawmakers’ pretensions and yearnings to impress their audience. Thus, Blackstone (in a delightfully Whiggish set piece) accused the Normans of having “frittered [Anglo-Saxon law] into logical distinctions . . . and . . . metaphysical subtleties, with a skill most amazingly artificial . . . [for] no other purpose . . . than to show the vast powers of the human intellect, however vainly or preposterously employed.” 4 BLACKSTONE, *supra* note 1, at *417. As a more recent observer echoes, “simplicity embarrasses . . . lawyers and judges.” LoPucki, *supra* note 12, at 1500. See also Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 182 (1985) (suggesting that in complexifying legal rules, courts are playing to an academic audience); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 7, 31–38 (1992) (positing that legal complexity is a “craft value”). Of course, special interest lobbying can cause a legal excrescence to arise in any corner of the legal landscape. See *supra* note 57 and accompanying text.

element contributes once again to the unpredictable quality, or contingency, of rules.⁸⁰

At the same time, task interference within judicial opinions might also manifest itself in consistent ways. Not infrequently, a single case implicates a substantive issue along with an issue of civil procedure. In the resulting opinion, by hypothesis, the quota of attention devoted to civil procedure—famously the “handmaid” to substance, meriting “due subordination”—could tend systematically to be the smaller of the two.⁸¹

Equivalent effects should appear within complex statutes and codes, whose peripheral provisions may be more poorly reasoned than those located at the center, even in the hands of a specialist. Indeed, peripheral provisions may be *unreasoned*: One of the key (cognitive) differences between a common law rule and a statutory rule is that the court establishing a rule in a case of first impression is supposed to give a reason for it, whereas a legislative body need not. Arbitrary choice simplifies decisionmaking even more than cursory choice—and legislators are free to indulge in this streamlining mechanism at will, thus potentially amplifying imbalances of effort within a given complex statute.⁸²

The Uniform Probate Code affords an example of this phenomenon. In 1990, the Commissioners set about revising from beginning to end the Code’s substantive articles. The self-identified “grand themes” of this revision included the perceived need to reduce reliance on formalities in inheritance law, to react to the growing frequency of probate-avoidance, and to take into account the rising incidence of so-called blended families (resulting from multiple-marriages).⁸³ But the Commissioners also took the occasion to touch upon some not-so-grand themes. One provision, included for the first time, dealt with the problem of honorary trusts for noncharitable purposes, covering

80. See *supra* note 29 and accompanying text.

81. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938). Of course, in an earlier age the opposite was true, an irony not lost on legal historians: “So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure.” HENRY MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1883). Because criminal procedure has become so highly constitutionalized, it occupies a more prominent status than its civil counterpart. But the law of evidence may display a similar tendency toward marginalization relative to substance.

82. But compare the sarcasm of Benjamin Franklin, proto-Realist: “So convenient a thing it is to be a *reasonable Creature*, since it enables one to find or make a Reason for every thing one has a mind to do.” BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 88 (Leonard W. Labaree et al. eds., Yale University Press 1964) (1791).

83. See UNIF. PROBATE CODE art. II, prefatory note (amended 2002), 8 U.L.A. 75 (1998); John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALA. L. REV. 871, 873–75 (1992).

bequests for the care of pets, graves, and the like. It was, as one of the Commissions admitted, “a tag end . . . a manifest frill. . . . The main concerns of the revised [Uniform Probate Code] lie elsewhere.”⁸⁴ How, then, did the Commissioners go about drafting this minor provision? By copying out of a draft submitted to them by a layperson!⁸⁵ The result was a rule shot-through with ambiguities and setting a limit on the duration of honorary trusts that was arrived at, as the reporter himself confessed, “for no particular reason.”⁸⁶ Commissioners, alas, are just as vulnerable to task interference as any other lawmakers.

Task interference within a code can manifest itself dynamically as neglect, on top of shoddy construction. As lawmakers struggle to modernize a code (which, because it takes so long to complete, can grow obsolete even before it is adopted⁸⁷), they will likely turn their attention first to its central provisions. Outlying provisions within a code—like outlying quadrants of law within a universe of codes—may once more be left to gather dust. What else could explain the survival within the estate-administration provisions of many local probate codes of those hoary distinctions between real and personal property that have long since disappeared from the (more prominent) substantive provisions of those very same codes?⁸⁸ Commissioners, too, have updated the Uniform Laws unmethodically.⁸⁹

Once again, lawmakers are not entirely oblivious to these phenomena, and they have offered at least one response to the problem of task interference

84. Letter from John H. Langbein to Adam J. Hirsch (Sept. 20, 1999) (on file with author).

85. See Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913, 952 (1999).

86. National Conference of Commissioners on Uniform State Laws, Proceedings in Committee of the Whole, Uniform Probate Code Article II (July 15, 1990), at 133–34 (unpublished document, on file with author) (statement of Professor Lawrence Waggoner). The sundry ambiguities in the provision are unpacked in detail in Hirsch, *supra* note 85, at 930–50.

87. See, e.g., Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 627 (1981) (discussing revisions to the Uniform Commercial Code).

88. See WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* § 12.6, at 505 (2d ed. 2001). E.g., FLA. STAT. ch. 733.612(21) (2001). On the antiquated theoretical roots of the distinction, see THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 668 (2d ed. 1953).

89. A striking illustration of peripheral obsolescence within the Uniform Laws is the provision dealing with lacunae in the Uniform Commercial Code, also replicated within the Uniform Probate Code and other Uniform Acts. The provision’s vague language—stating that gaps are to be filled “by the principles of law and equity”—has been slavishly copied without apparent reconsideration or elaboration by the Commissioners *for over a century*, originating in their first widely adopted product, the Uniform Negotiable Instruments Law of . . . 1896! Compare U.C.C. § 1-103 & cmt. (1987), and UNIF. PROB. CODE § 1-103 (amended 2002), 8 U.L.A. 27 (1998), with UNIF. NEGOTIABLE INSTRUMENTS LAW § 196 (1896). For a further discussion, noting several issues of construction raised by the provision, see Adam J. Hirsch, *supra* note 85, at 916 n.18.

within a given work product. Consider the distinction between precedent and dictum, a dichotomy so deeply ingrained that it is rarely discussed (although, historically, it did not take hold within the legal mind until sometime around the seventeenth century⁹⁰). One jurisprudential explanation for the nonbinding effect of dicta is political: Unlike legislators, judges are only empowered to decide the issues before them.⁹¹ But another explanation, offered by Justice John Marshall as early as 1821, is cognitive. He reflected in *Cohens v. Virginia*, “The reason for this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles . . . are considered in their relation to the case decided, *but their possible bearing on all other cases is seldom completely investigated.*”⁹²

There it was. Courts focus their attention on the central matter of the dispute at-hand and pay less mind to issues potentially raised by other facts. Justice Marshall understood intuitively that dicta should not bind, because they provide less reliable analysis. Both his descriptive and normative conclusions fit perfectly into a theory of cognitive jurisprudence.

IV. A TALE OF TWO OPINIONS

The theoretical propositions offered in the last many pages remain (maddeningly!) difficult if not impossible to demonstrate with any truly satisfying degree of rigor. The problem, of course, is that countless factors affect the process of lawmaking in any given instance, and we have no way to move the process into a laboratory.

