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Deference Mistakes

Jonathan S. Masur & Lisa Larrimore Ouellette*

This Article begins with what should seem a relatively straightforward proposition: it is impossible to fully understand the holding of a case without understanding its "deference regime"—the standard of review or burden of proof that governs the case. If a court holds in the context of a habeas petition that a constitutional right was not "clearly established," that does not necessarily mean that the court would hold that the right does not exist were it writing on a blank slate. If a court refuses to invalidate a granted patent, which is presumed valid and can only be held invalid upon a showing of clear and convincing evidence, that does not mean that the court believes the patent should have been granted in the first place. And if an appellate court holds that a trial court's ruling was not "plain error," that does not mean that the appellate court believes the trial court necessarily reached the correct result or would have affirmed the ruling if the review were more searching.

Yet in case after case, we find that judges (and their clerks) confuse one deference regime for another or ignore deference entirely. In so doing, they make what we term *deference mistakes*. Courts in standard criminal cases regularly rely upon habeas precedents holding that a federal right was not "clearly established" to conclude that the right does not exist. The Federal Circuit and the Patent and Trademark Office regularly rely on precedents involving granted patents (which are presumed valid) to justify granting new patents (which are not entitled to that presumption). And courts of appeals regularly rely upon "plain error" precedents to justify holdings in cases where the standard of review is less deferential.

Although the problem of deference mistakes cuts across legal doctrines, it has been neither identified nor described in prior scholarship. Our article presents a multitude of examples of deference mistakes in practice and explains why they are likely to occur. Deference mistakes may seem relatively innocuous, particularly if they are confined to individual cases. But that appearance is misleading. We develop a theoretical model of how deference mistakes, coupled with particular asymmetries in adjudication, can generate systematic shifts in legal doctrine. Deference mistakes may have contributed to the current patent crisis by adding to the proliferation of bad patents. They may also be partly responsible for retrenchment in the law of constitutional criminal procedure rights or the pro-employer shift in employment discrimination law. After analyzing the potential for deference mistakes to affect the long-term evolution of the law, we discuss potential solutions.

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* Jonathan S. Masur is the John P. Wilson Professor of Law, University of Chicago Law School. Lisa Larrimore Ouellette is an Assistant Professor of Law at Stanford Law School. We thank Will Baude, Frederic Bloom, Adam Chandler, Tun-Jen Chiang, David Engstrom, Eric Fish, Eric Goldman, Daniel Hemel, Aziz Huq, Mark Lemley, Richard McAdams, Greg Reilly, Michael Risinger, Shirin Sinnar, and Robert Weisberg for excellent comments. LT Edwards, Dayron Silverio, and Brooke Smith provided superb research assistance. We also thank the editors of the *University of Chicago Law Review* for their helpful suggestions and superb edits. Masur thanks the David and Celia Hilliard Fund for research support.

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Introduction

A district court relies on Eighth Circuit precedent to conclude that a claimed federal right does not exist—but the Eighth Circuit court had only held that the right was not "clearly established" for purposes of habeas corpus.[1] The Patent and Trademark Office (PTO) relies on Federal Circuit precedent in granting a patent application—but the Federal Circuit had only held that the challenger to a granted patent had not presented "clear and convincing" evidence to overcome the presumption of patent validity.[2] A district court relies on Seventh Circuit precedent in granting an employer's summary judgment motion in an employment discrimination case—but the Seventh Circuit had only held that a finding of no discriminatory intent was not "clearly erroneous."[3]

In all of these cases, the second decisionmaker made a "deference mistake": it mistakenly relied on precedent without fully accounting for the legal and factual deference regime under which that precedent was decided, thereby using the precedent in a way that the initial decisionmaker may not have intended.[4] (We use "deference" broadly to refer to anything that causes a decisionmaker to consider an issue differently from how it would in the first instance, including different standards of review, standards of evidence, or legal presumptions.) Just because an evidentiary holding is not an abuse of discretion does not mean that the contrary holding is not allowed. Just because a finding of negligence is not clearly erroneous does not mean that courts should find negligence in every similar factual scenario.

These types of mistakes might seem minor. After all, courts make small errors of many types on a regular basis. What are a few more here or there? And in many instances, deference mistakes will have no net effect on doctrinal development:

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[1] In *Newton v. Kemna*, the Eighth Circuit concluded that although "the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges," "[g]iven the restrictive nature of habeas review," it was not their "province to speculate as to whether the Supreme Court, if faced with the issue, would find that Missouri's physician-patient privilege must give way to a defendant's desire to use psychiatric records in cross-examination." 354 F.3d 776, 779 (8th Cir. 2004). A later district court erroneously relied on *Newton* in rejecting a party's request for a witness's medical records, stating that *Newton* "held that the trial court's denial of the criminal defendant's access to the witness's medical records did not violate the confrontation clause under the Sixth Amendment." Jackson v. Wiersema Charter Serv., Inc., No. 4:08-CV-00027, 2009 WL 1531815, at *1 (E.D. Mo. June 1, 2009).

[2] *See, e.g.*, *Ex parte* Albritton, No. 2008-5023, 2009 WL 671577, at *16 (B.P.A.I. Mar. 13, 2009) (reversing an obviousness rejection in a "close case" based on Arkie Lures, Inc. v. Gene Larew Tackie, Inc., 119 F.3d 953 (Fed. Cir. 1997)).

[3] In *Oxman v. WLS-TV*, the Seventh Circuit stated that while "it [would be] reasonable to infer that [the] statements [of a television station's News Director] reflected [the] opinions [of the station's General Manager with exclusive authority to fire employees], . . . such an inference is not mandated," and that the district court's decision to exclude the News Director's statements was "not clearly erroneous." 12 F.3d 652, 660 (7th Cir. 1993). In granting summary judgment for the employer in another employment discrimination case, a later district court relied on *Oxman* to conclude that the intentions of someone without firing authority "are irrelevant" and "not evidence of discrimination." Respondi v. Merrill Lynch & Co., No. 96-C-2618, 1998 WL 355447, at *4 (N.D. Ill. June 25, 1998).

[4] To be clear, these decisions are not "wrong" in the sense of contravening precedent; rather, the mistake is that the second decisionmaker misunderstood (or intentionally mischaracterized) the intent of the original decisionmaker and used the precedent in a way that its author did not intend and that might not be justified.

some district judges might mistakenly rely on precedent to exclude evidence they otherwise would (within their discretion) allow, while others might mistakenly rely on other precedent to allow evidence they would otherwise exclude.

But when some asymmetry in the system results in a skewed distribution of deference mistakes, their overall effect will not be so innocuous. If one type of deference mistake comes to predominate over the other—for instance, if there are many more cases of erroneous exclusions of evidence than erroneous admissions—the result will be a *systematic* shift in the doctrine. This work thus joins a broader literature on extra-legal determinants of doctrinal pathways. Other scholars have shown that legal doctrine can evolve due to factors other than normative rightness or judicial interpretive methods, including the choice of enforcement mechanism, the identity of the parties bringing suit, or structural factors related to the courts.[5] To this literature, our Article contributes the idea of long-term, lasting doctrinal evolution via mistake.

This doctrinal evolution is problematic even if the "mistakes" are made by decisionmakers who rule differently from how they otherwise would for strategic, reversal-averse reasons. For example, imagine if litigants appealed evidentiary rulings admitting evidence much more frequently than rulings excluding evidence.[6] Appellate courts would have many more opportunities to consider admissions of evidence, and the appellate caselaw would be skewed toward deferential affirmances of those admissions. Subsequent courts would thus have many more opportunities to make deference mistakes with respect to admissions of evidence than with respect to exclusions. The long-term result would be legal bias in the direction of admitting more and more evidence.[7]

Of course, for this mechanism to result in a shift in *doctrine*, the court granting deference must do so with regard to some issue that matters in future cases. In general, appellate courts only defer on case-specific factual determinations, while reviewing legal questions without deference. In practice, however, decisions on facts often infect decisions on law, and courts have recognized the difficulty of separating legal and factual determinations by declaring some issues to be "mixed questions of law and fact," which are often reviewed deferentially.[8]

Furthermore, there are a few areas in which legal questions are reviewed under different standards in different situations. These areas of doctrine can be

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[5] *See, e.g.*, David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from* Qui Tam *Litigation*, 115 COLUM. L. REV. (forthcoming 2014) (describing this literature and presenting a new theory of how the choice of private versus public enforcement can systematically shift doctrine); Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (discussing the dynamics of litigation in the presence of repeat players); Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011) (showing that when the Second and Ninth Circuits were overwhelmed with immigration appeals, they began to overrule district courts less often than other circuits in non-immigration civil appeals).

[6] This might occur for forensic evidence because criminal appeals are almost always made by defendants, who would be more likely to complain about the admission of incriminating evidence. *See infra* Section II.B.2.

[7] This mechanism is analogous to models in the natural sciences of biased, correlated random walks, under which small, random fluctuations of particles can lead to net movement in one direction when those random steps are biased in one direction or correlated with prior steps. *See generally* Edward A. Codling et al., *Random Walk Models in Biology*, 5 J. ROYAL. SOC'Y INTERFACE 813 (2008) (reviewing such models).

[8] *See infra* Section I.A.

especially fertile grounds for deference mistakes. For example, patent invalidity must be established by clear and convincing evidence in the infringement context, but only by a preponderance of the evidence when validity is challenged before the PTO.[9] Just because there is not clear and convincing evidence that a patent is invalid does not mean that it should not be held invalid under a lower standard. It is often a mistake for the PTO to rely on precedent from infringement cases when deciding to grant patents.[10] Similarly, courts consider whether federal rights are "clearly established" in the habeas and qualified immunity contexts, rather than considering whether these rights exist at all.[11] It is a mistake to rely on precedent that a right is not "clearly established" to conclude that it is "clearly not established." We find numerous mistakes of this type.

