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An Order, Most Fixed

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RULES: A SHORT HISTORY OF WHAT WE LIVE BY. By *Lorraine Daston*. Princeton: Princeton University Press. 2022. Pp. xvi, 278. $29.95.

INTRODUCTION

Every once in a while, a book is written that explains more than its own field. Lorraine Daston's *Rules: A Short History of What We Live By*[1] is that kind of book. She teaches us how the same concerns about rules legal thinkers focus on permeate many other domains and in the process demonstrates how legal rules are part of a larger social web of rules regulating human conduct. She also teaches us something about law that is analogous to the way lines and blurred lines work in depicting reality in portraiture. How to represent the difference between a thing and its surroundings—the figure and the ground—is one of the recurring problems in European painting. Truly great artistic geniuses in that tradition have come up with brilliant ways of depicting that difference. Consider Leonardo da Vinci, who perfected the technique of sfumato.[2] Counterintuitively, by blurring the lines around the figure, Leonardo made the subject of the painting seem *more* real. Although slightly blurred, his portraits reflected the world he inhabited.

Now contrast a portrait by Leonardo with one by Pablo Picasso during his cubist period. Picasso, too, was addressing the problem of how to represent the difference between the thing and its surroundings. His use of lines called into question that relationship, unlike Leonardo who was trying to depict it. We can have a formally interesting set of rules such as the lines and planes of a cubist painting, but they won't reflect the world we inhabit. Indeed, they push against that world.

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* Professor of Law, Cornell Law School. I am indebted to Fran Berman, Anne Higonnet, Emily Sherwin, Peter Siegelman, and Simon Stern for insights that improved this review. I am also grateful to the librarians at the University of Connecticut School of Law, especially Anne Rajotte and Maryanne Daly-Doran, for research help.

1. Emeritus Scientific Member, Max Planck Institute for the History of Science.

2. Leonardo's characteristic use of sfumato is so commonly accepted by scholars that the two are immediately associated in every discussion of either Leonardo or sfumato. *Sfumato – The History and Use of the Sfumato Technique*, ART IN CONTEXT (June 17, 2022), *https://artincontext.org/sfumato/* [*perma.cc/2WFR-LFP8*].

Fig. 1. Leonardo da Vinci, *Mona Lisa*, 1503–1505, oil on poplar wood, Louvre Museum, Paris, https://commons.wikimedia.org/wiki/File:Mona_Lisa,_by_Leonardo_da_Vinci,_from_C2RMF.jpg [perma.cc/7B7S-7DSM].

Fig. 2. Pablo Picasso, *Girl With a Mandolin (Fanny Tellier)*, 1910, oil on canvas, Museum of Modern Art, New York, https://www.moma.org/collection/works/80430 [perma.cc/8ZYY-VJ3Q].

The artists people might think have the most trouble-free representation of the relationship between the thing and its context, such as Leonardo da Vinci, depict that relationship in a fuzzy way. The more artists thought about it, however, the more they focused on the relationship between the figure and the ground, and the more problematic that relationship became, until Picasso made blasting apart any relationship between the figure and the ground the project of his cubist paintings. There is no pretense in the cubist portrait *Girl with a Mandolin* that the subject is separate from her surroundings. All the elements of the painting are depicted using two-dimensional planes intersecting with one another.

This brings us to Daston's book. Daston posits that, over time, there has been a shift from a view of rules-as-models or paradigms to one of rules-as-algorithms or tools of measurement. Daston observes that "by driving the exercise of discretion underground, rules-as-algorithms blow up the bridges that connected universals to particulars in rules-as-models" (pp. 2, 21). These algorithmic rules can be analogized to Picasso's two-dimensional planes and lines—they are clearly delineated, but not only are they unable to depict how we inhabit the world, they break apart the sense of wholeness that fuzzy techniques like sfumato create. It is hard to imagine living in a world of two-dimensional planes painted by Picasso. By contrast, the fuzzy borders of

Leonardo connect the figure and its surroundings. What Daston calls models similarly connect the universal with the particular.

In the law, we often refer to these algorithmic rules as bright-line rules—Daston call them thin rules (p. 3). The chief insight of Daston's book is that thin rules as well as algorithmic rules are a product of a stable legal order as much as they are formative of one. Only when the world is stable and relatively unchanging can such rules govern. Without stability, rules break down. "When rule-governed world orders do come into being," she explains, "the rules depend on the order just as crucially as the order does on the rules" (p. 20).

The implication of Daston's thesis is that while thin-rule regimes, or rules-as-algorithms, can be effective in times of relative stability, the rules do not *create* stability. In fact, it may be the other way around: stability allows rules to flourish. To the extent legal thinkers have staked their theories on the idea that rules promote stability, they may have the causal direction wrong. I close by considering the following question: what does it mean for an increasingly destabilized world if stability enabled rules?