Nevertheless, we next elaborate a sequence of cases that gets us marginally closer to that ideal. Both cases were decided by the *same* court—the Supreme Court of Florida—in unanimous opinions penned by the *same* judge—the Honorable Benjamin Overton, now retired—within a thirteen year span, and both dealt with the *same* doctrine of inheritance law—the pretermitted spouse rule. Not a true controlled experiment, to be sure, but

90. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 172–73 (2d ed. 1979); RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 41 (4th ed. 1991); Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 447–48 (1996).

91. See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000–01 (1994); Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431, 434 (1989).

92. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (emphasis added). See also Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996) (Posner, C.J.); BAKER, *supra* note 90, at 173 (quoting sixteenth-century commentary); KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 15–16 (Paul Gewirtz ed., 1989) (1928–29).

perhaps the best we can hope for—and with due apologies to the justices under observation for turning them into guinea pigs.

The pretermitted spouse rule, now codified into most states' probate codes, deals once again with the problem of how to interpret a will executed prior to a profound change in circumstances. Ordinarily, if a testator fails to provide for a surviving spouse, the survivor can claim a forced share of the decedent's estate, known as the elective share in common law jurisdictions. But if the survivor is omitted from a will the testator executed *prior* to marriage, and which the testator forbore to revise thereafter, the survivor can instead claim an intestate share of the decedent's estate—invariably a sum larger than the forced share.⁹³

The rationale for the pretermitted spouse rule is clear: It gives effect to the probable intent of the testator, one of the core policies of inheritance law. Although a premarital will may purport to leave out the surviving spouse, lawmakers surmise that the decedent's failure to update her will after the marriage, in the majority of cases, constitutes an oversight. In all likelihood, the premarital will fails to reflect the testator's actual postmarital intent. By overriding an obsolete estate plan, the pretermitted spouse doctrine operates to forestall inadvertent disinheritance of a surviving spouse.⁹⁴

That said, it has remained for lawmakers to iron out the details of the doctrine—whence our sequence of cases. In the first case, *Estate of Ganier v. Estate of Ganier*,⁹⁵ decided in 1982, the court was presented with a twist on the usual fact pattern. Here, the testator (*T*) and the person whom she would eventually marry (*A*) met in 1973 and became “close friends.”⁹⁶ In 1977, *T* executed a will under which she left *A* a modest bequest. The relationship deepened, and eighteen months later, in 1978, the parties wed. *T* died in 1979, never having amended her premarital will.⁹⁷

A could now elect against the will and claim a forced share (3/10 of the estate under state law), an improvement over his share under the executed estate plan. But could he claim instead an intestate share (here, 1/2 of the estate) based upon the pretermitted spouse rule? This rule had already been codified within the state. The text of the statute specified that a surviving spouse was entitled to an intestate share under a premarital will “unless . . .

93. MCGOVERN & KURTZ, *supra* note 88, § 3.6, at 135–36.

94. *See, e.g., In re Estate of Beaman*, 583 P.2d 270, 274 (Ariz. Ct. App. 1978); UNIF. PROBATE CODE § 2-301 cmt. (amended 2002), 8 U.L.A. 133 (1998); MCGOVERN & KURTZ, *supra* note 89, § 3.6, at 135.

95. 418 So.2d 256 (Fla. 1982).

96. *Id.* at 257.

97. *See id.*

[t]he spouse is provided for in the will,” as he *was* in the instant case.⁹⁸ On simple reading, then, this was an easy case.

Justice Overton did not resolve the issue easily, however. Having drawn attention to the statutory text, he proceeded to explore the purpose underlying the pretermitted spouse doctrine. The aim of that doctrine, Overton reported, was “to prevent the inadvertent disinheritance of a spouse whom the testator had married after executing a will.”⁹⁹ Yet what exactly did this policy encompass? On the one hand, a will might make no provision for an as yet unmet spouse, *or* it might fail to treat a premarital beneficiary *as* a spouse. Under this second scenario, deference to the language of the will would again thwart intent: “Marriage effects a profound change in a person’s relationships and responsibilities,” and “[s]ubstantially different considerations underlie a person’s bequest to a friend or acquaintance and that person’s testamentary provision for the well-being of a spouse.”¹⁰⁰ In light of this fact, Justice Overton opined for a unanimous court, “We hold that a spouse has not been ‘provided for,’ within the meaning of [the statute], unless the testator . . . made such provision in contemplation of marriage Eliminating [that] requirement . . . defeats the reason for the rule.”¹⁰¹

Justice Overton’s activeness of mind and preparedness to add a judicial gloss upon the statutory text is noteworthy. And the result is also eminently sensible, so much so that the rule in *Ganier* was grafted into the Uniform Probate Code when the Commissioners got around to revising it in 1990.¹⁰²

The Supreme Court of Florida was spared further encounters with the pretermitted spouse doctrine for the next twelve years. Then came *Via v. Putnam*¹⁰³ in 1995, raising a new and provocative set of facts.

In *Via*, the testator (*T*) and his first wife (*A*) executed mutual wills in 1985, under which each bequeathed his entire estate to the other, with the

98. *Id.* at 257 (quoting FLA. STAT. ch. 732.301(2) (1979)).

99. *Id.* at 258.

100. *Id.* at 260.

101. *Id.* at 260–61.

102. UNIF. PROBATE CODE § 2-301 & cmt. (amended 2002), 8 U.L.A. 133–34 (1998). The Commissioners’ comment accompanying the revision seems a trifle oblique: The language used in the original version of this section “impli[ed] . . . that the section was inapplicable if the person the decedent later married was a devisee in his or her premarital will. It was clear, however, from the underlying purpose of the section that this was not intended.” *Id.* § 2-301 cmt. What is actually clear, however, is that the drafters had *failed to anticipate* this scenario, and hence had failed to provide for it in the original version of the section—just as legislators in New York had failed to anticipate the scenario of the slayer-beneficiary. *See supra* notes 39–42 and accompanying text. Commissioners, no less than legislators, engage in selective search when they craft rules, and so they may experience surprise and need to correct their products later on—even if they would prefer to downplay their fallibility.

103. 656 So.2d 460 (Fla. 1995).

survivor's estate going to their children. *T* and *A* simultaneously entered into a contract, whereby each promised not to amend his will. Under the law of will contracts, that agreement became binding once one party died in compliance. In this case, *A* died first, without changing her will. *T* thereby inherited *A*'s entire estate. *T* subsequently remarried and ultimately died in compliance, in or about 1993, having executed no new will after his first wife's death nor after his second marriage.

T's second spouse and widow (*B*) sought in the alternative an elective share, despite the will contract, or a larger intestate share as a pretermitted spouse, despite the will contract.