This Article makes two principal contributions. First, we explain, categorize, and document deference mistakes across a wide swath of legal fields. We discuss numerous cases in which a court cites a precedent for a proposition that precedent does not support, given the deference regime under which the precedent was decided. Though we cannot be certain, it seems likely that in many of these cases the deference mistake was dispositive. Second, we build and analyze a theoretical model of deference mistakes in judicial decision-making. Using this model, we demonstrate that, under the right conditions, deference mistakes can propagate across time and lead to long-term evolution in the law, merely through their very occurrence. Asymmetries in the types of cases that reach the court, or the contexts in which they arise, or even the types of decisionmakers involved, can lead to asymmetries in the numbers and types of deference mistakes that courts or other decisionmakers commit. Over time, like water dripping on a rock, these asymmetries can carve new doctrinal channels and steer the law in directions it might not otherwise have taken. The Article proceeds in four parts. In Part I, we explain why we expect deference mistakes to occur. First, we review the various deference regimes (again, using our broad definition of "deference") and describe a number of situations in which appellate decisionmakers grant deference on issues that matter in future cases. Second, we review the literature and cases on the extent to which deference regimes actually affect outcomes, and we conclude that deference likely does matter to at least some extent. Finally, we discuss factors that might cause courts to make deference mistakes—where we use "mistake" to refer to the kinds of legal errors discussed above.

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[9] *See* Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238 (2011); *In re* Baxter Int'l, Inc., 678 F.3d 1357, 1364 (Fed. Cir. 2012) ("[A] challenger that attacks the validity of patent claims in civil litigation has a statutory burden to prove invalidity by clear and convincing evidence. . . . In contrast, in PTO reexaminations the standard of proof—a preponderance of the evidence—is substantially lower than in a civil case and there is no presumption of validity in reexamination proceedings." (internal quotation marks omitted)). We will at times use "validity" to refer to the patentability of patent applications for ease of explication, even though this term is technically reserved for granted patents.

[10] One of us has suggested that this mechanism may have been partially responsible for the expansion of the boundaries of patentability that has occurred since the creation of the Federal Circuit. *See* Lisa Larrimore Ouellette, *What Are the Sources of Patent Inflation? An Analysis of Federal Circuit Patentability Rulings*, 121 YALE L.J. ONLINE 347, 368-71 (2011).

[11] *See* 28 U.S.C. § 2254(d)(1) (2012) (habeas); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (qualified immunity).

Part II then presents numerous examples of actual deference mistakes. For instance, we show that courts have erroneously relied upon precedents holding that a given right was not "clearly established" (in the context of a petition for habeas) in concluding that a right does not exist. Analogously, the PTO and the Federal Circuit have relied on precedents from suits for patent infringement—where patents and trademarks carry a presumption of validity—to justify granting new patents or registering new trademarks (which are not entitled to that presumption). We also provide examples of criminal cases in which a precedent involving plain error review—because the appealing party failed to object at trial—is used to decide a later case subject to lower standard of deference.

In Part III, we present a theoretical model of how deference mistakes can lead to systematic doctrinal shifts. This model is simplest when the deference is not to the lower decisionmaker, but rather is a legal presumption, such that similar cases are sometimes decided under different legal standards (as in patent and habeas cases). But we also show that when an appellate decisionmaker defers to a lower decisionmaker, a skewed distribution of precedents can arise when only one type of party appeals (or appeals more often), when the deference is one-sided, or when the lower decisionmaker is likely to be biased relative to the appellate decisionmaker. We then explain how a skewed distribution of precedents, coupled with the cumulative effect of innocuous deference mistakes, can lead to systematic doctrinal shifts.

To be clear, we do not claim that deference mistakes are solely responsible for doctrinal shifts in the areas of law we described in Part II—the areas in which we have documented repeated instances of deference mistakes. Rather, the mechanism we describe can work in tandem with, or even supplement, shifts based on changing judicial philosophies and other factors. We do not even claim to have proven here that our mechanism has in fact caused systematic doctrinal shifts. Part II demonstrates that all of the elements necessary for the mechanism we lay out in Part III—including actual examples of deference mistakes—are present in a variety of doctrinal areas. The extent to which deference mistakes are driving doctrinal shifts in these or other areas is thus ripe for empirical study.

Part IV then explores potential solutions to the problem of deference mistakes. We consider whether to require that appellate decisionmakers be more explicit about deference, such as by noting that they might have reached a different conclusion if they were deciding the case on a clean slate. In the qualified immunity context, courts are encouraged (and were for a time required) to decide whether a constitutional right was violated before deciding whether that right was clearly established.[12] This seems to have led to a fewer formal deference errors than in the habeas context. But the qualified immunity regime is not necessarily healthier for the development of constitutional doctrine: it might simply cause courts to overstate the case against a particular right in order to avoid cognitive dissonance and minimize the probability of reversal. In any case, because the problem only occurs when some actor in the system makes a mistake, simply publicizing the problem is likely to help. Unless decisionmakers become more comfortable admitting ambiguities, the best hope for avoiding deference mistakes may lie with increased awareness on the part of

[12] *See* Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011).

decisionmakers, advocates, and commentators, which will enable these different actors to recognize and announce such mistakes when they occur.

I. Defining Deference Mistakes

One of the virtues of a system in which judges issue written opinions is clarity regarding what the judge has actually decided. In the written opinion, the judge will typically explain both the decision she has reached and the legal standard under which the decision was made—including such a basic element as the burden of proof. Of course, this system does not always function smoothly. Sometimes a judge is not clear about what she has decided or the standard she has applied. Other times a judge is clear, but subsequent courts and litigants misinterpret what she has written. It is difficult to imagine a subsequent court mistaking which party actually won an earlier case, but occasionally a court will err in interpreting the burden of proof or standard of review that a previous judge applied.

A mistake regarding the appropriate burden of proof in a prior case may not, at first glance, appear particularly important. It might seem like a highly technical legal mistake, of interest only to legal sticklers (or pedants). But this impression would be misleading. Misunderstanding the burden of proof in operation in an earlier case is often equivalent to misunderstanding the legal decision on the merits. For example, if a court holds that a right is not clearly established in the habeas or qualified immunity contexts, and that court is misunderstood to have held that a right is *clearly not established*, it creates a precedent (at least in the opinion of the misinterpreting court) that may be precisely the opposite of what the first court would actually have decided had the issue been presented to it. This type of misunderstanding—which could be unintentional or willful—is a deference mistake.

For deference mistakes to matter, three key elements must be present. First, courts must sometimes grant deference (in our broad sense of the term) on issues that matter in future cases in ways that might be asymmetric. Second, legal deference regimes must actually affect outcomes in at least some cases. And third, courts, agencies, or other legal decisionmakers must sometimes make deference mistakes: they must rely on precedent, in a way that the issuing decisionmaker may not have intended, by failing to fully account for the legal and factual deference regime under which that precedent was decided. In this Part, we argue that these three elements are present in the U.S. legal system.

A. What Is Deference?

Judicial deference can be a "slippery concept to define precisely."[13] For this Article, we use deference in its broadest sense to include any situation in which a second decisionmaker is influenced by the judgment of some initial decisionmaker,

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[13] Jonathan M. Justl, Note, *Disastrously Misunderstood: Judicial Deference in the Japanese-American Cases*, 119 YALE L.J. 270, 285 (2009); *see* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 4-5 (1983).

rather than examining an issue entirely de novo.[14] In our model, these decisionmakers might be courts, agencies, or other government actors who resolve individual cases.[15]

Deference might be granted through a variety of mechanisms. Federal courts often review lower courts and agencies under deferential standards of review, such as clear error (for district court factfinding[16]), plain error (for issues not raised below[17]), substantial evidence (for jury verdicts[18] and certain agency factfinding[19]), and abuse of discretion (for many procedural and evidentiary determinations).[20] Deference might also be granted due to legal presumptions coupled with standards of evidence or burdens of proof. For example, patents are presumed valid, which means that a court will only hold a patent invalid if there is clear and convincing evidence of invalidity (rather than a preponderance of the evidence).[21] In essence, this means that courts are granting some deference to the PTO's prior determination of patent validity. And as we describe further below, many other specific deference regimes are required by statute or have been developed by courts.

Because we are only interested in deference as it affects doctrinal development, the variable on which deference is granted must be something that matters in subsequent cases. Agencies frequently receive deference on legal determinations under *Chevron* or other agency deference regimes,[22] and it would be erroneous for another decisionmaker to rely on one of these deferential precedents as if it were de novo review. But outside the *Chevron* context, one might question whether courts in fact defer on issues that would be relevant in the future. Questions of law are almost universally reviewed without deference;[23] instead, deference is typically granted on case-specific facts, known as "adjudicative facts," which (by

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[14] We thus adopt a broader definition than Paul Horwitz, who was hesitant about using "deference" to describe "a thumb on the scales but not a complete surrender of judgment," or where "some independent controlling authority dictates to [C_2] that it defer to [C_1]." Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1076 (2008). We also adopt a broader definition than commentators who have focused on deference only to facts. *See, e.g.*, Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 946 (1999).