I. DASTON'S TAXONOMY OF RULES

Daston puts rules into three semantic clusters, which will be at once familiar and unfamiliar to lawyers. There are rules that are (1) tools of measurement and calculation, (2) laws, and (3) models or paradigms (p. 2). For each of these, there are three oppositions that can structure them: (1) thin versus thick, (2) rigid versus flexible, and (3) specific versus general (p. 3). Algorithms—or tools of measurement and calculation—are ordinarily thin, a condition which Daston demonstrates is historically contingent. Algorithms "implicitly assume a predictable, stable world in which all possibilities can be foreseen, [and] they do not invite the exercise of discretion" (p. 3). Laws are more varied. They can be thick or thin, rigid or flexible, general or specific.[3] What lawyers and legal scholars often think of as a broad principle, sometimes called a standard, Daston calls a "law." And laws can be more or less general. Legal scholars who write about rules spend much of their time thinking about the threesome of oppositions: thin/thick, rigid/flexible, and particular/general,[4] and less time thinking of the three semantic clusters: algorithms, laws, and models.

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3. *See* p. 4.

4. For a great example, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988). She contrasts hard-edged rules ("crystals") that clearly delineate entitlements with ambiguous or fuzzy rules of decision ("mud") and demonstrates that property law does not tend towards clear entitlements as economists would predict. *Id.* at 578. She argues that the debate over which type of rule is better is really a debate over what kind of social world we live in—a world of individuals distanced from one another (thin, rigid rules) or a more cooperative community (thick, flexible ones). *Id.* at 610. A great many other authors have written thoughtfully on this subject, and I apologize to them all for not citing them here.

What legal scholars often call a rule, Daston places in a category she calls regulations,[5] which overlaps substantially with algorithms and other mechanical calculations. An example from my own field of civil procedure is the twentieth-century rule that jurisdiction over a corporation cannot be obtained by serving its agents process,[6] or that a defendant has twenty-one days to serve an answer after being served with the summons and complaint.[7] Attempts in law to predict outcomes of cases using algorithms or to create "personalized law" by mechanical calculation are the perfect crossover between the two categories.[8] Daston's examples include a twelfth-century Genoan ordinance outlawing sable trim (p. 157) and a nineteenth-century Parisian traffic ordinance that required everyone to drive on the right side of the road (p. 183). Regulations can be thinned or thickened with exceptions and explanations. They can be placed on a continuum of flexibility and generality.[9] In Daston's view, regulations do not avoid the ambiguity and challenges posed by those not wanting or able to comply. Her example of sumptuary[10] laws is particularly useful here: every time a new regulation was passed (such as one banning pointy shoes), fashion would change (pointy shoes are so last season!) (p. 157).

What has been largely lost, Daston argues, is models. Lawyers are very familiar with models. After all, models, or cases, and their primary tool of analysis, analogical reasoning, are the core of the common law method. It should be the case that Daston is wrong, that models live on in our common law tradition. Indeed, her use of common law reasoning is a core case of models in action.[11] But she is mostly right that, even in law, models have fallen out of favor (albeit not entirely), and to our detriment.[12] Before we get there, however, we should experience a taste of the beautiful journey that is Daston's book.

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5. *See* p. 18.

6. 4A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1069.5 (4th ed. 2015).

7. FED. R. CIV. P. 12(a)(1)(A)(i).

8. *See, e.g.*, OMRI BEN-SHAHAR & ARIEL PORAT, PERSONALIZED LAW (2021) ("This book is the first to explore personalized law, offering a vision of law and robotics that delegates to machines those tasks humans are least able to perform well.") (quotation on inside cover); Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401 (2017) (describing such an algorithmic rule regime as a "microdirective"); *cf.* Marc B. Victor, *Decision Tree Analysis: A Means of Reducing Litigation Uncertainty and Facilitating Good Settlements*, 31 GA. ST. U. L. REV. 715, 716 (2015) (describing a method of predicting litigation risk based on lawyer evaluations of probability of success).

9. *See* pp. 3–4.

10. Sumptuary laws were laws regulating consumption, often limiting how opulent clothing could be. Their purpose was both to prevent extravagance and to police social status. The Genoan ordinance outlawing sable trim is an example of such a law. Often people of noble rank were permitted to wear luxurious clothing forbidden to the lower classes, thereby signaling social status. *See* pp. 157–160.

11. *See, e.g.*, p. 8.

12. For example, analogies are the primary way of determining what causes are proximate in tort. By contrast, as Jamal Greene has convincingly argued, the Supreme Court's constitutional

She begins with a fascinating historical tour of semantics. The Greek word for rules, *kanon*, derives from the Semitic word for a giant cane plant, "tall as a tree and arrow-straight" (p. 23). The Roman term, *regula*, was also associated "with straight planks and wands and, more metaphorically, to that which upholds and directs" (p. 23). These are rules as mechanical tools of measurement. They have multiple meanings—rigid and specific, for example. But they can sometimes bend, "like Aristotle's pliable ruler of Lesbos, which curved to measure rounded surfaces" (p. 239). She then walks the reader through the development of mechanistic calculations, including a fascinating short history of cookbooks, which did not always provide as much specificity for the would-be baker as they do today (pp. 70–76).

Three chapters in the book are of particular interest to legal scholars and students and are therefore the focus of this Review: Chapter 6 on Rules and Regulations, Chapter 7 on Natural Laws and the Laws of Nature, and Chapter 8 on Bending and Breaking Rules.