Once again, the court's ruling was unanimous, and once again Justice Overton spoke for the court. But here the court had *two* issues of law to resolve, since the effectiveness of a will contract against the elective share—that is to say, the ability of one spouse to contract around the forced share in an agreement with parties other than the other spouse—is unclear as a matter of general law and had not previously come before a court within the state. Overton addressed this issue first and at some length, assaying the competing policies of contract rights and spousal protection. Ultimately, he ruled that the elective share should supersede a will contract.¹⁰⁴

Then, toward the end of the opinion, Justice Overton turned his attention to the pretermitted spouse rule. The will at issue here was an unamended premarital will, albeit a contractual one, and the pretermitted spouse statute made no textual exception for contractual wills. Overton ruled that the statute controlled the case:

[Florida's] statute sets forth three specific circumstances when a pretermitted spouse would not be entitled to a share of the decedent's estate To hold as suggested by the children [*viz.*, that the pretermitted spouse rule not apply] would essentially amend the statutory exceptions . . . and add a fourth exception. The legislature enacted these exceptions based on the public policy of protecting the surviving spouse The legislature has clearly taken into account when this provision should apply and when it should not apply. . . . We conclude that we have no authority to judicially modify the public policy protecting a surviving spouse's interest in the deceased spouse's estate¹⁰⁵

Held, *B* could claim a full intestate share of *T*'s estate, according to the letter of the pretermitted spouse statute.

104. *Id.* at 462–65. See generally MCGOVERN & KURTZ, *supra* note 88, § 4.9, at 215–16.

105. *Via*, 656 So.2d at 466.

Now, as a theoretical matter, this decision cannot possibly be sound. Justice Overton identified the purpose of the pretermitted spouse rule as the “protecti[on of] the surviving spouse.”¹⁰⁶ That is true only at the broadest level of generality. More specifically, as Overton himself had indicated thirteen years earlier in *Ganier*, the policy underlying the rule is to protect the surviving spouse from *inadvertent* disinheritance.¹⁰⁷ Under the facts of *Via*, *T*’s failure to update his will was *not* inadvertent; on the contrary, *T* was contractually bound not to do so, so his intent was irrelevant! Paradoxically, if *T* had breached the contract and left *B* an inheritance, intending to benefit her, she would have wound up with *less*! For then a postmarital will *would* exist, the pretermitted spouse rule would *not* apply, the bequest would be ineffective as a breach of the will contract, and *B* would have had to settle for an elective share.

Under this ruling, then, *T*’s decision to abide by the binding contract in effect rendered it nonbinding, whereas a breach of contract would have rendered it binding. Only a Lewis Carroll could applaud such logic. Sadly, and strikingly, Justice Overton’s presence of mind in *Ganier* had deteriorated into an absence of mind in *Via*.

Related and equally striking was the second opinion’s more superficial approach to statutory construction. In *Ganier*, Justice Overton searched beneath the text for the policies underlying the statutory language and discovered them buried in the subtext. In *Via*, he skimmed the surface, ending his abbreviated search with the “three specific . . . exceptions”¹⁰⁸ set out in the very same statutory text.

So, what was going on here? Of course, one cannot dismiss the possibility that either the court’s or Justice Overton’s own judicial philosophy had evolved (if that is the right word) over the space of thirteen years. If so, that was not an evolution Justice Overton chose to remark in *Via*, which never once refers to *Ganier*. A cynic—or a Realist—might also point out that the results of the two cases coincide suspiciously. In each instance, the surviving spouse carried the day.

Cognitive jurisprudence suggests at least the plausibility of another interpretation. In *Ganier*, Justice Overton’s attention was focused on the task of elaborating the pretermitted spouse rule. No other issue requiring his attention was presented by the facts of the case. In *Via*, on the other hand, his attention was divided between two tasks, each demanding separate effort:

106. *Id.*

107. See *supra* note 99 and accompanying text.

108. *Via*, 656 So.2d at 466.

elaboration of the elective share rule and of the pretermitted spouse rule. In *Via*, analysis of the first issue took up more pages and appears to have consumed more intellectual energy. By hypothesis, the first issue distracted his attention from the second one; the second portion of the opinion in *Via* reads more like an afterthought. There is no evidence that Justice Overton even consulted *Ganier* when he drafted *Via*¹⁰⁹—which in-and-of-itself might have triggered in his mind greater reflection. And his formalistic method of analysis concerning the second issue—seeking no further than a plain meaning—served to spare him from further effort.¹¹⁰ Textualism is the cognitive analogue of precedent when statutory construction stands at issue.

Can we point to the indications of task interference here as conclusive? Well, perhaps not.¹¹¹ But this curious sequence of cases is at least suggestive that task interference within opinions can occur. And if that helps to explain the court's behavior in *Via*—if, in fact, the court would have been inclined to pursue more thoughtfully its analysis of the pretermitted spouse rule, as it had in *Ganier*, but for the need to pursue other issues simultaneously¹¹²—then we can readily see how contingent that inclination is. For the existence of the elective-share diversion in *Via* was pure happenstance. That part of the case

109. As already remarked, *Ganier* is never once cited in *Via*.

110. For a recognition of the intellectual frugality of plain-meaning analysis, see Schauer, *supra* note 76, at 253–56.

111. Still another possible cognitive explanation for the deterioration of Justice Overton's analysis in *Via* is that, quite apart from having to face multiple tasks, he was simply thirteen years *older* than when he composed his opinion in *Ganier*. Justice Overton wrote his opinion in *Via* within four years of his retirement. As we age, our attentional resources, and hence the total effort we have available to put into things, tend to diminish. For a review of the studies in this area, see generally Joan M. McDowd & Raymond J. Shaw, *Attention and Aging: A Functional Perspective*, in HANDBOOK OF AGING AND COGNITION 221 (Fergus I.M. Craik & Timothy A. Salthouse eds., 2d ed. 2000). And so it is reported that Justice Thurgood Marshall delegated more and more opinion writing to his clerks as he aged, *see* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 73–74 (1992); BOB WOODWARD & SCOTT ARMSTRONG, THE BROTHERS: INSIDE THE SUPREME COURT 258–59 (1979), whereas Justice Oliver Wendell Holmes, who, living in a different era, always wrote his own opinions, simply produced progressively shorter and less analytical ones as he aged, *see* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1400–04 (1975) (discussing an example of “late-vintage Holmes, magisterial in tone, studded with quotable phrases, and devoid of analysis”); Adam J. Hirsch, *Searching Inside Justice Holmes*, 82 VA. L. REV. 385, 391–92 (1996).

112. For two cases contrary to *Via*, heard in other jurisdictions, where the pretermitted spouse issue was the primary one before the court, see *In re Estate of Beauchamp*, 564 P.2d 908, 910 (Ariz. Ct. App. 1977); and *In re Estate of Stewart*, 444 P.2d 337, 339–40 (Cal. 1968) (Traynor, J.). “It would be anomalous to conclude that this [pretermitted spouse] statute requires that [the surviving spouse] receive more because the testator performed his contract than she would have received had he breached it.” *Id.* It bears noting that whereas Justice Overton's opinion in *Via* undertook to explore the law of other states in connection with the elective share issue, *Via*, 656 So.2d at 464–65, he made no equivalent exploration in connection with the pretermitted spouse issue, which would have revealed these earlier opinions—another apparent reflection of the disparate attention Justice Overton devoted to these two issues.

might just as easily have been absent, for instance if a statute or a separate common law opinion had already resolved the issue.

V. WHERE TO GO FROM HERE

Having sketched the outlines of a cognitive theory of jurisprudence, together with some of its predictions and observed manifestations, we must finally take up—or at least raise—the prescriptive and normative questions that follow in its train: Are the behavioral adaptations of lawmakers to the boundedness of their own rationality functionally undesirable? And if so, in what ways should we (or rather they) respond?