[15] For example, Daniel Solove has noted that the Supreme Court "frequently accords deference to the judgments of numerous decisionmakers in the bureaucratic state: Congress, the Executive, state legislatures, agencies, military officials, prison officials, professionals, prosecutors, employers, and practically any other decisionmaker in a position of authority or expertise." Solove, *supra* note 14, at 944.

[16] *See* FED. R. CIV. P. 52(a)(6).

[17] *See* FED. R. CRIM. P. 52(b). Errors that do "not affect substantial rights" are considered "harmless" and "must be disregarded." *Id.* 52(a). While we do not focus on them here, the rules for harmless error are themselves complex.

[18] *See* Hamling v. United States, 418 U.S. 87, 124 (1974).

[19] Agency factfinding is reviewed for substantial evidence when it results from formal adjudication and rulemaking; other agency actions are reviewed for whether they are "arbitrary and capricious." 5 U.S.C. § 706(2) (2012).

[20] *See generally* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW (4th ed. 2010) (summarizing the standards of review employed by federal courts).

[21] *See* 35 U.S.C. § 282 (2012); Microsoft Corp. v. i4i Ltd. Partnership, 131 S. Ct. 2238, 2243 (2011).

[22] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984); *see* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098-1120 (2008).

[23] *See* Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308 (2009) (criticizing universal de novo review of legal issues).

definition) are supposed to be unimportant in subsequent cases.[24] If this formal law/fact division were clear and precisely followed, so that any issue that might be relevant in a subsequent case were always reviewed de novo (functionally as well as formally), the deference mistakes at the heart of our model would never occur.

The real world, however, is not so precisely divided. Some facts are relevant in many cases—these "legislative facts" might be found by courts or legislatures,[25] and they are sometimes granted deference.[26] Even adjudicative facts might be relevant in subsequent cases if those facts infect decisionmaking on law. For example, an appellate court that only sees particular factual postures might subconsciously shape the law to fit those facts.

There is also no clear divide between fact and law: the Supreme Court has acknowledged that the boundary is "slippery"[27] and "vexing,"[28] and scholars have questioned the coherence of the distinction.[29] Legally imbued issues that have been deemed questions of fact—and which are thus reviewed deferentially—include whether there was discriminatory intent in an employment discrimination case,[30] whether an exemption to the Fair Labor Standards Act applies in a particular case,[31] and negligence and causation in tort cases (except in the Second Circuit).[32] Some issues have been explicitly called "mixed questions of law and fact," and the standard of review for these issues varies.[33] *Wright and Miller* has compiled a long list of issues "that certainly seem to contain both legal and factual elements" but that have been reviewed for clear error, including the scope of a fiduciary relationship, the existence of a contract, the likelihood of consumer confusion about trademarks, and the existence of personal jurisdiction.[34] In any of these cases, an appellate court might grant deference to a district court decision on an issue that matters in future cases, such as a conclusion that an employer's seniority system does not reflect

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[24] *See* FED. R. EVID. 201 advisory committee's note ("Adjudicative facts are simply the facts of the particular case."); *supra* notes 16-20 and accompanying text.

[25] *See* FED. R. EVID. 201 advisory committee's note ("Legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.").

[26] *See* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 49 (2011); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1 (2009).

[27] Williams v. Taylor, 529 U.S. 362, 385 (2000) (quoting Thompson v. Keohane, 516 U.S. 99, 111 (1995)).

[28] Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

[29] *See, e.g.*, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1790 (2003); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863 (1992).

[30] *Pullman-Standard*, 456 U.S. at 290.

[31] Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 713 (1986).

[32] 1 CHILDRESS & DAVIS, *supra* note 20, § 2.28.

[33] *See* 9C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2589 (3d ed. 2012); *see, e.g.*, Lowry Dev., L.L.C. v. Groves & Assocs. Ins., Inc., 690 F.3d 382, 385 (5th Cir. 2012) (applying different standards of review to distinct aspects of a single issue).

[34] WRIGHT ET AL., supra note 33, § 2589 (footnotes omitted).

discriminatory intent,[35] or about the extent of a speeding driver's contributory negligence.[36]

Appellate courts also apply deferential review to many decisions that involve legal judgments that may be relevant in subsequent cases, including evidentiary rulings,[37] injunctions,[38] sentences,[39] attorneys' fees and sanctions,[40] declaratory jurisdiction (in some circuits),[41] and numerous other issues.[42] This deference means that a given case may have more than one acceptable conclusion.[43] If an appellate court affirms one such outcome—the exclusion of a certain type of expert testimony, or the denial of an injunction under certain circumstances—future district courts may rely on that precedent without realizing that admitting the testimony or granting the injunction would also be within their discretion.

Finally, as we will discuss in much greater detail in Part II, courts sometimes evaluate issues more deferentially based on specific statutory requirements. As mentioned, courts must evaluate granted patents more deferentially than they would in the examination context due to the presumption of patent validity.[44] Similarly, courts must evaluate habeas petitions more deferentially than direct criminal appeals due to the requirement that relief may be granted only where there was a violation of "clearly established Federal law."[45] Where statutes require review of similar issues under different standards in different contexts, deference mistakes may be especially pernicious.

In sum, decisionmakers often grant deference (broadly defined) on issues that matter in future cases. This brief review of deference regimes has focused on U.S.

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[35] *See Pullman-Standard*, 456 U.S. at 290.

[36] *See* Pohl v. Cnty. of Furnas, 682 F.3d 745, 754 (8th Cir. 2012).

[37] General Elec. Co. v. Joiner, 522 U.S. 136, 141-42 (1997); *see also* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999) (noting that decisions on whether to admit expert testimony are subject to abuse-of-discretion review).

[38] *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (permanent injunctions); Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 664 (2004) (preliminary injunctions).

[39] Gall v. United States, 552 U.S. 38, 41 (2007).

[40] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (whether sanctions are justified under Rule 11); Pierce v. Underwood, 487 U.S. 552, 558-563 (1988) (whether a U.S. litigation position was "substantially justified" for attorneys' fees under the Equal Access to Justice Act). Note that prior to *Pierce v. Underwood*, the D.C. Circuit and the Second Circuit had treated substantial justification as a question of law subject to de novo review. 487 U.S. at 558.

[41] *See* Pac. Employers Ins. Co. v. M/V Capt. W.D. Cargill, 474 U.S. 909 (1985) (White, J., dissenting from denial of certiorari) (noting the circuit split on this issue).

[42] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001) (whether a punitive damages award is excessive); Wilton v. Seven Falls Co., 515 U.S. 277, 281 (1995) (whether to stay a declaratory judgment action pending state litigation); I.N.S. v. Abudu, 485 U.S. 94, 96 (1988) (whether to reopen deportation proceedings).

[43] *Cf.* Wheat v. United States, 486 U.S. 153, 164 (1988) ("[W]e hold that the District Court's [decision] . . . was within its discretion . . . . Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was 'right' and the other 'wrong'.").

[44] *See supra* note 21 and accompanying text.

[45] 28 U.S.C. § 2254(d) (2012).

federal law, but similar mechanisms may also be at play at the international, state,[46] and local levels.[47] All that is needed is for one authoritative decisionmaker to defer to another decisionmaker on an issue that will be relevant in the future.

B. Does Deference Matter?

The second key element required by our model is that legal deference regimes must actually affect outcomes. One reason to believe that standards of review, legal presumptions, and other deference regimes can matter is that judges say they do. Judge Harry Edwards of the D.C. Circuit opens his book on standards of review by noting that they "are critically important in determining the parameters of appellate review."[48] Former Tenth Circuit Chief Judge Deanell Tacha said the standard of review "is everything."[49] Former D.C. Circuit Chief Judge Patricia Wald stated that the appellate standard of review "more often than not determines the outcome."[50] And Judge Harry Pregerson of the Ninth Circuit wrote that "[t]he standard of review is the keystone of appellate decision making" because appellate courts do not "reweigh all the evidence and find the facts anew," and he criticized briefs that "overlook this critical issue."[51]

Federal courts require parties to state the applicable standard of review for each issue,[52] and many opinions state that the standard of review was outcome determinative in that case.[53] The Seventh Circuit has memorably stated that a decision

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[46] *See, e.g.*, William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr, *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287 (2001); W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351 (1998).

[47] *Cf.* Christopher P. Terry, *On the Frontiers of Knowledge: A Flexible Substantial Evidence Standard of Review for Zoning Board Tower Siting Decisions*, 20 TEMP. ENVTL. L. & TECH. J. 147 (2002) (discussing a circuit split over the deference due to zoning board tower siting decisions).

[48] HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW, at v (2007).

[49] *Id.* (quoting Judge Deanell Tacha).

[50] Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1391 (1995).

[51] Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 437 (1986).

[52] *See* FED. R. APP. P. 28(a)(9)(B) (requiring briefs to contain "for each issue, a concise statement of the applicable standard of review").