In her chapter on natural laws and the laws of nature, Daston demonstrates a transition from the view of natural laws and the laws of nature as changeable, dependent on God's will, to one in which the most important quality of both was constancy and universality. "Medieval commentators . . . concluded that whatever God ordained, even in defiance of his own commandments, was *ipso facto* mete and right," she explains (p. 234). "[I]n contrast, eighteenth-century proponents of natural law in jurisprudence and laws of nature in natural philosophy equated human justice and natural order with unflinching adherence to fundamental laws" (p. 234). Not everyone, she points out, agreed with this view, and the local continually reasserted itself against the universal. Montesquieu, for example, "highlighted the critical disanalogy between natural laws and laws of nature: the latter compelled obedience by physical necessity, the former only by the assent of reason" (p. 236). As the eighteenth century went on, universal legality became merely a metaphor, whereas universal physical laws remained just that: immutable, inescapable, and all-inclusive. Still, universal legality was an important metaphor. Daston discusses Kant's treatment of reason as "sever[ing] almost all the ties that had once bound" natural law and the laws of nature together, although he nonetheless "exhorts all rational beings" through the categorical imperative: "Act as though the maxim of your action were by your will to become a universal law of nature" (pp. 236–37).

The idea that law is immutable and universal plays an increasingly important role in American legal culture, particularly among the loose group of people who claim to adhere to some forms of constitutional originalism. Consider for example the idea that "[t]he meaning of the constitutional text is fixed when each provision is framed and ratified" and that this should constrain

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jurisprudence increasingly applies a threshold approach to difficult questions of constitutional rights rather than a balancing approach. *See* Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 38 (2018). The result is more rule-like.

interpretation of those provisions.[13] It purports to be universal in two ways. First, it requires that constitutional meaning be consistent across jurists over a long period of time, for all U.S. residents and citizens whenever and wherever they might live. Second, this meaning is not only immutable and unchanging, it allows for a very limited scope of interpretation.[14] There may be some wiggle room: one must still decide at what level of abstraction the meaning is to be fixed.[15] Even theologians recognized exceptions to the most foundational of rules. Daston explains,

> Thou shalt not kill (Exodus 20:13). But it is God himself who orders Abraham, "Take your son, your only son Isaac, whom you love, and go to the land of Moriah, and offer him there as a burnt offering upon one of the mountains of which I shall tell you" (Genesis 22:1). (p. 238)

"Has God violated his own law?" she asks (p. 238). Thomas Aquinas, recognized as one of the "greatest of Catholic theologians," dealt with this apparent violation of God's own fundamental law by invoking "secondary principles that 'in some particular cases of rare occurrence' might suspend the 'first principles' even of eternal divine law" (p. 238). She points to this same problem in American constitutional theory but takes us a step further out, asking "when and why does rule-bending and rule-breaking come to be perceived as problematic, as opposed to just how the world works?"[16]

Increasingly since the seventeenth century, as Daston explains with a beautiful turn of phrase: "rules come shorn of the woolly coat of examples, exceptions, and appeals to experience that had cushioned earlier rules . . . against collision with unforeseen circumstances." And thus while "[j]udgement and discretion did not become obsolete[,]" they "did become deeply controversial" (p. 241). How this came to be is the subject of the eighth chapter of the book, Bending and Breaking Rules.

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13. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015). This, combined with what Solum calls the "constraint thesis," which holds that "the communicative content ought to constrain constitutional practice," form the theoretical foundations of constitutional originalism. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1961 (2021) (defining terms and giving an overview of the theory).

14. Some theorists argue that there is only one answer. This is how I read, for example, Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1, 2 (2017).

15. *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1066–67 (1990) (explaining the problem of determining at what level of generality a right deemed to be a fundamental constitutional right ought to be understood and using examples from various right-to-privacy cases).

16. *See* p. 240.

II. A CASE FOR JUDGMENT

So far, I have described rules-as-regulations and rules-as-universal laws. Regulations can barely keep up with change and are always ridden with loopholes. Universal laws are always being challenged by the exception, the instance where adherence is inconsistent with what we understand to be just. In the common law tradition, the place where exceptions to the rigidity of law were permitted was equity (p. 249). But Daston argues that during the seventeenth and eighteenth centuries equity became regularized: "Chancellors fortified their decisions with reasoned justifications that emphasized consistency and stable procedures" (p. 253). This is how ultimately one gets the arcane system described in Charles Dickens's novel *Bleak House* from a system meant to serve the higher cause of justice.[17]

As Daston observes, in today's legal climate, theorists will "go so far as to argue that these values [consistency and uniformity] trump those of justice and fairness in cases of conflict" (p. 254). To support her point, she quotes from Fredrick Schauer's book, *Thinking Like a Lawyer*,[18] and it is worth reprinting the quote in its entirety:

> It is not the law's purpose, of course, to be unfair for the sake of being unfair. But there is an important group of values—predictability of results, uniformity of treatment (treating like cases alike), and fear of granting unfettered discretion to individual decision-makers even if they happen to be wearing black robes—that the legal system, especially, thinks it valuable to preserve. These values often go by the name of the Rule of Law, and many of the virtues of the Rule of Law are ones that are accomplished by taking rules seriously as rules. (p. 254)

This quotation is not entirely fair to Schauer, who is a more nuanced legal thinker than the pull quote implies.[19] Still, at least some of his work emphasizes the importance of predictability over other values and is skeptical about the

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17. *See* CHARLES DICKENS, BLEAK HOUSE (1853) (the story of an inheritance lawsuit, which dragged on so long it consumed the entire corpus of the estate). For a more modern denigration of equity as merely a judicial whim, see the Supreme Court's decision in Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) ("[T]he standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.").