Plainly, our answer to the first question hinges on whether lawmakers are making optimal use of their cognitive resources, given the scarcities that exist within their minds. As earlier remarked,¹¹³ persons achieve cognitive efficiency by throwing themselves into tasks that generate the greatest rewards. An optimal allocation of cognitive effort is “meta-rational,” leading to decisions that remain imperfect—we have surveyed those imperfections in foregoing pages—but nevertheless are as good as they can become in the aggregate.¹¹⁴

By emphasizing “important” rules over insignificant ones, lawmakers take a step in the right direction. All else being equal, attention to important rules is time well spent.¹¹⁵ Were lawmakers instead to concentrate on less important rules, they would again make mountains out of molehills, leaving themselves with insufficient attentional resources to devote to the truly momentous issues. The overall quality of our law would suffer as a consequence.

113. See *supra* notes 48–52 and accompanying text.

114. Cf. Sale, *supra* note 16, at 944–63 (criticizing judicial resort to decision-simplifying rules in connection with securities cases). The concept of meta-rationality is developed in Helmut Jungermann, *The Two Camps on Rationality*, in JUDGMENT AND DECISION MAKING, *supra* note 13, at 575, 581–82. See also Hal R. Arkes, *Costs and Benefits of Judgment Errors: Implications for Debiasing*, 110 PSYCHOL. BULL. 486, 487, 492 (1991) (observing that to the extent “[s]uboptimal behaviors occur . . . because the effort or cost of a more diligent judgment performance is greater than the anticipated benefit,” the behaviors are “adaptive in a larger sense”).

115. But all else is not necessarily equal; another factor in the equation of cognitive efficiency is the *complexity* of the issue of law in question—and hence the size of the cognitive investment necessary to dispose of that issue intelligently. When decisions are equally important, but some are complex while others are simple, scarce cognitive energy is more efficiently devoted to resolving the simpler issues. Such concerns may influence the cognitive investment strategies of some lawmakers. Judge Learned Hand spoke suggestively of his aversion to tax law:

[T]he words of such an act as the Income Tax . . . leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.

Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947).

The problem of how we go about evaluating the importance of a rule remains a puzzle, to be sure.¹¹⁶ If no consensus can form on this question—if the matter is simply one of taste—then the efficiency of attention allocation becomes subjective and the issue evaporates. Assuming, however, that a rough consensus on the relative importance of rules lies within our grasp, then the strategy lawmakers ought to follow is clear enough.

That lawmakers do appear to divide their time disproportionately among rules may indicate that the strategy commands a following and that something approaching an optimal allocation of effort is being made. But we can hardly rest assured of that fact. For lawmakers in most instances do not divide their time among tasks according to any formal process,¹¹⁷ following an articulated standard; the division occurs *in camera* and hence (as Karl Llewellyn would remind us) is unreliable.¹¹⁸ Indeed, the mode of sorting may not rise to the level of consciousness;¹¹⁹ sometimes, even the decision *to* sort may not rise to that level. It remains entirely possible that lawmakers deliberate most over rules not that they rate as more important, but rather that appear to them as more conspicuous.

Psychological studies suggest several reasons to fear that these will not always be one and the same. Obviously, we all pay greatest attention to, even fixate on, those matters of greatest personal moment to us, at least insofar as our physical well-being is concerned. Bred into our ancestors, who would not have survived without it, this instinct remains adaptive in our less feral, but still dangerous, world of today.¹²⁰ Perhaps as a byproduct of that instinct, evidence shows that when we feel a sense of “issue involvement,” when an issue before us has significance to our own lives, we are actuated to pay closer attention.¹²¹ Of course, many of the issues lawmakers address lie beyond the

116. For one tantalizingly simple response to this problem, which may, however, be more properly taken as the starting point of the analysis, see Kaplow, *supra* note 5, at 579 (“The value of effort in designing a rule depends on the frequency of behavior subject to the rule.”). See also PERRY, *supra* note 59, at 254, 260, 262, 264.

117. Processes of the legislative agenda, and of the judicial agenda insofar as it can accept or reject appeals, are of course exceptions.

118. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 365 (1960) (“Covert tools are never reliable tools.”).

119. Consider a comment made by an anonymous Supreme Court Justice to Professor H.W. Perry, in response to his query of whether the Justice’s interest in subject areas affects the Justice’s decisions to grant certiorari: “I am sure it [does], but I am not even sure what those areas are for me.” PERRY, *supra* note 59, at 261.

120. This may not be true of all our instincts, a point now under exploration within the realm of behavioral biology. See generally Owen D. Jones, *Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology*, 95 *NW. L. REV.* 1141 (2001).

121. See Shelly Chaiken, *The Heuristic Model of Persuasion*, in 5 *SOCIAL INFLUENCE: THE ONTARIO SYMPOSIUM* 3, 8–11 (Mark P. Zanna et al. eds., 1987) (surveying the literature in connection with persuasion

social boundaries of their own lives. In those instances where lawmakers do, however, experience issue involvement, one would expect them to deliberate more. And because the presence or absence of issue involvement is peculiar to the individual lawmaker, its cumulative effect on the allocation of attention should be to heighten its randomness.

A second risk, having the same effect, is that lawmakers' attention may be drawn not to rules, but rather to *facts*. Psychological studies find a tendency of persons to focus more on "vivid," concrete information than on "pallid," abstract information, and the extremeness of information also tends to grab attention.¹²² Facts are more concrete than rules, and the salience of facts does not necessarily correlate with the importance of the issues of law that they raise. Certainly, the power of facts to concentrate legislative minds is well known. Some statutory rules are even named after the events that swept them onto the agenda, such as Megan's Law, the Son-of-Sam Laws, and, once upon a time, Tilden's Law.¹²³

That fact-salience draws (and, by so doing, distorts) the attention of the judicial mind is also likely. We are already familiar with one of its other manifestations: Hard cases make bad law! Presumably, judges are prompted to lavish attention on those very same cases. Willful legal error, like a reevaluation of law, requires mental effort, after all. In these instances, facts provoke the court to effort. If the same court, thus galvanized, were instead to find cause to revise the applicable rule, the effort expended would not necessarily bear any relation to the importance placed on the rule in question.

A closely related magnet for attention is emotion: People tend to focus on what stirs them, along with what stands out.¹²⁴ Emotion, surely, is largely responsible for making a hard case an attention-getting case. But issues of law as well as of fact may excite the emotions of a lawmaker. Here, again,

research); Shelly Cjaolem & Charles Stangor, *Attitudes and Attitude Change*, in 38 ANN. REV. PSYCHOL. 575, 594-96 (1987) (observing that at higher levels of personal involvement, subjects tend to engage not only in more, but also in biased, information processing).

122. See RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 47-49 (1980); SUSAN T. RISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 247-66 (2d ed. 1991); Leslie Z. McArthur, *What Grabs You? The Role of Attention in Impression Formation and Causal Attribution*, in 1 SOCIAL COGNITION: THE ONTARIO SYMPOSIUM 201, 203, 215 (E. Tory Higgins et al. eds., 1981); Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 190, 192-93 (Daniel Kahneman et al. eds., 1982).

123. For the dramatic, but now forgotten, events that gave rise to the last of these, see J.B. Ames, *The Failure of the "Tilden Trust,"* 5 HARV. L. REV. 389, 389-92 (1892); and Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 590 n.156 (1964).