[53] *See, e.g.*, Brown v. Payton, 544 U.S. 133, 148 (2005) (Breyer, J. concurring) ("[T]his is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference."); Island Creek Coal Co. v. Garrett, 459 F. App'x 524 (6th Cir. 2012) ("The standard of review makes a difference in some cases, and this is one of them."); Fantasyland Video, Inc. v. Cnty. of San Diego, 496 F.3d 1040, 1041 (9th Cir. 2007) ("Identification of the proper standard of review under state law will likely determine the outcome of this appeal."); Madelux Int'l v. Barama Co., 186 F. App'x 10, 10 (1st Cir. 2006) ("This is an appeal in which the applicable standard of review determines the outcome."); Transamerica Premier Ins. Co. v. Ober, 107 F.3d 925, 929 (1st Cir. 1997) ("[T]he pertinent standard of review . . . is decisive in shaping the outcome of our assessment."); *In re* Brana, 51 F.3d 1560, 1569 (Fed. Cir. 1995) ("[E]ven though in some cases [the standard of review] might not matter, in others it would, otherwise the lengthy debates about the meaning of these formulations and the circumstances in which they apply would be unnecessary."); United States v. D'Ambrosio, 9 F.3d 1554 (9th Cir. 1993) ("[T]he standard of review controls the outcome of this case."); United States v. Conley, 4 F.3d 1200, 1204 (3d Cir. 1993) ("[T]he standard of review can be outcome determinative."); Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992) ("The relevant standards of review are critical to the outcome of this case."); United States v. Vontsteen, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc) ("[T]he standard chosen often affects the outcome of the case."); United Steelworkers of Am. v. Schuylkill Metals Corp., 828 F.2d 314, 320 (5th Cir. 1987)

will only be overturned under the clearly erroneous standard if it "strike[s] [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish,"[54] a metaphor adopted by many other circuits to illustrate the burden of challenging facts on appeal.[55] Commentators agree that standards of review matter and have devoted many pages to subtle distinctions between standards of review, suggesting that these distinctions are not entirely meaningless.[56]

To be sure, legal realists who believe that judicial outcomes are determined primarily by the facts may be skeptical of the relevance of deference regimes—although realists do not claim that rules never matter.[57] A treatise on federal standards of review begins by emphasizing two points about the importance of legal practice over formalism: first, that "[t]he formulations do not say much until the appeals court . . . gives them life," and second, that "[e]ven when the slogans have no real internal meaning . . . the issue framing or assignment of power behind the words is the turning point of the decision."[58] Thus, for example, the phrase "abuse of discretion" reflects the sense that appellate courts should not review de novo every minor evidentiary or procedural determination of trial courts—but "the variety of matters committed to the discretion of district judges means that the standard is necessarily variable."[59]

Similarly, one might believe that the Federal Circuit uses a higher standard to invalidate issued patents not because of formal evidentiary standards, but because of its reluctance to disrupt settled expectations and reveal a split with a coordinate branch. The presumption of patent validity merely captures this legal practice. And the legal practice behind the words matters: former Federal Circuit Chief Judge Paul

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("In this case, the standard of review determines the outcome."); Fox v. C.I.R., 718 F.2d 251, 253 (7th Cir. 1983) ("The critical issue in this case is one not discussed by the parties: our standard of review.").

[54] Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988).

[55] *See, e.g.*, McCormack v. Hiedeman, 694 F.3d 1004, 1019 (9th Cir. 2012); L.J. v. Wilbon, 633 F.3d 297, 311 (4th Cir. 2011); United States v. Lanham, 617 F.3d 873, 888 (6th Cir. 2010).

[56] *See, e.g.*, 1 CHILDRESS & DAVIS, *supra* note 20, § 1.01 ("*[S]tandards of review*—those yardstick phrases meant to guide the appellate court in approaching both the issues before it and the trial court's earlier procedure or result—actually matter. They do affect subsequent courts, trial and appellate, in doing their job."); EDWARDS & ELLIOTT, *supra* note 48; Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIRCUIT B.J. 279 (2002); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2441 & nn.62-63 (1998) ("Skeptics may suggest that, in practice, the standard of review matters little—that judges will manipulate the standard to reach the results they want. We disagree. Doubtless such manipulation sometimes happens, but in our experience courts generally do take the standard of review seriously."). As of December 22, 2012, there were over six hundred articles in Westlaw's JLR database with "standard" (or "standards") and "review" in the title.

[57] *See* Brian Leiter, *Rethinking Legal Realism: Toward A Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269, 275 n.39 (1997) (stating that "everyone commonly thought to be a Realist . . . endorses the following descriptive claim about adjudication: in deciding cases, judges respond primarily to the stimulus of the facts" but that "[p]roper emphasis must be put on the word 'primarily': no Realists (except perhaps Underhill Moore) claimed that rules never mattered to the course of decision").

[58] 1 CHILDRESS & DAVIS, *supra* note 20, § 1.01; *see also* Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367, 397 (1997) (arguing that "the reasoning behind the labeling is the important first step in the [standard of review] analysis" and the attempt to base standards of review on the law/fact distinction "is a misguided and impossible adventure").

[59] EDWARDS & ELLIOTT, *supra* note 48, at 67.

Michel once told practitioners that "standards of review influence dispositions in the Federal Circuit far more than many advocates realize."[60]

When the en banc Federal Circuit considered its review of PTO factfinding in *In re Zurko*, it noted that "the outcome of this appeal turns on the standard of review."[61] This meant that it thought the PTO's finding was clearly erroneous (and thus reversible under this standard) but that the finding was supported by substantial evidence (and thus not reversible under this less-searching standard of the Administrative Procedure Act (APA)). The Supreme Court reversed, stating that the Federal Circuit had not explained why PTO review "demands a stricter fact-related review standard than is applicable to other agencies."[62] The debate was not over the inherently slippery distinction between "clear error" and "substantial evidence." Rather, it was over the meaning behind these words and the balance of power between the PTO and the Federal Circuit. An empirical study concluded that there was a statistically significant decrease in the Federal Circuit's reversal of the PTO in post-*Zurko* patent cases,[63] suggesting that the decision did impact Federal Circuit review.

Efforts to quantify the effect of standards of review are challenging due to selection effects. Simply counting reversals misses those cases that are settled or not appealed. But one would expect these effects to *decrease* the observable impact of the standard of review.[64] It is thus noteworthy that there was an observable effect post-*Zurko*, and that another empirical study of Illinois appellate cases found that "application of standards of review that grant less deference to the lower court's decision regularly yield lower affirmance rates."[65] Another study of federal appellate cases found that "deferential standards of review appear to considerably decrease the probability of outright reversal" and found "no evidence that judges manipulate standards of review."[66] Another study avoided the selection effect problem by looking at the effect of changing standards of review on departures from federal sentencing

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[60] Craig Allen Nard, *Deference, Defiance, and the Useful Arts*, 56 OHIO ST. L.J. 1415, 1415 (1995) (quoting Paul Michel in 1994, when he was a Circuit Judge on the Federal Circuit).

[61] *In re* Zurko, 142 F.3d 1447, 1449 (Fed. Cir. 1998) (en banc), *rev'd sub nom*, Dickinson v. Zurko, 527 U.S. 150 (1999).

[62] Dickinson v. Zurko, 527 U.S. at 165.

[63] Jeffrey M. Samuels & Linda B. Samuels, *The Impact of* Dickinson v. Zurko *on Federal Circuit Review of USPTO Board Decisions: An Analytic and Empirical Analysis*, 20 FED. CIRCUIT B.J. 665, 679-80 (2011) (reviewing all relevant decisions of the Federal Circuit from 1990 to 2009, straddling the 1999 *Zurko* decision).

[64] *Cf.* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 29 (1984) (arguing that selection effects will cause win rates to be independent of decision standards (but dependent on the stakes of the parties), and that this model "applies indistinguishably to trial and appellate disputes").

[65] Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. ILL. U. L.J. 73, 103 (2009).

[66] Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 5 (2012). The full effects of deferential review were "complex"; for example, "findings of fact [were] associated with more manifested ideological disagreement than discretionary rulings or conclusions of law." *Id.* The overall rates of reversal in the federal courts are quite low. In 2013, for instance, the Federal Courts of Appeals reversed only 6.8% of the cases they decided on the merits. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2013, at tbl.B-5 (2014), *available at* http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/december-2013.aspx. Reversal rates for private civil cases were slightly higher, at 11.8%. *Id.*

guidelines (because all convicted offenders must be sentenced) and found that "[c]hanges to standards of review clearly have an impact on district judges' sentencing behavior."[67] The authors concluded that these "results also provide indirect evidence that review standards constrain circuit courts."[68]

To be sure, courts sometimes make mistakes in determining the correct standard of review,[69] and similar deference regimes may be treated differently in different contexts.[70] But for our purposes, all that matters is that courts do in fact grant deference: the evidence presented in this Section demonstrates that in some cases, courts place a thumb on the scales toward the judgment of another decisionmaker, rather than simply making the decision independently.

C. Deference Mistakes Formally Defined

We are now ready to describe the class of cases and situations with which this Article is centrally concerned. We are interested in situations in which, at time t_1, court C_1 decides a particular legal issue. At time t_2, some other legal decisionmaker C_2 is confronted by a similar legal issue in a different case, and C_1's opinion is either binding or persuasive precedent. Note that C_2 could be a court, agency, or any other legal actor—the only requirement is that C_1's opinion have some influence on C_2's eventual decision.[71] C_2 makes a "deference mistake" when it misapplies C_1's opinion by either inadvertently misunderstanding or intentionally mischaracterizing the "deference regime" under which it was decided.

We use "deference regime" to describe trans-substantive standards of review, burdens of proof, and standards of evidence. "Clear and convincing evidence" is a deference regime, as are "abuse of discretion," "clearly established federal law," "preponderance of the evidence," "*Chevron* deference," and "de novo." We focus on these trans-substantive standards because their potential to generate judicial errors—particularly errors that propagate and affect doctrine—has been overlooked. And we treat them as a class because they share many of the same characteristics, including their propensity to be misunderstood or addressed sloppily by the courts that apply them.

"Deference regime" may not seem like the most appropriate term, as many of these evidentiary standards do not self-evidently involve deference to a lower body in the way that an "abuse of discretion" standard might. We employ the term largely

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[67] Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 413 (2011).