18. FREDERICK SCHAUER, THINKING LIKE A LAWYER (2009).

19. For example, in his early work defending rule formalism and its emphasis on predictability, Schauer admits that rules must sometimes give way to discretion. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 547–48 (1988) [hereinafter *Formalism*] ("More likely, formalism ought to be seen as a tool to be used in some parts of the legal system and not in others."); *see also* Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 618 (2010) (reviewing SCOTT J. SHAPRIO, LEGALITY (2011)) (recognizing "loose concepts" as necessary to law in contrast to formal, complete, and perfect line drawing). In one paper, Schauer and his coauthor even describe, and I think impliedly defend, analogical reasoning much in the same way Daston does. *See* Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 265 (2017) (arguing that analogical reasoning in law utilizes legal expertise "to see connections of a certain type, connections that will be beyond the appreciation of the nonexpert").

possibility of reasoned discretion.[20] And in any event, as I explain below, Schauer's general sentiment is consistent with a currently dominant model of legal thinking.[21]

What room does such rigidity leave for exceptions, never mind states of exception? Daston uses the examples of pandemics and terrorist attacks as states of exception to which the ordinary rules don't apply (p. 264). She contrasts the reliance on rules with the idea of the sovereign prerogative of wise intervention (rather than arbitrary caprice) (p. 262). I leave aside the issue of when states of exception such as pandemics or wars justify emergency power, an important and difficult issue that Daston addresses briefly but does not grapple with to my satisfaction. For lawyers, the most worthwhile contribution of her book is to force us to ask whether our profession no longer believes it is possible for judges, regulators, and legislators to exercise discretion wisely and with reason. The block quote above juxtaposes rules with "unfettered discretion," which reads as arbitrary in two senses: on its face the excerpt argues that unfettered discretion equals arbitrariness, but it is also arbitrary to say that the only alternative to rigid rules is arbitrary decisionmaking. What of *reasoned* discretion?

I want to be clear that in some circumstances there are very good arguments for respecting rigid categories,[22] a point easily proven in Daston's discussion of traffic regulations. We cannot use our discretion to determine which side of the road to drive on; the result would be chaos. But as Daston points out, these rigid categories are always being pushed against (p. 210). Passing permitted on one-lane roads, which requires the driver to cross a broken yellow line into the opposite lane and to drive momentarily on the left side of the road, is an obvious example. Some rigid regulations become what she calls "norms" and are both widely accepted and followed (p. 209). Driving on

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20. In at least one article, Schauer does take the position that predictability is the most important value and that discretion is a jurisdictional question better left to the higher levels of the legal system than to individual on-the-ground decisionmakers. Schauer, *Formalism*, *supra* note 19, at 539–44. For other prominent scholars making similar arguments, see generally LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW (2001) (arguing that from a systemic perspective following rules without considering their purpose or implications can both limit bias and increase predictability of others' conduct).

21. I use the term "model" advisedly here, as it echoes Daston's description of the abbot. *See* p. 36. The idea is that the model judge is one who treats the law as much like an algorithm as that person can while recognizing it is probably impossible. *See* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–47 (1999) (reviewing ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)) ("Justice Scalia, for example, thinks that for judging to be genuinely mechanical (per the formalist's ideal), the interpretive principles that are part of the class of legal reasons must be austerely simple, lest discretion sneak into adjudication under the guise of 'interpretation.' ").

22. My personal favorite article in this vein is Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000). The authors write that "[t]he existence of unusual property rights increases the cost of processing information about all property rights." This increase in cost may be an externality when not taken into account by those creating idiosyncratic property rights, but standardization "reduces these measurement costs." *Id.* at 8. *But see* Rose, *supra* note 4, at 580, 610.

the right side of the road is a good example of a regulation that is also a norm. But other regulations are constantly undermined, gamed, and resisted. Sumptuary laws are the seventeenth-century example; tax laws are the modern equivalent. For every regulatory move, there will be an evasive countermove, leaving the regulator one step behind and the rules always incomplete.[23]

There is yet another significant problem with the focus on consistency and predictability at the expense of other, more substantive values, and especially the denigration of all discretion as lack of reason.[24] The alternative to rules-as-regulations or worse, as-algorithms, is not arbitrary decisionmaking. After all, the rules themselves will often become arbitrary as contexts change. The alternative to rules is judgment. Writing in the strand of legal scholarship that lauds judgment, for example, Jamal Greene argues for greater attention to fact-based adjudication rather than general, abstract, and unyielding principles.[25] Why be afraid of judgment? "[L]ow tolerance for discretion indexes rampant distrust in society," Daston explains (p. 270). When governments do not trust citizens to pay their taxes and citizens do not trust governments to refuse bribes, "all exceptions become suspect" (p. 270).

But it is not only the exercise of discretion that undermines rules. What Daston calls "rule vertigo"—when rules "change . . . so frequently and so drastically that none can take hold in the first place"—also undermines rules (p. 270). Daston gives the example of different types of orders during the first year of the COVID pandemic in the United States: to mask or not to mask, to quarantine or go out, to keep schools open or closed, and many other short-lived rules undermined the sense that government knew what it was doing (p. 268). The thinner the rule, the more limited the discretion, the more frequently it will need to change.