124. NISBETT & ROSS, *supra* note 122, at 45-47; PASHLER, *supra* note 47, at 246-48; SIMON, *supra* note 2, at 29-30. See generally Yaniv Hanoch, "Neither an Angel Nor an Ant": Emotion as an Aid to Bounded Rationality, 23 J. ECON. PSYCHOL. 1 (2002).

lawmakers may find themselves lured away from issues they would deem more important, were the choice made dispassionately. For a cognitive concomitant to emotional poignancy is emotional aridness—an unstimulating, thankless task is liable to be a thinkless one.¹²⁵

These theoretical predictions find some support in the extant literature of legal criticism. The observation that emotion can move lawmakers is as old as Aristotle,¹²⁶ but the notion that it affects *attention* to rules has also been sounded on occasion. Recall Dean Gulliver's explanation for lawmakers' neglect of future interests law: The facts of these cases "[are] not calculated to engender a white heat of emotional prejudice in favor of either" litigant.¹²⁷ Recall also Professor Langbein's speculation that the U.S. Supreme Court is "bored" with the law of ERISA and other "complex bodies of statutory law," and for this reason "has discharged ERISA business shoddily."¹²⁸

Other commentators have also weighed in on this theme. Professor Frederick Schauer asserts that the Supreme Court's "comparatively brief," unanimous or nearly unanimous opinions in ERISA, AFDC, and tax cases reflect the fact that "the substance of the dispute[s] seem[.] . . . less politically or morally or economically charged" in these cases than in constitutional cases simultaneously before the Court.¹²⁹ Yet, Schauer adds, the Court's implicit judgments concerning the importance of these cases are "morally and socially erroneous," for "[f]ar more of the public welfare of the United States turns on questions of qualification for AFDC benefits than on the question of flag desecration."¹³⁰

Failures of attention have also been observed at the root of a more concrete phenomenon—the setting, and skewing, of the judicial agenda. Here, even participants in the process have voiced concerns. Not long after leaving the federal Court of Appeals, Kenneth Starr criticized the Supreme Court for agreeing to hear an excess of "sexy" cases while turning aside "important but unglamorous business-related issues."¹³¹ Presumably, the sex

125. The problem of emotion in law has recently aroused scholars. For a contribution addressing some of its other dimensions, see RICHARD A. POSNER, *Emotion in Law*, in *FRONTIERS OF LEGAL THEORY* 225 (2001).

126. See ARISTOTLE, *supra* note 23, at 5–7. See also *N. Sec. Co. v. United States*, 193 U.S. 197, 400–01 (1903) (Holmes, J., dissenting).

127. GULLIVER, *supra* note 65, at 12.

128. Langbein, *supra* note 74, at 228–29.

129. Schauer, *supra* note 76, at 247–48.

130. *Id.* at 247. Schauer himself rates these cases as "[un]interesting," or even as "real dogs," but "[t]hat is not to say they [are] socially unimportant." *Id.*

131. Kenneth W. Starr, *Rule of Law: Supreme Court Needs a Management Revolt*, *WALL ST. J.*, Oct. 13, 1993, at A23.

appeal of a case again relates either to eye-catching facts or to emotional attractions. The upshot, in Starr's view, was that the Court had "squander[ed] a precious national resource—the time and energy of the justices themselves"¹³²—a metaphor singularly apt within a theory of cognitive jurisprudence. In similar terms, Justice Harry Blackmun dissented from the denial of certiorari in what he deemed an "important" tax case: "I hope that the Court's decision to pass this case by is not due to a natural reluctance to take on another complicated tax case that is devoid of glamour and emotion."¹³³

Along with emotional considerations, Professor H.W. Perry reports statements by Supreme Court justices to the effect that their brethren's willingness to hear cases has also turned on their individual interests stemming from "their activities [and] . . . personal experience."¹³⁴ For instance, Westerners on the Court are alleged to have been particularly concerned about, and disposed to take, cases dealing with water rights.¹³⁵ Such evidence fits the hypothesis that the random incidence of issue involvement can direct, or at least play a part in directing, lawmakers' attention.

If lawmakers do truly fail on a regular basis to apportion their cognitive energies optimally—a possibility raised, albeit in no way proven, by these anecdotal suggestions—what could be done about it? From a structural perspective, we may class our answers under two heads: (1) curative measures, designed to enhance lawmakers' rationality, and (2) conciliatory measures, which accept bounded rationality as inevitable and adjust other principles in response to it.¹³⁶

Among curative options, perhaps the most obvious one is to introduce more (cognitive) labor.¹³⁷ Task interference dwindles as we break apart

132. Kenneth W. Starr, *Rule of Law: Trivial Pursuits at the Supreme Court*, WALL ST. J., Oct. 6, 1993, at A17.

133. Singleton v. Commissioner, 569 F.2d 863, cert. denied, 439 U.S. 940, 941–42 (1978) (Blackmun, J., dissenting).

134. PERRY, *supra* note 59, at 260–63.

135. See *id.* at 261–62.

136. See generally Baruch Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 122, at 422.

137. We shall not delve here into the question of whether individual lawmakers could somehow be motivated to dedicate greater cognitive effort to their work than they already do. By all accounts, judges and legislators labor rather diligently at their jobs, whatever their mercenary incentives to do so. *E.g.*, JEWELL & PATTERSON, *supra* note 77, at 92–98; ALAN ROSENTHAL, LEGISLATIVE LIFE 62–64 (1981); Griswold, *supra* note 73, at 398, 403; Judith S. Kaye, *Forward: "Year in Review" Shows Court of Appeals Continuing Its Great Traditions*, 42 N.Y.L. SCH. L. REV. 331, 333–35 (1998); Markey, *supra* note 23, at 373; Robel, *supra* note 23, at 7–8. *Cf.* POSNER, *supra* note 10, at 85–86, 221–36, 335–36 (suggesting that judges could be

compound tasks and distribute them to additional personnel.¹³⁸ What is more, those personnel might fruitfully deliberate with one another, a point long acknowledged in the maxims of folk psychology.¹³⁹ Judges, too, have grasped the point, at least at the macroscopic level. Their pleas for more hands (and minds) to carve up the judicial workload is historically longstanding.¹⁴⁰ Interaction among courts also occurs (in effect) via the appellate process and percolation.

At the microscopic level, however, fewer efforts have been undertaken in this direction. When disposing of individual cases, the various members of a court collude, or collide, but they rarely collaborate in the sense of sharing responsibility.¹⁴¹ Personality clashes and jealousies have often interfered with the exchange of ideas.¹⁴² Whether or not greater collegiality and deliberation among judges would lead to better lawmaking,¹⁴³ task interference within

prompted to greater effort). See generally Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605 (2002) (addressing theoretically lawmakers' devotion to their work). Cf. *infra* note 143.

138. "[I]t is now clear that the elaborate organizations that human beings have constructed in the modern world to carry out the work of . . . government can only be understood as machinery for coping with the limits of man's abilities to comprehend and compute in the face of complexity . . ." Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 501 (1979). See also SIMON, *supra* note 2, at 87–88.

139. Thus, *two heads are better than one*. Modern cognitive studies tend to confirm the maxim, albeit with significant reservations. See *infra* note 143.