[68] *Id.* at 431-32.

[69] *See* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 252-75 (2009) (reporting that "in nearly three percent of the factual sufficiency appeals in Texas, the appellate court was using a disfavored standard of review" and that a handful of California cases applied de novo review "under questionable circumstances").

[70] Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002) (quantifying affirmance rates in various administrative appeals).

[71] C_1 and C_2 could be any combination of appellate courts, trial courts, administrative bodies, or other decisionmakers; all that is necessary is that C_2 would consider C_1's opinion to be at least persuasive on the issue and that C_2 rely to some extent on the outcome that C_1 reached, in addition to its reasoning.

because it is convenient and relatively descriptive. But we believe that it captures much of what is driving the trans-substantive standards in these situations. For instance, the fact that a federal court can only invalidate an issued patent if there is "clear and convincing evidence" is due to the deference the court affords to the PTO, which issued the patent.[72] The fact that a federal court will only overturn a state conviction if it violated "clearly established federal law" is due to the deference the federal courts owe to state courts under the Anti-Terrorism and Effective Death Penalty Act (AEDPA).[73] Likewise for cases of qualified immunity, where police officers and other state actors may only be held responsible under § 1983 for violations of "clearly established" law in part because of the deference owed by courts to officers whose responsibility it is to enforce the law.[74] Although the precision of the term we employ is not of great importance, we wish to emphasize the commonalities between these trans-substantive standards, and thus the sense behind treating them collectively here.

A "deference mistake" occurs when C_2 relies on C_1's opinion without fully accounting for the deference regime under which C_1 decided the prior case, thereby using the precedent in a way C_1 may not have intended. C_2 could mistakenly treat C_1's opinion as if it involved more deference than it actually did (a "stronger" deference regime) or less; either type of error is a deference mistake.[75] The mistake could be explicit or implicit, and it may or may not be dispositive in a given case. But if precedent influences judicial decisions, and deference matters, then deference mistakes will have the potential to influence the way cases are decided and, in the long run, the shape of the law.

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[72] *See* Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2243 (2011) (agreeing with the Federal Circuit that the statutory presumption of patent validity codified the "common-law presumption based on 'the basic proposition that a government agency such as the [PTO] was presumed to do its job'" (quoting American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350 (Fed. Cir. 1984)); KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 426 (2007) (noting that the "rationale underlying the presumption" of patent validity is "that the PTO, in its expertise, has approved the claim").

[73] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *see* Renico v. Lett, 559 U.S. 766, 773 (2010) ("AEDPA thus imposes a highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt." (citation omitted) (internal quotation marks omitted)); *see also* Monique Anne Gaylor, Note, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 HOFSTRA L. REV. 1263, 1264 (2003) ("Although opinions differ on the practical magnitude of change in federal habeas review of state petitions wrought by the enactment of the AEDPA, the statute does mandate a level of federal deference to state court decisions on issues of federal law previously nonexistent." (footnote omitted)).

[74] *See* Charles T. Putnam & Charles T. Ferris, *Defending a Maligned Defense: The Policy Bases of the Qualified Immunity Defense in Actions Under 42 U.S.C. § 1983*, 12 BRIDGEPORT L. REV. 665, 708 (1992) ("As might be expected, the courts appear willing to grant wide deference to the judgment of correctional officials when those officials are confronted with situations in which the use of force is perceived as necessary."); *see also* Hoitt v. Vitek, 361 F. Supp. 1238, 1242 (D.N.H. 1973) ("This deference to the judgment of prison officials in perceiving what they consider to be an emergency situation and unilaterally acting to quell or prevent it has been recognized by the federal judiciary and reflects a proper understanding of a prison's need for discipline, safety, and security.").

[75] This definition includes the possibility that C_2 treats C_1's decision as having been qualified by deference when it was really de novo.

D. Why Would Courts Make Deference Mistakes?

Those who believe that deference regimes matter might still be skeptical of our thesis for another reason: the idea that a court might make a *mistake* about the relevant deference regime might seem bizarre. For example, it is well understood that a right must be "clearly established" to defeat a claim of qualified immunity, so the very fact that the defendant is a public official—or that the defendant has made a claim of qualified immunity—should alert the judge reading the opinion to the fact that what is at issue is whether the right is clearly established, not whether the right exists.

Yet it is easy to see how such a mistake might be made. A sloppy judge (or clerk) might not read an opinion in full, or might not attend to all of the details and circumstances surrounding a holding. A judge (or clerk) might take a single sentence or paragraph out of context. The availability of legal materials online, which allows individuals to search electronically for certain words or phrases or jump to certain portions of an opinion, might facilitate and exacerbate these types of errors.[76] And indeed, courts *do* make these types of mistakes, and they do so across a variety of legal doctrines, as we show in Part II. Even though we cannot quantify the frequency of such mistakes, we think most readers would agree that courts sometimes cite cases inappropriately, either intentionally or unintentionally (or both).

Judges may have strategic reasons for citing precedents misleadingly in some cases. But such mistakes may also occur where judges lack the resources to carefully consider each of their citations. When judicial caseloads surge, judges have less time to devote to each case. This can affect substantive outcomes.[77] Deference mistakes are also likely to become more common as average opinion length increases, giving judges less time to focus on each citation.[78] The average number of cases cited in federal appellate opinions has increased from around 15 in 1957 to over 30 in 2007, in part due to the ease of citation production through electronic legal research.[79]

Judges increasingly rely on law clerks (who are often fresh out of law school) to perform legal research and to draft opinions (as indicated by textual analysis,[80] statements by judges,[81] and even opinions themselves[82]). Nonprecedential cases may

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[76] One of us committed such an error while clerking, though the error was fortunately caught by a co-clerk.

[77] *See* Huang, *supra* note 5.

[78] *Cf.* Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621 (2008) (examining the increase in Supreme Court opinion length over time).

[79] Casey R. Fronk, *The Cost of Judicial Citation: An Empirical Investigation of Citation Practices in the Federal Appellate Courts*, 2010 U. ILL. J.L. TECH. & POL'Y 51, 70 tbl.1.

[80] *See* Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307 (2011).

[81] *See, e.g.*, RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 148 (1990) ("[M]ost judicial opinions are written by the judges' law clerks rather than by the judges themselves . . . ."); WILLIAM H. REHNQUIST, THE SUPREME COURT 261 (2002) ("After this [post-conference] discussion, I ask the clerk to prepare a first draft of a Court opinion and to have it for me in ten days or two weeks."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1383 (1995) ("It is an ill-kept secret that law clerks often do early drafts of opinions for their judges.").

[82] *See, e.g.*, Acceptance Ins. Co. v. Schafner, 651 F. Supp. 776, 778 (N.D. Ala. 1986) ("This Memorandum of Opinion was prepared by William G. Somerville, III, Law Clerk, in which the Court fully concurs.").

be written entirely by staff attorneys and law clerks with little supervision.[83] A law clerk might insert a quotation from some precedential opinion that supports his or her judge's argument without reading the entire opinion or considering its context, and judges might not verify every citation in their opinions.[84] In sum, we believe that there are many reasons why courts may make deference mistakes. We next bring some content to this existence claim by documenting instances in which courts have made such errors; Part III will then explicate our model of deference mistakes and the way in which they can exert long-term influence on legal doctrine.

II. Deference Mistakes in Practice

Part I showed that the three necessary elements for deference mistakes are present in the real-world legal system: (1) decisionmakers sometimes grant deference on issues that matter in future cases in ways that might be asymmetric; (2) this deference does sometimes affect outcomes; and (3) various institutional factors might cause courts to rely on precedent without considering the deference regime under which it was decided. This Part now demonstrates that deference mistakes have actually occurred in practice, that they may been dispositive and caused courts and agencies to err, and that they are a plausible source of some of the doctrinal movement that has occurred in these areas of law.

A. Federal Rights Under Qualified Immunity and Habeas: Not Clearly Established or Clearly Not Established?

Deference mistakes may be most pernicious when courts review issues of law under different standards. If a criminal defendant raises an issue of criminal procedure in the course of a criminal trial, the court will decide the issue according to whatever legal standard is intrinsic to the criminal procedure right itself. A court must decide whether a search was "reasonable," whether a defendant's waiver of her Fifth Amendment right was "voluntary," or whether a defendant was denied the right to "confront" an accuser. These are the baseline legal standards. As described in the following sections, however, if the same question arises in the context of a habeas petition or a § 1983 suit for damages, this baseline standard is not the only one at issue. A court must determine in addition whether the right was "clearly established"—that is, whether prior cases firmly establish the right, or whether it represents a step beyond existing law.[85] This is a higher standard and represents a position of deference, either to the state court that originally tried the defendant (habeas) or to the state actor who is the defendant (§ 1983).

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[83] *See* Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007); Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153 (2012).

[84] *Cf.* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1934 (2011) (stating that when federal courts "cite [state] cases that are outdated from a methodological perspective," "[t]hese citation choices are likely due to errors by law clerks or lawyers or to the tendency of courts to rely on the same (sometimes outdated) set of boilerplate precedents from case to case").

[85] We do not mean to imply that "clearly established" has the same meaning in both contexts. The precise meaning of the term is unimportant here; the only important point is that finding a right to be "clearly established" requires a more searching inquiry than *de novo* review.