Rules vertigo is a kind of cubist painting—all the parts are there, but the composition abstracts and breaks apart its subject; it stops making sense as a depiction of the world. In the case of cubism, the point of the composition is precisely to emphasize the two-dimensional flatness of the canvas, as opposed to the illusion of depth that had, until then, characterized European painting. Such an aesthetic justification does not hold water when it comes to laws that affect people's lives. In the case of rules meant to govern, lawyers should have less tolerance for two-dimensionality.

Daston is especially helpful in providing new illumination into what "judgment" might be. It can be found in the concept of the model. "Models

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23. *See* p. 164.

24. It is a bit overdone, but still not entirely wrong, to remember Justice Holmes's aphorism that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

25. JAMAL GREENE, HOW RIGHTS WENT WRONG 255 (2021). For an analysis of Greene's thesis, especially his focus on fact-based adjudication, see Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1320 (2022) (reviewing JAMAL GREENE, HOW RIGHTS WENT WRONG (2021)).

bridge the ancient philosophical opposition between universal and particulars, rules and cases" (p. 272). To get a sense of how models as a mode of rule reasoning worked, she gives the example of the Rule of Saint Benedict (pp. 33–35).

The Rule of Saint Benedict governed every aspect of the working of the monastery (pp. 31–40). It contained thin particular rules, such as a requirement that everyone participate in working in the kitchen, a limitation on eating four-footed animals, and strict portions at mealtimes (pp. 33, 35). But these rules could be relaxed at the abbot's discretion in order to adapt the rules to the individual capacities of the monks, such as "out of consideration for the weak" (p. 35). How was this combination of discretion and rigidity understood? Not as an opposition but as a complete rule: "The abbot does not simply enforce the Rule;" explains Daston, "he exemplifies it" (p. 36). One might give a similar description of the Master da Vinci in his studio. The apprentices follow the work of the master, but they do not "copy these models to the last detail" (p. 40). Their paintings are not mechanical or they would not be any good. The master's work is their model to be emulated, and whether their sfumato is sufficiently nuanced and skilled is a subject for discussion and critique (pp. 40–41).

The type of discretion implied by models, Daston explains, has two sides. The first is cognitive, the ability to distinguish cases in crucial details. The second is the executive aspect of discretion, or "the wisdom of experience, which teaches which distinctions make a difference in practice, not just in principle" (p. 37). These sides broke apart in the seventeenth century, Daston argues, and discretion came to be tarred with arbitrary caprice. When practical wisdom no longer commands trust, execution of discretion becomes suspect (p. 38).

The success in creating "islands of uniformity, stability, and predictability," Daston writes, "fostered the dream of rules without exceptions, without equivocations, without elasticity" (p. 273). People thought that "models that mediated between rules and the unruly world could be kicked away like the scaffolding from a completed building" (p. 273). This created a new philosophical problem, one that ancient philosophers could not have imagined: how to square predictability and discretion. The result of the reliance on explicit rules made "[d]iscretion, judgment, and reasoning by analogy" the object of mistrust (p. 273). These skills, Daston argues, "are in danger of slipping into the murky regions inhabited by intuition, instinct, and inspiration, all opaque to critical scrutiny" (pp. 273–74).

III. The Inevitability of Judgment

The common law has always focused on analogies and distinctions from the model case to the one before the court. In recent years, the trend has been to reject this method. There are many examples of this phenomenon. I will illustrate it using a doctrine familiar from first-year Civil Procedure. The example uses a relatively unexciting subject matter that students find frustrating but not as controversial as other constitutional questions: personal jurisdiction. I pick this topic precisely because it is not what law professors call a "hot"

case.[26] The fact that it does not raise strong sympathies makes it easier to see how the operation of the doctrine tracks Daston's analysis.

Famously, in *International Shoe v. Washington*, the Supreme Court articulated a rule at a relatively high level of generality: that, in order to be subject to personal jurisdiction, a defendant must have sufficient contacts with the forum that it would be fair to hale them into court there.[27] The case involved a shoe company that sought to avoid state court jurisdiction, and by extension state taxes, by structuring its business to leave no footprint in the State of Washington.[28] The company's thirteen salespeople worked on commission, there were no offices or stores in the state, and even orders were sent prepaid, so that packages entering Washington were already the property of the purchasers.[29] The company's goal was to avoid the rule at the time, which was that in order to be subject to the state's jurisdiction, the company had to be "present" in that state.[30] As every first-year law student knows, the general rule as stated in *International Shoe* does not answer whether a court may exercise jurisdiction to adjudicate over a defendant in myriad specific factual scenarios that have since been litigated, such as whether a dealership that sold a car in New York could be sued in Oklahoma, where a terrible accident injured the buyer,[31] or whether a company that sold millions of dollars of a drug in California could be sued there by a patient who had taken the drug and been injured in Ohio.[32] Over time, specific issues of application of a general common law principle to a particular set of facts are answered in individual cases with repeated fact patterns. They accrue slowly, like sedimentary rock, when followed by other courts. The general thick rule is given shape by many thinner rules that are more easily and mechanically followed. Consider the following examples of particular rules ostensibly derived from the test for personal jurisdiction:

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26. As Mark Tushnet explains, "[I]nstructors present hot cases to show that a student's initial reaction of sympathy and outrage is 'naive, nonlegal, irrelevant to what you're supposed to be learning, and maybe substantively wrong into the bargain.' " Mark V. Tushnet, *Metaprocedure?*, 63 S. CAL. L. REV. 161, 167 (1989) (reviewing ROBERT M. COVER, OWEN M. FISS & JUDITH RESNICK, PROCEDURE (1988)) (quoting Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 58 (David Kairys ed., Basic Books 1998) (1982)).

27. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940) ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' ").

28. *Id.*

29. *Id.* at 313–14 (describing the company's business model).

30. *Id.* at 315 (describing the company's argument that it was not subject to jurisdiction because it was not "present" in Washington).

31. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

32. *See* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773 (2017).

- Rules for service:
  - A human being personally served in the forum is subject to jurisdiction.[33]
  - An agent for an entity (e.g., a corporation) personally served in the forum does not give rise to jurisdiction over that entity.[34]
- Rules for contract:
  - A contractual provision providing for jurisdiction gives rise to jurisdiction.[35]
  - Jurisdiction does not follow the obligor to a contract to a new forum if the obligor moves.[36]
- Rules for tort:
  - In a defamation case, there is jurisdiction wherever the defamatory material was physically distributed.[37]
  - In a products liability case against a manufacturer selling through an intermediary, if between one and four items were sold in the forum, there is no jurisdiction unless those items were custom-made.[38]

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33. WRIGHT ET AL., *supra* note 6.

34. *Id.*

35. A Westlaw search for cases in which personal jurisdiction was *not* granted involving a specific contractual provision found only the following cases: First Nat'l Monetary Corp. v. Chesney, 514 F. Supp. 649, 655–56 (E.D. Mich. 1980); Exum v. Vantage Press, Inc., 563 P.2d 1314, 1315 (Wash. Ct. App. 1977). Further, the opinions in these cases make clear that their rulings are exceptions to the general rule.

36. The paradigm case is Hanson v. Denckla, 357 U.S. 235 (1958). A search of the Westlaw database found no cases to the contrary.

37. The paradigm case is Keeton v. Hustler Mag., Inc., 465 U.S. 770 (1984). A search of the Westlaw database found no cases to the contrary, with the caveat that state long-arm statutes may narrow this rule.

38. I recognize that this rule statement may be controversial. *Cf.* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1028 n.4 (2021) ("We have long treated isolated or sporadic transactions differently from continuous ones."); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 892 (2011) (Breyer, J., concurring). Between one and four items seems to be squarely in the "sporadic transaction" category, but if the company created a long-term relationship by, for example, offering continuing service or a payment plan, a court is more likely to find jurisdiction. *See* McGee v. Int'l Life Ins., 355 U.S. 220 (1957) (holding that California had jurisdiction over an out-of-state company where a California resident had purchased a life insurance policy from the company); Burger King v. Rudzewicz, 471 U.S. 462 (1985) (holding that Florida had jurisdiction over an out-of-state franchisee that had entered into a long-term contract with a Florida franchisor). A Westlaw search for exceptions found four cases. Two courts have treated a single indirect sale, without more, as sufficient to confer jurisdiction. A.J. Sackett & Sons Co. v. Frey, 462 So. 2d 98 (Fla. Dist. Ct. App. 1985); Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961). Note the age of both these cases. Two courts have found jurisdiction where the product is sold through a distributor and custom-made. Brown v. Bottling Grp., L.L.C., 159 F. Supp. 3d 1308 (M.D. Fla. 2016); Haw. Forest & Trial Ltd. v. Davey, 556 F. Supp. 2d 1162 (D. Haw. 2008).

- Where the manufacturer has significant sales in a jurisdiction, it can be sued for injuries caused by that product in the state.[39]
- A person passing through a state who commits a tort in that state (such as a car accident) may be sued where the tort occurred.[40]

- Miscellaneous rules:
  - A company can be sued for any reason where it is incorporated or where it has its principal place of business.[41]
  - A person may be sued for any reason where she is domiciled.[42]

A law professor is not likely to give an exam raising any of these because they are all well-settled thin rules requiring little demonstration of doctrinal facility by a student.

When a district court judge applies these particularistic rules in a concrete case, a plausible argument could be made that the adjudicator has not complied with the overarching standard based on the facts of the individual case.[43] This is because the minimum contacts test *could* support a substantial number of different outcomes, a fact that many first-year law students, law professors, and even Supreme Court justices find frustrating.[44] But this appearance of indeterminacy is misleading in practice. For litigants and courts in the run of cases, the law in application is (relatively) determinate and predictable because what is being applied is not the general principle in itself, but rather a subrule for this particular oft-repeated factual scenario.

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39. *Ford Motor Co.*, 141 S. Ct. 1017.

40. *See, e.g.*, Farrie v. McCall, 568 S.E.2d 603, 604 (Ga. Ct. App. 2002) (holding that an out-of-state driver can be subject to jurisdiction for an accident occurring in state and stating that "[a]n automobile collision is such a tortious act that can confer jurisdiction on a nonresident under the Long Arm Statute"). A Westlaw search revealed no exceptions to this rule.