140. By the nineteenth century, even the traditionally monocratic Court of Equity bowed to this logic. BAKER, *supra* note 90, at 95–99. For modern discussions in connection with the federal courts, see, for example, POSNER, *supra* note 10, at 181, 193; Griswold, *supra* note 73, at 407–08; and William L. Reynolds & William M. Richman, *Justice with More Judges*, 15 J.L. & POL. 559 (1999).

141. Opinions are rather a product of "solitary incubation," as one judge has put it. COFFIN, *supra* note 68, at 169.

142. For a brief recitation of some of the petty conflicts that plagued the U.S. Supreme Court in the mid-twentieth century, see Michael J. Klarman, *Book Review*, 12 LAW & HIST. REV. 399, 402–03 (1994). Disrespectful rhetoric within opinions hardly improves matters. See, e.g., *United States v. Virginia*, 518 U.S. 515, 594–95 (1996) (Scalia, J., dissenting) (asserting that "[a]ny lawyer who gave . . . advice" a priori in line with the ruling of the six-Justice majority "ought to have been either disbarred or committed"). Conferences of the Supreme Court have been characterized as remarkably devoid of discourse, although the Justices do exchange views by way of written memoranda. See LAZARUS, *supra* note 23, at 285; REHNQUIST, *supra* note 73, at 254–55, 257–59; SAVAGE, *supra* note 111, at 202–03. One byproduct of the paucity of interaction is a proliferation of multiple opinions. Griswold, *supra* note 73, at 400. As described by one former law clerk, the Court is "really nine separate courts. The Justices lead separate, even isolated lives." LAWRENCE BAUM, *THE SUPREME COURT* 158–69 (7th ed. 2001) (quotation at 159). But compare Judge Coffin's assertion that appellate courts have fostered a collegial atmosphere that results in superior judgments. COFFIN, *supra* note 70, at 58–59, 171–75.

143. Studies suggest that the effectiveness of brainstorming and information pooling as a means of enhancing the quality of decisions can depend upon such factors as how the group is organized and what sort of decision lies at issue. For surveys of the literature, see generally Daniel Gigone & Reid Hastie, *Proper Analysis of the Accuracy of Group Judgments*, 121 PSYCHOL. BULL. 149 (1997); Reid Hastie, *Review Essay: Experimental Evidence on Group Accuracy*, in INFORMATION POOLING AND GROUP DECISION MAKING 129 (Bernard Grofman & Guillermo Owen eds., 1986); and John M. Levine & Richard L. Moreland, *Progress in*

cases could still be reduced if we regularly assigned lawmaking responsibility by the issue instead of by the case (at least to the extent that issues are wholly distinct)—giving new meaning to the per curiam opinion. One can speculate about the utility of such a “co-authorship” strategy in a case like *Via v. Putnam*; the possibility at least deserves considering.

Group effort also occurs within legislative bodies and private lawmaking bodies, via the committee system. At the macroscopic level, different personnel undertake different Uniform Law projects, but at the microscopic level, drafting responsibility within a Uniform Law project falls primarily on the Reporter. A more formalized subcommittee approach to drafting (in the legislative tradition) might better serve the end of cognitive efficiency.¹⁴⁴

Another strategy for enhancing rationality involves a related operation: division of labor, along with its addition. Experts within a given area have already made a cognitive investment that pays dividends, so to say, in the form of heightened decisionmaking ability within their range of expertise.¹⁴⁵ Specialized courts take advantage of this efficiency,¹⁴⁶ as do both specialized legislative committee staffs and the selective committees of private

Small Group Research, 1990 ANN. REV. PSYCHOL. 585. The utility of group involvement is doubtful, for example, when tasks have no easily demonstrable solution, which is often true of lawmaking. Gigone & Hastie, *supra*, at 149. Group decision is also vulnerable to social loafing by individual members of the group, see Levine & Moreland, *supra*, at 615 (citing to studies), and even to group pathologies that encourage the group to risky and extreme choices, see *id.* at 619 (citing to studies). For discussions in a legal context, see COFFIN, *supra* note 68, at 168; Eleanor C. Main & Thomas G. Walker, *Choice Shifts and Extreme Behavior: Judicial Review in the Federal Courts*, 91 J. SOC. PSYCHOL. 215 (1973); Schkade et al., *supra* note 14, at 1139; Seidenfeld, *supra* note 16, at 527–43; and Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

144. In a similar spirit, the American Law Institute employs consultative groups as adjuncts to the process of drafting Restatements. “The apparent organizational theory behind this system is based upon the principle that the more persons to review a draft, the better the finished product will be,” and consultative groups “provide those drafting the project with a sounding board” for their ideas. Averill, *supra* note 23, at 904–05. One Commissioner has suggested that Uniform Act projects duplicate this technique, possibly with “subgroups,” for different segments of projects. *Id.*

145. See the related economic discussion in GARY S. BECKER, HUMAN CAPITAL 17–21 (3d ed. 1993). On the cognitive efficiency of expert judgment, see, for example, Robert J. Sternberg & Peter A. Frensch, *On Being an Expert: A Cost-Benefit Analysis*, in THE PSYCHOLOGY OF EXPERTISE 191, 191–97 (Robert R. Hoffman ed., 1992). Expertise is not, however, an unqualified blessing, for it can breed dogmatism and respond inflexibly to new situations. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U.P.A. L. REV. 1111, 1120 (1990) (quoting Justice Scalia); Seidenfeld, *supra* note 16, at 496–508; Sternberg & Frensch, *supra*, at 197–98. Needless to add, social change often does present lawmakers with novel problems. Once again, the point finds expression in the maxims of folk psychology: Sometimes the most novel insights come *out of the mouths of babes*.

146. Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 378–79; Griswold, *supra* note 73, at 408. *But see* POSNER, *supra* note 10, at 250–53, 244–70 (suggesting that specialization of courts renders lawmaking more ideological because experts in an area of law are apt to embrace one of a number of competing ideologies).

lawmaking bodies. Exploitation of expertise is perhaps the single greatest virtue of statutory law, as well as of Uniform Acts and Restatements, which can contrast so sharply, and favorably, with law made in the same field by a generalist judge, as earlier observed.¹⁴⁷ Specialized lawmaking entities should be less prone to relegate subject areas than a generalist lawmaker might, although even here the danger of microscopic task interference remains. Another virtue of the subcommittee approach to lawmaking, however, is that it opens opportunities for subspecialization that can also produce efficiencies at the microscopic level.

Apart from these rather drastic measures, other measures might be taken simply to acknowledge the inevitability of bounded rationality in lawmaking and to reduce the damage that it inflicts. Scholars have long perceived in cognitive theory normative implications for the substance of rules governing citizens,¹⁴⁸ while other scholars have lately begun to consider how lawmakers might craft rules designed to respond to the bounded rationality of the trial court judges and juries whose task it is to apply them.¹⁴⁹ *Arguendo*, the cognitive frailties of lawmakers themselves could, by the same token, tell us something about what sorts of rules they ought to craft when they go about their creative task.