If a court announces that a certain right was not "clearly established", and then courts rely on that precedent in a direct criminal appeal to conclude that the right does not exist at all, this mistake would tend to shrink the scope of the right. In other words, if courts regularly mistake a right that is not "clearly established" for one that is "clearly not established," the effect will be to contract the scope and power of that right.[86]

1. Habeas Relief for Criminal Defendants

The writ of habeas corpus allows a prisoner to challenge the legal authority for his detention. We focus here on 28 U.S.C. § 2254, which allows the writ to be granted when a state prisoner is held "in violation of the Constitution or laws or treaties of the United States."[87] Under AEDPA, such relief is available after a state-court merits adjudication only if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts."[88]

A court considering a habeas petition is thus not determining de novo whether there was a violation of federal law; rather, the court may only consider whether there are on-point Supreme Court "holdings, as opposed to . . . dicta" on the legal issue and whether the state court decision was "diametrically different"[89] from this precedent or involved an "unreasonable" application of law on which it is not "possible fairminded jurists could disagree."[90] The Supreme Court has made clear that it is not enough for the state court to have gotten the law wrong: "an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[91] In addition to this restricted legal review, a court considering a habeas petition must also give "remarkably deferential review" to "state court factfindings, actual or implied."[92]

Given this high degree of deference on both law and facts, we would expect federal courts at all levels to deny habeas relief—finding no "clearly established" violation of federal law—in many cases where they would have found a violation on direct review. It would be a mistake to rely on these habeas precedents when evaluating the existence of these rights on direct review, and yet numerous courts have done exactly that.

In *Harris v. Stovall*, the Sixth Circuit considered a habeas petition from an indigent defendant who argued that due process was violated when he was denied

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[86] As we will explain in Section III.C, such mistakes could also operate in the opposite direction: just because some court has held that a right is established does not mean that the right is "clearly established." We have not found any examples of such errors, and we think these errors less likely because the government tends to focus on the importance of the "clearly established" requirement in cases where it applies, but which kind of mistake dominates is ultimately an empirical question.

[87] 28 U.S.C. § 2254(a) (2012).

[88] *Id.* § 2254(d); *see generally* Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999).

[89] Williams v. Taylor, 529 U.S. 362, 405-06, 412 (2000).

[90] Harrington v. Richter, 131 S. Ct. 770, 786 (2011).

[91] *Id.* at 785 (quoting *Williams*, 529 U.S. at 410) (internal quotation marks omitted).

[92] 2 CHILDRESS & DAVIS, *supra* note 20, § 7.02.

transcripts from the earlier trial of his codefendants.[93] The defendant had hoped to use these transcripts to impeach the state's witnesses. The Supreme Court had held, in *Britt v. North Carolina*, that "the state must 'provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.'"[94] But the Sixth Circuit concluded that the Supreme Court had not specifically extended *Britt*'s principle to the situation in *Harris*: "Supreme Court precedent existing at the time of petitioner's trial did not dictate or compel a rule that a defendant is entitled to a free copy of a transcript of his codefendants' previous trial for impeachment of witnesses."[95] *Harris* was then cited by a district court *in an initial criminal trial* in denying a motion for transcripts from an indigent defendant:

> In *Harris v. Stovall* . . . this Circuit reviewed the limits of the United States Supreme Court's directive in *Britt*. . . . The Court concluded in *Harris* that U.S. Supreme Court precedent did not establish that the defendant was entitled to a free copy of a transcript of his co-defendants' previous trial for impeachment of witnesses.[96]

But this is a mistake: *Harris* did not say that "Supreme Court precedent did not establish" a right to free transcripts of earlier proceedings—it said that Supreme Court precedent did not *clearly* establish such a right. The Supreme Court of Ohio also made a deference mistake involving *Harris*: in rejecting a capital defendant's request for daily transcripts of his trial, the court erroneously cited *Harris* as "rejecting defendant's contention that *Britt* entitled him to transcripts from his accomplice's trial."[97] And a brief by the United States before the First Circuit similarly erred by citing *Harris* as "holding an indigent defendant is not entitled to free copies of transcripts from a co-defendant's trial."[98]

In *Brown v. Payton*,[99] the California Supreme Court held that the prosecutor's misstatements (that the jury should disregard the defendant's religious conversion) did not mislead the jury about its ability to consider mitigating evidence.[100] The U.S. Supreme Court agreed that the prosecutor was mistaken, but held that habeas relief was not warranted because the decision was not an objectively unreasonable application of clearly established federal law.[101] Two concurrences disagreed about whether they would have found an Eighth Amendment violation on direct review; Justice Breyer noted that "this is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference."[102] But *Payton* was later cited to reject challenges to similar prosecutorial statements in non-habeas cases. The Arizona Supreme Court stated that in *Payton*, the Supreme Court had

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[93] 212 F.3d 940, 941-42 (6th Cir. 2000).

[94] *Id.* at 944 (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

[95] *Id.* at 945.

[96] Carrion v. Wilkinson, 405 F. Supp. 2d 850, 851-52 (N.D. Ohio 2005) (citing *Harris*, 212 F.3d 940).

[97] State v. Treesh, 739 N.E.2d 749, 770 (Ohio 2001).

[98] Brief for Appellee at 50, United States v. Solano-Moreta, No. 09-1067, 2009 WL 7196601, at *50 (1st Cir. Sept. 2, 2009).

[99] 544 U.S. 133 (2005).

[100] *See id.* at 138-39.

[101] *Id.* at 147.

[102] *Id.* at 148 (Breyer, J., concurring); *see id.* at 147-48 (Scalia, J., concurring).

concluded that "the jury was adequately instructed as to mitigation," and that the prosecutor's comments at issue in the Arizona case were "[l]ikewise" allowable.[103] *Payton* was also cited by the Second Circuit in support of the conclusion that "it is extremely unlikely that the jury felt constrained in its consideration of . . . mitigating evidence" in a case where "the prosecutor erroneously argued that the jury could not consider mitigating evidence that was unrelated to the crimes for which he had been found guilty."[104]

In *Poole v. Goodno*, the Eighth Circuit affirmed the denial of a habeas petition because "[t]here is no clearly established Supreme Court law which holds that due process requires a jury trial in civil commitment proceedings or that incorporates the Seventh Amendment right to a jury for such cases."[105] But in five subsequent cases, the Minnesota Court of Appeals mischaracterized this case, repeatedly stating that "the Eighth Circuit has held that federal due process does not require a jury trial before a person is committed as [a Sexually Dangerous Person] under Minnesota law."[106] The First Circuit also cited *Poole* as a case where "the claim to a jury trial right in civil commitments has been rejected."[107]

In the habeas appeal *Sims v. Rowland*, the Ninth Circuit held that "the state court's failure to hold an evidentiary hearing sua sponte when presented with evidence of juror bias" was not contrary to clearly established federal law: "The reason is simple: the Supreme Court has not yet decided whether due process requires a trial court to hold a hearing sua sponte whenever evidence of juror bias comes to light."[108] But in a later direct appeal involving juror bias, the Ninth Circuit itself erroneously cited *Sims* as "holding that due process does not require a trial court to hold an evidentiary hearing sua sponte when presented with evidence of juror bias."[109]

The habeas petition in *Anderson v. Mullin* raised a double jeopardy challenge to defendant's prosecution for a lesser included offense after his conviction for a greater offense had been reversed based on insufficient evidence.[110] The Tenth Circuit denied the petition based on the Supreme Court's "express reservation" of this question in *Greene v. Massey*.[111] But then the Supreme Court of Kentucky stated that "[a]lthough the United States Supreme Court has not ruled upon this precise issue, at least three federal appellate courts have determined that it is permissible for a defendant to be retried for a lesser included offense" in these circumstances—citing *Anderson* and two

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[103] State v. Roque, 141 P.3d 368, 398 (Ariz. 2006).

[104] United States v. Fell, 531 F.3d 197, 221, 224 (2d Cir. 2008).

[105] 335 F.3d 705, 710-11 (8th Cir. 2003).

[106] *In re* Civil Commitment of Sargent, No. A04-1767, 2005 WL 406345, at *2 (Minn. Ct. App. Feb. 22, 2005); *see In re* Civil Commitment of Shell, No. A08-1043, 2009 WL 1182152, at *8 (Minn. Ct. App. May 5, 2009); *In re* Civil Commitment of Martin, A04-1634, 2005 WL 354088, a *5 (Minn. Ct. App. Feb. 15, 2005); *In re* Civil Commitment of Hartleib, No. A04-863, 2004 WL 2283558, at *2 (Minn. Ct. App. Oct. 12, 2004); *see also In re* Commitment of McEiver, No. A04-2002, 2005 WL 704298, at *2 (Minn. Ct. App. Mar. 29, 2005) ("There is no established law requiring a jury trial under the Seventh Amendment before a person is committed . . . under Minnesota law. (citing *Poole*, 335 F.3d at 710-11)).

[107] United States v. Carta, 592 F.3d 34, 43 (1st Cir. 2010).

[108] Sims v. Rowland, 414 F.3d 1148, 1153 (9th Cir. 2005) (citation omitted).

[109] United States v. Mitchell, 568 F.3d 1147, 1151 (9th Cir. 2009).

[110] 327 F.3d 1148, 1150-52 (10th Cir. 2003).

[111] *Id.* at 1155 (citing Greene v. Massey, 437 U.S. 19, 25 n.7 (1978)).

other habeas cases.[112] A federal district court similarly stated that *Anderson* held that "double jeopardy [is] no bar to prosecution for lesser included offense" in these circumstances.[113] These citations ignore the deferential context of *Anderson*: the habeas petition was necessarily rejected because of the Supreme Court's express reservation in *Greene*, but that does not mean that the Tenth Circuit would not have found a violation on direct review.