41. Daimler AG v. Bauman, 571 U.S. 117, 137 (2014). A Westlaw search revealed no exceptions to this rule.

42. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011). A Westlaw search revealed no exceptions to this rule.

43. You might, for example, compare the concurrence of Justice Alito and Justice Breyer with Justice Ginsburg's dissent in *Nicastro* for a flavor of this. *Nicastro*, 564 U.S. 873.

44. *See, e.g.*, A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618 (2006) (describing "near-universal condemnation" of personal jurisdiction doctrine and proposing an alternative analysis); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 3 (2010) ("Confusion is inevitable . . . ."); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1302 (2014) ("The field is widely described as a mess, an irrational and unpredictable due process morass."); Cody J. Jacobs, *In Defense of Territorial Jurisdiction,* 85 U. CHI. L. REV. 1589, 1647 (2018) ("Many practitioners, judges, and academics have long lamented that personal jurisdiction doctrine is a mess."); Brooke D. Coleman, *Endangered Claims*, 63 WM. & MARY L. REV. 345, 378 (2021) ("The Court's decades-long personal jurisdiction fissures have left lower courts, commentators, and litigants without a clear personal jurisdiction test."); Christine P. Bartholomew & Anya Bernstein, Ford*'s Underlying Controversy*, 99 WASH. U. L. REV. 1175, 1175 (2022) ("Personal jurisdiction—the doctrine that determines where a plaintiff can sue—is a mess.").

How do judges arrive at these relatively determinate thin rules from the general minimum contacts test? The model or paradigm case and the rule work together to "regularize and refine practice" (p. 272). The use of the paradigm case, in Daston's words, "circumvent[s] the modern philosophical problem of how to interpret rules unambiguously altogether: ambiguity in a model is a feature, not a bug" (p. 272). Judges, working in the common law tradition, bridge the gap between universals and particulars through case analysis—that is, models.

To illustrate how this is done, consider a hypothetical posed in oral argument in *Ford Motor Co. v. Montana Eighth Judicial District*,[45] a 2021 personal jurisdiction case. At oral argument, Chief Justice Roberts asked: what if a small Maine craftsperson sells a carved duck decoy over the internet?[46] Would they be subject to jurisdiction for this single exchange? Lower courts have largely held that there is specific personal jurisdiction based on single sales where the defendant advertised on the internet and sold the product directly to the plaintiff.[47] Two Supreme Court cases involving single sales offer analogies. The first, *McGee v. International Life Insurance*,[48] involved a single life insurance contract between a Texas company and a California resident. Insurance is a highly regulated industry; life insurance contracts are long-term contracts. For these reasons, the Court held that jurisdiction was appropriate in *McGee*, as it did in *Burger King Corp. v. Rudzewicz*,[49] another case involving a long-term contractual relationship with out of staters. The second case involving a single contact is *J. McIntyre Machinery, Ltd. v. Nicastro*, in which the Court held that the indirect sale of a single shear used to cut scrap metal, albeit one that cost over $20,000, was insufficient to justify jurisdiction.[50] This was true even through the shear injured the plaintiff in his home state of New Jersey, where he filed suit. The reasoning of the *Nicastro* opinions, particularly the plurality, leaves much to be desired on the matter of which principles govern personal

45. 141 S. Ct. 1017 (2021).

46. *Ford Motor Co.*, 141 S. Ct. at 1029 n.4 ("So consider, for example, a hypothetical offered at oral argument. '[A] retired guy in a small town' in Maine 'carves decoys' and uses 'a site on the Internet' to sell them. Tr. of Oral Arg. 39. 'Can he be sued in any state if some harm arises from the decoy?' *Ibid*. The differences between that case and the ones before us virtually list themselves. (Just consider all our descriptions of Ford's activities outside its home bases.) So we agree with the plaintiffs' counsel that resolving these cases does not also resolve the hypothetical.").

47. *See, e.g.*, NBA Props., Inc. v. HANWJH, 46 F.4th 614, 625 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 577 (2023) (holding that a single direct sale can give rise to a trademark claim when the defendant made the product available for sale on the internet and sold the offending product directly to the plaintiff). *But see* Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777, 788 (Tex. 2005) (holding that a single sale, solicited by the consumer and paid for in advance, did not give rise to specific personal jurisdiction even though the defendant delivered the product to plaintiff across state lines).

48. 355 U.S. 220 (1957).

49. 471 U.S. 462 (1985).

50. 564 U.S. 873 (2011).

jurisdiction doctrine.[51] But the case nevertheless provides a paradigm for suits involving a single indirect sale. The problem in the duck decoy hypothetical is that the single sale is direct, unlike *Nicastro*. Presumably the duck decoy purchase is a one-time event, but the duck was sent directly to the consumer, rather than sold through an intermediary. The hypothetical pushes at the boundaries between *Nicastro* and *McGee*. Is the scope and length of the relationship most important or the fact that it was direct and the craftsperson knew they were engaging in business out of state when they sent the duck decoy to the customer?