147. See *supra* text following note 77. Even a generalist court may be able, however, to exploit the expertise of individual members by deferring to them within their particular *metier*. For a suggestion that Justice Powell received such deference in corporate and securities cases, see Bainbridge & Gulati, *supra* note 16, at 139–42. For a suggestion by one of his brethren that Justice Blackmun served as the Court’s authority on tax matters, see William J. Brennan, Jr., *A Tribute to Justice Harry A. Blackmun*, 1990 ANN. SURV. AM. L. xi, xiii. See also COFFIN, *supra* note 70, at 141 (asserting that his philosophy in assigning cases was to “exploit expertise in moderation, making sure that each judge eventually gains experience in all fields”). But see Kaye, *supra* note 137, at 335 (noting the practice of one appellate court to assign cases at random so that “no one of us is designated ‘the expert’ in any particular subject area”); Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAXL. REV. 171, 174–75 (2000–2001) (suggesting that the Court failed to avail itself of Justice Jackson’s tax expertise). Staff assistance aside, a similar pattern of deference to the expertise of individual legislators within a legislative body has been observed. JEWELL & PATTERSON, *supra* note 77, at 218–20.

148. See *supra* note 6 and accompanying text.

149. See Guthrie et al., *supra* note 15, at 821–22, 828–29 (suggesting that “judges and legislators might craft rules that minimize the adverse effects that cognitive illusions can have on judgment”); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 70–81, 85–101 (2000) (offering examples); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 602–24 (1998) (same) [hereinafter Rachlinski, *Psychological Theory*]; Schkade et al., *supra* note 14, at 1168–70 (concerning juries). Several recent scholars have identified rules whose function (they posit) is to reduce the cognitive burdens of judgment, through no-fault and other fact-excluding mechanisms, without substantially impairing judgment, in areas of law where disputes are perceived to be relatively unimportant. Bainbridge & Gulati, *supra* note 16, at 118–36; Kull, *supra* note 79, at 286, 289, 291; Sale, *supra* note 16, at 905–44. On the utility of these devices, compare Bainbridge & Gulati, *supra* note 16, at 136–38, with Sale, *supra* note 16, at 944–63, and with Kull, *supra* note 79, at 292–93.

In a (half serious?) aside, Judge Posner remarks that if the cognitive frailties of human beings are as severe as the behavioralists posit, then the universality of those frailties should, in effect, cancel out any justification for paternalizing that we could otherwise derive from them: “Dare we vest responsibility for curing irrationality in the irrational?” he rhetorically inquires.¹⁵⁰ This suggestion is reminiscent of another *tu quoque* argument offered centuries earlier by Adam Smith, again in defense of individual autonomy: “It is,” Smith scoffed,

the highest impertinence and presumption . . . in kings and ministers, to pretend to watch over the œconomy of private people, and to restrain their expence . . . by sumptuary laws They are themselves always, and without exception, the greatest spendthrifts in the society. Let them look well after their own expence, and they may safely trust private people with theirs.¹⁵¹

There may be a moral component to this sort of reasoning. Certainly, one does best to lead by example. Yet this maxim hardly implies that those who *cannot* do so durst not lead at all; those who want ability may still have things to teach. Followed to its logical conclusion, Judge Posner’s query suggests the equal unfitness of lawmakers to promote *any* normative agenda for law, be it paternalistic or libertarian—and hence, as it were, their equal fitness to do so. In the absence of a manifest Deity, mortal lawmakers must make do with what mental faculties they possess, striving imperfectly to promote paternalism—as well as efficiency—wherever appropriate.

On the contrary, recognition of the universality of bounded rationality suggests the possibility of *extending* paternalism. Lawmakers may, where necessary, *self*-paternalize, protecting themselves from their own perceived irrationality, just as they do for others.¹⁵² Thus have Adam Smith’s hopelessly prodigal politicians endeavored to shield themselves from their own extravagance by enacting balanced-budget laws while simultaneously taxing consumer luxuries.¹⁵³ Lawmakers, creating substantive rules to govern others and *process rules* to govern themselves, can do the same.

150. Posner, *supra* note 6, at 1575.

151. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 329 (Edwin Cannan ed., The Modern Library 1937) (1776).

152. Compare the suggestion that in a regime of populist lawmaking, the prospect for paternalistic intervention is diminished, because lawmakers will act irrationally under pressure from irrational citizens. See Jolls et al., *supra* note 6, at 1543. Yet self-paternalistic behavior by citizens is common, see Hirsch, *supra* note 6, at 86–89, and could likewise be mediated through their representatives, *see id.* at 55 nn. 198–99. See generally JON ELSTER, ULYSSES UNBOUND (2000) (offering a theoretical discussion of self-paternalism—also known in the philosophical literature as precommitment).

153. On balanced-budget laws as a form of self-paternalism, see Hirsch, *supra* note 6, at 87.

One example is the principle that dicta lack the weight of precedent.¹⁵⁴ Because judges are (however dimly) aware both of their own tendency to gloss over portions of an opinion peripheral to the issue at-hand and of a succeeding judge to free-ride on a predecessor's cognitive effort, they have taken care to underscore to successors that no such portion should carry the full force of law. In this instance, a principle of legal process finds its vindication in the frailties of the very ones who have propounded it.

Conceivably, we could expand on and diffuse this bright-line principle, according diminished precedential weight to common law in outlying regions of the legal landscape, where lawmaking is bound to be less thoughtful. Such a principle would, however, disrupt reliance and would probably prove unworkable in any event, given the difficulty of defining law's fringes.¹⁵⁵ At the same time, a legislature can, and should, as a rule of thumb scrutinize with a more skeptical eye provisions of common law rules and model codes, not to mention its own existing codes, that it recognizes as remote whenever it codifies and revises law. Because they are less likely to have been carefully crafted, minor rules merit less legislative deference, apart from the separate consideration of reliance and transition costs.

Lawmakers could also take steps to protect themselves against some of the manifestations of bounded rationality by insisting on reallocations of cognitive effort that they might not otherwise be inclined to make. A suggestion (or directive) that statutes and opinions contain relation-to-other-rules comments or analysis would help to assuage the problem of legal inconsistency by encouraging (or requiring) lawmakers to develop peripheral vision. Likewise, a suggestion (or mandate) that comments expounding a rationale for each and every one of a statute's or model rule's provisions accompany its passage or promulgation would serve to reduce the frequency of arbitrary choice within these forms of lawmaking.¹⁵⁶ Coaxing lawmakers to redistribute the effort they dedicate to law found in different substantive areas or secreted in different cases seems more difficult to accomplish via

154. See *supra* notes 90–92 and accompanying text.

155. Courts have it in their power in discrete cases to avoid setting a precedent by issuing unpublished opinions, whereby in effect entire opinions become the functional equivalent of dicta. Courts can employ this technique in instances where they prefer to devote less attention to the issues of law raised by a case. See POSNER, *supra* note 10, at 162–75 (citing to earlier discussions); Richman & Reynolds, *supra* note 68, at 632–36, 642–43; Wald, *supra* note 68, at 1374–75 (observing that “unpublished opinions . . . are the product of a . . . much-abbreviated decision-making process”).

156. The National Conference of Commissioners' style manual calls for drafters of Uniform Acts to omit purpose clauses because “[c]omments and annotations supply this detail.” National Conference of Commissioners on Uniform State Laws, *Procedural and Drafting Manual 26* (1997) (unpublished document, on file with author). In practice, however, even the comments appended to Uniform Acts often want discussions of their rationales. See Hirsch, *supra* note 23, at 184.

process rules. There remains, nevertheless, one last thing that lawmakers can do about bounded rationality in that regard, without really doing anything at all: They can follow the Delphic admonition to *know thyself!* By gaining an appreciation of cognitive theory, lawmakers may learn to budget their own attention more reflectively and hence to become less susceptible to attentional errors.