Finally, in *Newton v. Kemna*, the defendant had sought to disqualify a witness as incompetent based on drug use, and his habeas petition asserted that the trial court's refusal to grant access to the witness's psychiatric records violated the Confrontation Clause.[114] The Eighth Circuit noted that "the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges," but concluded that "[g]iven the restrictive nature of habeas review," it was not their "province to speculate as to whether the Supreme Court, if faced with the issue, would find that Missouri's physician-patient privilege must give way to a defendant's desire to use psychiatric records in cross-examination."[115] A later district court relied primarily on *Newton* in rejecting a party's request for a witness's medical records, erroneously stating that *Newton* "held that the trial court's denial of the criminal defendant's access to the witness's medical records did not violate the confrontation clause under the Sixth Amendment."[116] Another district court said that a criminal defendant's request for medical records "appears to be foreclosed by the Eighth Circuit's recent decision in *Newton v. Kemna*."[117] And a treatise cites *Newton* as support for the proposition that "privilege claims by testifying witnesses should generally be sustained."[118]

In sum, these examples illustrate that numerous courts have made deference mistakes by relying on habeas precedents in cases that arose on direct review. In the absence of other factors, the cumulative effect of such mistakes would be a systematic shrinking of federal rights. We would thus expect a declining success rate for both habeas petitions and direct criminal appeals.

There is some evidence that the availability of habeas relief is shrinking, and not only in response to AEDPA's 1996 enactment.[119] There are many possible

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[112] Cohron v. Commonwealth, 306 S.W.3d 489, 498 n.26 (Ky. 2010) (citing *Anderson*, 327 F.3d at 1154-58; Shute v. Texas, 117 F.3d 233 (5th Cir. 1997); Beverly v. Jones, 854 F.2d 412 (11th Cir. 1988)).

[113] Hargrove v. Ohio Dep't of Rehab. & Corr., No. 1:08-CV-00669, 2010 WL 518176, at *12 (S.D. Ohio Feb. 3, 2010).

[114] 354 F.3d 776, 779 (8th Cir. 2004).

[115] *Id.*at 781-82.

[116] Jackson v. Wiersema Charter Serv., Inc., No. 4:08CV00027, 2009 WL 1531815, at *1 (E.D. Mo. June 1, 2009).

[117] United States v. Stone, No. CR. 05-30049, 2005 WL 1845153, at *3 (D.S.D. July 29, 2005).

[118] 2 CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:43 & n.71 (3d ed. 2012).

[119] *See* Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 102 tbl.2 (2012) (examining all 115 Supreme Court habeas decisions from 1996 to 2011 and finding that the success rate declined from under 50% in the 1990s to just over 20% in the 2000s to under 15% in 2010-11); *see also* NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 79 (2011) ("[T]he percentage of petitioners who obtain relief has decreased over time.").

explanations for the shrinking availability of habeas relief, including changing judicial philosophies, and many of these explanations may be complementary.[120] We simply add one more possible explanation: that deference mistakes—in which courts mistake rights that are not clearly established for those that are clearly not established—may be contributing to a systematic doctrinal creep by limiting the range of substantive rights that may be enforced.

2. Qualified Immunity in § 1983 and Bivens Suits

A similar deference regime exists in the qualified immunity context. Plaintiffs may seek redress for constitutional violations by government officials under § 1983[121] (for state actors) or *Bivens*[122] (for federal officials), but the doctrine of qualified immunity limits government liability for damages.[123] The Supreme Court has held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[124] Thus, as in the habeas context, courts might evaluate whether federal rights exist (applying a less deferential standard), or whether the rights are "clearly established" (the more deferential standard of § 1983/*Bivens* cases), although the "clearly established" language was judicially rather than statutorily created.

One might expect a similar problem as in the habeas context: even if a court thinks there was a constitutional violation, the government will win on qualified immunity if the violation was not "clearly established." And if similar situations arise outside the qualified immunity context—for example, where a lawsuit seeks an injunction or the suppression of evidence or involves municipal policy[125]—and courts mistakenly rely on these qualified immunity precedents to conclude that there was no violation, the result would be a systematic shrinking of constitutional rights. In other words, courts might mistake rights that are not clearly established for ones that are clearly not established.

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[120] We certainly do not mean to imply that changes to habeas doctrine have been driven entirely by mechanistic effects that have escaped judicial notice. *See, e.g.*, Hawthorne v. Schneiderman, 695 F.3d 192, 199 (2d Cir. 2012) (Calabresi, J., concurring) ("During the past several decades, many both inside and outside the courts have called for federal habeas review to focus on issues that cast doubt upon the prisoner's guilt, rather than technical errors unrelated to guilt or innocence. Yet, amidst these calls, the Supreme Court and Congress have shaped habeas review so that technical errors—typically by prisoners and their counsel—often preclude genuine inquiry into guilt and innocence." (citations omitted) (internal quotation marks omitted)).

[121] 42 U.S.C. § 1983 (2012).

[122] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[123] *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 726-42, 947-1006 (6th ed. 2009) (describing *Bivens*, § 1983, and qualified immunity).

[124] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Hope v. Pelzer, 536 U.S. 730, 741 (2002) (earlier cases with "materially similar" facts are not necessary to show that a "clearly established" right was violated); United States v. Lanier, 520 U.S. 259, 268 (1997) (right may be established by consistent Courts of Appeals precedent); Anderson v. Creighton, 483 U.S. 635, 640 (1987) (right must be established in a "particularized" rather than general sense).

[125] *See* Camreta v. Greene, 131 S. Ct. 2020, 2036 n.5 (2011) (listing these as situations where qualified immunity is unavailable).

But there is an important difference between qualified immunity and habeas that makes these deference mistakes less likely. In the 2001 decision *Saucier v. Katz*, the Supreme Court mandated a particular sequencing for qualified immunity cases, holding that courts must first consider whether the alleged conduct violated a constitutional right before considering whether that right is clearly established.[126] Many criticized *Saucier* for mandating dicta about important constitutional questions,[127] but others argued that the benefits of constitutional articulation outweighed these concerns.[128] In 2009, the Supreme Court abrogated mandatory *Saucier* sequencing in *Pearson v. Callahan*,[129] but the Court has emphasized that sequencing "is sometimes beneficial to clarify the legal standards governing public officials."[130] And post-*Pearson* studies have found that when courts concluded that qualified immunity applied, only around twenty-five to thirty percent of circuit cases and fewer than five percent of district cases exercised their discretion to avoid the underlying constitutional issue.[131]

A formal deference mistake (as we have defined it) requires precedent that finds immunity without reaching the constitutional question, and given the small universe of such cases, it is unsurprising that we found fewer examples of such mistakes than in the habeas context. But that is not to say that no such examples exist.

For example, in *DiMeglio v. Haines*, a zoning inspector alleged that the zoning commissioner violated his First Amendment rights by reassigning him in retaliation for his speech at a public meeting.[132] The Fourth Circuit held that the zoning commissioner was protected by qualified immunity: it was not clearly established that the inspector's speech was protected because he was speaking as an employee.[133] The court noted that shortly before the events here, "the Fifth Circuit [in *Terrell*] actually had held that whether speech is protected . . . depends upon whether the employee is speaking as an employee or as an interested citizen," and that it was thus "at least questionable" whether the speech was protected.[134] A district court within the Fourth

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[126] Saucier v. Katz, 533 U.S. 194, 201 (2001). The Supreme Court had followed this approach in earlier cases. *See* Wilson v. Layne, 526 U.S. 603, 614 (1999) ("Since the police action in this case violated petitioners' Fourth Amendment right, we now must decide whether this right was clearly established at the time of the search."); Mitchell v. Forsyth, 472 U.S. 511, 535 (1985) ("Mitchell is immune from suit for his authorization of the Davidon wiretap notwithstanding that his actions violated the Fourth Amendment.").

[127] *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275-81 (2006).

[128] *See, e.g.*, Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401 (2009); Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539 (2007); *cf.* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115 (2009) (arguing that the *Pearson* rule is defensible in certain contexts).

[129] 555 U.S. 223 (2009).

[130] Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011).

[131] *See* Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 629 & tbl.2 (2011) (examining 190 circuit cases from 2009 to 2010 and finding that 31.4% of denied claims avoided the constitutional question); Colin Rolfs, Comment, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 489, 496-497 & tbls.1-2 (2011) (examining 100 district cases and 100 circuit cases from 2009 and finding that of denied claims, 24.6% of circuit decisions and 2.7% of district decisions avoided the constitutional question).

[132] 45 F.3d 790, 794 (4th Cir. 1999).

[133] *Id.* at 805.

[134] *Id.* at 805-06 (citing Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360 (5th Cir. 1986)).

Circuit then cited *DiMeglio* in support of its rejection of a First Amendment claim, stating that "the critical determination is 'whether the speech at issue . . . was made primarily in the plaintiff's role as citizen or primarily in [her] role as employee.'"[135] But the language quoted is from *Terrell*, the Fifth Circuit case cited to show that the right was not clearly established—*DiMeglio* was not adopting *Terrell*'s holding.