First-year students often experience this exercise as frustrating—how can they learn which analogies are convincing and which are not? How is legal judgment developed? But it is more concerning, and demonstrative of the negative effect of mechanistic thinking, when justices of the United States Supreme Court seem flummoxed by, or perhaps reject, this form of judgment. This rejection is exemplified by Justice Gorsuch's concurrence in *Ford*. He laments, "[T]he majority supplies no meaningful guidance about what kind or how much of an 'affiliation' will suffice" for jurisdiction to adjudicate.[52] He wishes a return to an older test that might "assess fairly a corporate defendant's presence or consent."[53] His proposal to return to the old "presence" test for personal jurisdiction poses the same problems as those created by the general standard articulated in *International Shoe*, which itself claimed to be merely providing a more functional restatement of the concept of presence.[54] And it ignores the fact that the *Ford* decision itself offers guidance as a model.

The judicial rejection of the fundamentals of common law reasoning is not unique to Justice Gorsuch. In his dissent in *World-Wide Volkswagen v. Woodson*,[55] Justice Blackmun complained that the ruling "will now be about parsing every variant in the myriad of motor vehicles fact situations that present themselves. Some will justify jurisdiction and others will not. All will depend on the 'contact' that the Court sees fit to perceive in the individual case."[56] In Daston's terminology, Justices Blackmun and Gorsuch are demonstrating in their criticism the modern decoupling of the cognitive side of discretion, "parsing every variant," from the executive side, "the wisdom of

51. *Id.* at 877–87 (Kennedy, J.) (plurality opinion) (stating that the key consideration for personal jurisdiction is authority rather than fairness); *id.* at 887 (Breyer, J., concurring) ("I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.").

52. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1035 (Gorsuch, J., concurring).

53. *Id.* at 1039; *see also* Maggie Gardner et al., *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455, 472–73 (2022) (describing Justice Gorsuch's position).

54. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945) ("[T]he terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.").

55. 444 U.S. 286.

56. *World-Wide Volkswagen Corp.*, 444 U.S. at 319 (Blackmun, J., dissenting).

experience, which teaches which distinctions make a difference in practice, not just in principle" (p. 37).

CONCLUSION

A good law school hypothetical, or a difficult case, will result in disagreements about which distinction ought to make a difference. These disagreements go to the heart of what is at stake in the determination at hand, whether it is the question of jurisdiction to adjudicate in the above example or the running of an abbey in Daston's discussion of the Rule of Saint Benedict. The abbot who serves as the model or paradigm for the monastery is both compassionate and abstemious. Which is the more important quality in judging whether a monk who is weak or ill should nevertheless be required to help in the kitchen and in what capacity, the emphasis on restraint or on compassion? One purpose of the minimum contacts test is to prevent end runs around state power while another is to protect entities against state overreach when they have little or no relationship with the state.[57] In *Ford*, the company had consistently sold and serviced cars in Montana, the plaintiff was injured in Montana, and the Court unanimously held it was subject to jurisdiction because the company's attempt to evade jurisdiction smacked of forum shopping,[58] very much like *International Shoe* did.[59] The requirement that judges analyze these disagreements, using analogical reasoning to bridge the gap between the universal test and the specific instance at hand, is the great benefit of common law reasoning. This analysis is an efficient and flexible way of developing and adjusting rules to societal needs.

It would be a pity if we lawyers abandoned what Daston describes as the "cognitive skills needed to follow rules-as-models"—discretion, judgment, and reason—in a fruitless search for the impossible state of "rules without exceptions, without equivocations, without elasticity" (p. 273). Until recently, we might have been forgiven for believing this impossible state was possible because we were living on one of those islands of stability that make governance by thin rules seem both possible and desirable. But the legal scholars and jurists who seek stability in rules had the causal direction wrong—it was not necessarily that the rules produced the order that they seek, but rather that the order made possible the rules they favor.[60]

The poet Wallace Stevens, himself a lawyer,[61] explained this interrelationship of rules, order, and disorder in a poem called *Connoisseur of Chaos*: "A. A

57. *Int'l Shoe*, 326 U.S. at 319.

58. *Ford Motor Co.*, 141 S. Ct. 1017.

59. This is my own view of why Ford Motor Company lost the case.

60. *See* p. 20.

61. THOMAS C. GREY, THE WALLACE STEVENS CASE 1 (1991).

violent order is disorder; and / B. a great disorder is an order. These / Two things are one."[62] He went on to consider,

> But suppose the disorder of truths should ever come
>
> To an order, most Plantagenet, most fixed. . .
>
> A great disorder is an order. Now, A
>
> And B are not like statuary, posed
>
> For a vista in the Louvre. They are things chalked
>
> On the sidewalk so that the pensive man may see.[63]

A fixed order is a disorder, just as the sumptuary laws will chase the fashions and never catch them, only incentivizing more creative ways of dress; just as an absolutist rule barring gun regulation will be a violent order of disorder;[64] just as the lines and planes of cubist paintings, so clearly delineated, depict a destabilized world. By contrast, the lack of fixity at the edges of the model, the way the Mona Lisa lacks a clear border between figure and ground, may paradoxically yield the stability lawyers crave. Smudged lines, like chalk on a sidewalk, for the pensive judge to see.

62. WALLACE STEVENS, *Connoisseur of Chaos*, *in* THE COLLECTED POEMS OF WALLACE STEVENS 228, 228 (John N. Serio & Chris Beyers eds., Vintage Books 2d ed., 2015) (1954).

63. *Id.* at 228-29.

64. *See generally* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (striking down a century-old gun regulation and severely limiting the ability of states to regulate firearms).