There is room for optimism that, once made aware of task interference and salience, lawmakers will become better equipped to conduct themselves efficiently. Although some “robust” cognitive biases have proven unresponsive to education,¹⁵⁷ these seem to be ones involving mental processes that occur outside of awareness and hence that are difficult to manipulate.¹⁵⁸ At a certain level, this is also true of attention: The processes whereby one is led to focus on a matter “occur rapidly and seem opaque to the individual.”¹⁵⁹ Still, one’s overall distribution of attention at least has the potential to occur consciously and so ought to be malleable.¹⁶⁰ Certainly, lawmakers are sensible of the choices they make to accept an appeal or to introduce legislation, rationing attention at a gross level. They could easily enough be made sensible of other, more subtle, choices that lawmakers have (presumably) been making intuitively, as well as of the saliency phenomena that can cause them to discriminate between cognitive tasks. By act of will, surely, persons are capable of redirecting their attention.¹⁶¹

In other words, lawmakers may do well simply to *read this article*.

But even saying this much involves assumptions. One is that, once educated, lawmakers will prove able to apply what they have learned correctly.¹⁶² The risk nonetheless exists that they will commit so-called errors

157. The hindsight bias, *see supra* note 3, is one example. For references to studies, see Rachlinski, *Psychological Theory*, *supra* note 149, at 586–88. *Cf.* Hillman, *supra* note 7, at 735–36.

158. *See* Arkes, *supra* note 114, at 493 (citing to studies); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influence on Judgments and Evaluations*, 116 *PSYCHOL. BULL.* 117, 121–22 (1994) (citing to studies). People also appear to underestimate their own susceptibility to cognitive bias and so may be less inclined to take education about it to heart. *See id.* at 125–26.

159. PASHLER, *supra* note 47, at 8.

160. *See* PAYNE ET AL., *supra* note 23, at 14–15, 107–08 (suggesting that “people sometimes explicitly control their mode of cognition,” although “conscious decisions on how to decide are not made that often”).

161. Justice Holmes spoke of consciously ignoring hard cases: “I have long said there is no such thing as a hard case. I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath.” Letter from Oliver Wendell Holmes, Jr., to Frederick Pollock (Dec. 11, 1909), *in* 1 *HOLMES-POLLOCK LETTERS* 155, 156 (Mark DeWolfe Howe ed., 2d ed. 1961).

162. The strategy of raising lawmakers’ consciousness, so that they learn to think about thinking, may simply push unconscious behaviors back one step. “The distinction between automatic and controlled processes is somewhat muddled by the fact that in principle, even deliberate, conscious actions are mediated

of application,¹⁶³ possibly by *overcompensating* for the cognitive errors they are now striving to avoid.¹⁶⁴ Jerome Frank recognized the problem in the related context of judicial prejudice: “The conscientious judge will, as far as possible, make himself aware of his biases . . . and, by that very self-knowledge, nullify their effect,” he observed from the bench, “the sunlight of awareness has an antiseptic effect on prejudices.”¹⁶⁵ At the same time, “[o]ne of the subtlest tendencies which a conscientious judge must learn to overcome is that of ‘leaning over backwards’ in favor of persons against whom his prejudices incline him. . . . [S]ome men . . . have been unjust in their efforts to exclude bias”¹⁶⁶ By analogy, lawmakers apprised of the foibles of task interference might similarly “lean over backwards,” paying too *much* attention to matters they appreciate having a propensity to neglect.¹⁶⁷

More fundamentally, however, the danger exists that, in the course of deciding consciously how to allocate attention, lawmakers will consume more attention than that decision is worth.¹⁶⁸ Do lawmakers possess the *sangfroid* to keep allocative decisions in perspective? Or is subconscious choice preferable to *self*-conscious choice in this respect? Could it turn out that, once made wittingly, lawmakers’ decisions about how to allot their thinking—and hence about how to perform their job as best they can—would once again prove emotionally fraught and thus get in the way of the primary decisions that must follow? In other words, could the task of diminishing task interference itself interfere with other tasks, thereby aggravating the very

by unconscious, automatic processes.” John F. Kihlstrom, *Conscious Versus Unconscious Cognition*, in *THE NATURE OF COGNITION* 173, 178 (Robert J. Sternberg ed., 1999).

163. Daniel Kahneman & Amos Tversky, *On the Study of Statistical Intuitions*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, *supra* note 122, at 493, 495 (1982); Matthew Rabin, *Psychology and Economics*, 36 *J. ECON. LITERATURE* 11, 31–32 (1998).

164. For a study reporting this “reversed impact” effect, see Richard E. Petty, Duane T. Wegener & Paul H. White, *Flexible Correction Process in Social Judgment: Implications for Persuasion*, 16 *SOC. COGNITION* 93, 109–10 (1998). For a review of other studies reporting instances of overcompensation, among other errors of application, see Wilson & Brekke, *supra* note 158, at 130–33. *See generally* Duane T. Wegener, Meghan Dunn & Danny Tokusato, *The Flexible Correction Model: Phenomenology and the Use of Naive Theories in Avoiding or Removing Bias*, in *COGNITIVE SOCIAL PSYCHOLOGY* 277 (Gordon B. Moskowitz ed., 2001).

165. *In re J.P. Linahan*, 138 F.2d 650, 652–53 (2d Cir. 1943) (Frank, J.).

166. *Id.* at 652 n.10.

167. Or, paradoxically, education might literally backfire: trying to suppress attention to something salient could cause it to become more accessible than before, “and this can lead to the thought having a *greater* contaminating effect on judgment.” Wegener et al., *supra* note 164, at 282 (citing to studies) (emphasis added).

168. For discussions raising this dilemma in the abstract, see Conlisk, *supra* note 5, at 686–88; Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 *ETHICS* 5, 28–30 (1999); Wilson & Brekke, *supra* note 158, at 136. *See also* Kihlstrom, *supra* note 162, at 177–78 (suggesting that even unconscious cognitive processes may draw on attentional resources).

problem it is supposed to alleviate?¹⁶⁹ And assuming that were the case, would it be the part of wisdom for conscientious lawmakers *not* to read this article?¹⁷⁰

* * *

Alas, we must end the discourse, just when it is beginning to get interesting.

169. For one study in which such a “disruptive” effect appeared, see Cesare Cornoldi, *The Impact of Metacognitive Reflection on Cognitive Control*, in METACOGNITIVE AND COGNITIVE NEUROPSYCHOLOGY 139, 153–54 (Giuliana Mazzoni & Thomas O. Nelson eds., 1998). See also Wilson & Schooler, *supra* note 67, at 191 (suggesting such an effect as one possible explanation for the study’s data). Of course, we can alert lawmakers to this danger as well (unless doing so simply compounds the problem, see *supra* note 167). But lawmakers will then have to ponder how to make decisions about how to make decisions about how to make decisions, and we face an infinite regress.

170. The parable of the centipede comes to mind:
The centipede was happy, quite,
Until the frog for fun
Said, “Pray which foot comes after which,”
Which wrought his mind to such a pitch
He lay distracted in the ditch,
Considering how to run.

A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 151 (H.L. Mencken ed., Alfred A. Knopf 6th ed. 1960) (anonymous).