Given the smaller number of deference mistakes in the qualified immunity context than in the habeas context, one might conclude that habeas courts should similarly be encouraged to determine whether a right is established before deciding whether it is clearly established. One scholar has even argued that mandatory *Saucier*-type sequencing should be required in habeas cases as a benefit to future criminal defendants.[136] There is, however, a vigorous empirical debate over whether *Saucier* actually led to an expansion in constitutional rights, with some evidence demonstrating that when courts were forced to reach constitutional issues, they almost always decided these issues against the defendant.[137] Nancy Leong, who conducted one of these studies, argues that "[t]he act of recognizing a right, yet precluding a remedy, could create cognitive dissonance for many judges," and "[r]ather than tolerate this cognitive dissonance, judges may be subconsciously inclined to deny that a constitutional violation occurred at all."[138]

The empirical debate over *Saucier* illustrates that while requiring courts to be explicit about how they would have decided an issue without deference may reduce the risk of formal legal error, it could also worsen the underlying deference problem. If a decisionmakers engage in motivated reasoning to align their non-deferential conclusions with their deferential ones, then these (erroneous) non-deferential conclusions will become formally enshrined in the caselaw.

The risk of technical errors would also be reduced by eliminating the heightened deference regime, such that the inquiry in habeas and § 1983 cases were

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[135] Jackson v. Alleghany County, No. 7:07CV0417, 2008 WL 3992351 (W.D. Va. Aug. 28, 2008) (quoting *DiMeglio*, 45 F.3d at 805).

[136] Stephen I. Vladeck, *AEDPA,* Saucier*, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595 (2009). *But see* Berghuis v. Thompkins, 560 U.S. 370, 391-92 (2010) (Sotomayor, J., dissenting) (criticizing the majority for announcing rules that are unnecessary to resolve the case "which is governed by the deferential standard of review set forth in" AEDPA).

[137] *Compare* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 690 (2009) [hereinafter Leong, Saucier *Experiment*] (finding "virtually no change in the percentage of cases where courts held that a constitutional violation had taken place and a striking increase in the percentage of cases where courts held that no constitutional violation had taken place"), Rolfs, *supra* note 131, at 486 n.130 (finding "a lopsided increase in the frequency with which courts find that no right was violated"), *and* Sampsell-Jones & Yauch, *supra* note 131, at 639 (finding that "the constitutional questions avoided pre-*Saucier* are now almost uniformly decided in defendants' favor"), *with* Hughes, *supra* note 128, at 422 tbl.1 (reporting a post-*Saucier* increase in cases announcing constitutional rights), *and* Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 547-49 (2010) (reporting a not-statistically-significant increase in rights-restricting holdings post-*Saucier* and a statistically significant increase in rights-affirming holdings). Nancy Leong has argued that the differences between her study, the Hughes study, and the Sobolski-Steinberg study stem from her inclusion of nonprecedential cases and multiple claims, as well as the different time periods of the studies. *See* Nancy Leong, *Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries*, 105 NW. U. L. REV. 969, 972 n.32 (2011).

[138] Leong, Saucier *Experiment*, *supra* note 137, at 704. *But see* Jeffries, *supra* note 128, at 125 (arguing that cognitive dissonance does not apply in this context because judges are not making unconstrained choices).

simply whether a right exists. But this approach seems likely to make the deference problem worse. As explained in Section I.B, formal deference regimes typically reflect underlying functional considerations. Even without the "clearly established" language, courts may be reluctant to require the government to pay money damages in a § 1983 case, or to contradict a state court by granting a habeas petition, unless there was clear notice of the unlawfulness of the state's conduct. In other words, deference regimes typically exist for a substantive reason, and courts might reach similar outcomes for this reason irrespective of the formal deference regime. Without the "clearly established" language to serve as a flag, future courts would be at even greater risk of making deference mistakes by applying habeas or § 1983 precedents in direct appeals.

In Part IV, we will return to this issue of how the deference mistakes problem is best addressed, but first we provide a few more examples of deference mistakes in other contexts.

B. Criminal Law and Procedure: De Novo, Abuse of Discretion, or Plain Error?

Mistakes between the different contexts of direct criminal appeals and habeas and qualified immunity cases are particularly striking, but mistakes can also occur wholly within the context of direct appeals. Many issues in criminal cases are reviewed under deferential standards, and later courts (both district and appellate) sometimes fail to account for a precedent's deference regime.

When a party to a criminal case appeals an issue that was raised at trial, the appellate court typically considers that issue under one of several deferential standards. Criminal procedure questions, including evidentiary determinations, challenges for cause, jury instructions, and motions for a new trial, are reviewed under a deferential "abuse of discretion" standard.[139] Others issues are reviewed under a clearly erroneous standard, including questions of the defendant's competency and the voluntariness of waivers.[140] Appeals of guilty verdicts based on insufficient evidence are reviewed according to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements beyond a reasonable doubt."[141] However, when the appealing party has failed to raise and preserve the issue at trial, all of these types of questions are reviewed only for "plain error," an even more deferential standard.[142]

Unlike the habeas and qualified immunity deference regimes, in which the deference formally favors the state, deferential standards of review such as "plain error" could involve deference to either party in a criminal appeal. But in practice, the deference usually favors the state, as most criminal appeals are brought by criminal defendants who lost below. Defendants appeal convictions but prosecutors generally

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[139] *See* 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(e) (3d ed. 2000 & Supp. 2012).

[140] *See id.*

[141] *Id.* (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[142] *See id.* § 27.5(d).

cannot appeal when the defendant prevails,[143] and defendants appeal sentences much more frequently than prosecutors do.[144] Appellate criminal caselaw will thus appear more government-friendly than the appellate court may have intended. This one-sided appeal problem will compound the deference mistakes in the habeas and qualified immunity contexts discussed above: in addition to mistaking the "clearly established" standard, subsequent courts may not fully account for an appellate court's deferential standard of review, which most commonly favors the government's position.[145]

Below we provide examples of two kinds of deference mistakes that have occurred in criminal cases: (1) relying on precedents holding that an error did not rise to the level of "plain error" to reject claims of error when this high level of deference is inappropriate, and (2) relying on precedents holding that an evidentiary ruling was not an abuse of discretion when the same issue later arises in a non-deferential posture. We then conclude this section by examining the role of deference mistakes in the overall doctrinal development of criminal law and procedure.

1. Plain Error Mistakes

Even those who accept that deference regimes sometimes matter might be skeptical that courts would ever distinguish between different deference regimes, rather than lumping different standards such as "abuse of discretion" and "plain error" under one mental category of "deference."[146] We agree that the labels for these deference regimes have little intrinsic meaning, but we think they reflect the way judges generally treat the different situations in which they apply. When a criminal defendant fails to object at trial so that a district court judge has no warning of a

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[143] *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."); Benton v. Maryland, 395 U.S. 784, 795-97 (1969). A judgment for the defendant entered on legal grounds—rather than based on a jury verdict or on the insufficiency of the evidence—may be appealed when a reversal would not require a second trial. *See* United States v. Scott, 437 U.S. 82, 91 & n.7 (1978); United States v. Wilson, 420 U.S. 332, 345 (1975). Prosecutors may also appeal pre-trial suppressions of evidence. *See* 18 U.S.C. § 3731 (2012).

[144] For example, the federal courts of appeals decided 5,844 sentencing appeals from federal criminal defendants in 2011, compared with fifty-three sentencing appeals from the government. *See* U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.56-56A (2012), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/SBTOC11.htm.

[145] In habeas appeals, the government will necessarily have won below. And qualified immunity appeals may be more likely to be cases in which the government won below for two reasons. First, a denial of qualified immunity may only be appealed when it involves a question of law (whereas grants of qualified immunity may always be appealed). *See* Ashcroft v. Iqbal, 556 U.S. 662, 671-74 (2009) (summarizing the law); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' . . . ."). Second, the government—as a repeat player in qualified immunity cases—may also be more likely to settle cases that are likely to result in unfavorable appellate precedent. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 102 (1974) ("[W]e would expect the body of 'precedent' cases—that is, cases capable of influencing the outcome of future cases—to be relatively skewed toward those favorable to [repeat players.").

[146] A district court abuses its discretion whenever it makes an error of law, Koon v. United States, 518 U.S. 81, 100 (1996), but a district court will only be reversed under plain error review if "the legal error [is] clear or obvious, rather than subject to reasonable dispute," if it "affected the appellant's substantial rights," and if "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," Puckett v. United States, 556 U.S. 129, 135 (2009) (internal quotation marks omitted).

potential problem, appellate judges may be exceedingly reluctant to undo the hard work of their colleague. This hesitance may well surpass whatever caution an appellate judge would exercise before overturning a lower court decision reviewed for abuse of discretion. Problems can arise, however, if in one case the defendant doesn't object at trial and the court of appeals affirms on plain error review, and then in subsequent cases—in which defendants do object at trial—that precedent is used mistakenly by district or appellate courts to find against the defendants.

For example, in *United States v. Ristine*, the Eighth Circuit held that it was not plain error to prohibit the defendant from "possessing 'any pornographic materials'" or entering "'any establishment' where pornography or erotica can be obtained" as a condition of supervised release from imprisonment, despite precedent from another circuit suggesting that such a condition raises First Amendment concerns.[147] The court explicitly highlighted the highly deferential standard of review:

> Were we reviewing this special condition for an abuse of discretion, we might be forced to select the line of reasoning we find more compelling, but the standard here is plain error. . . . [W]e cannot conclude that the District Court committed an error that is clear under current law because . . . the current law concerning this issue is unsettled. Because the imposition of the condition was not plain error, we are bound to uphold it.[148]

It is a deference mistake to rely on *Ristine* to find that similar conditions on supervised release are not an abuse of discretion without realizing or recognizing the difference in posture of the two cases. Yet a later Eighth Circuit panel did exactly that. The court found that a ban on entering any location where pornography could be obtained was not an abuse of discretion because the restriction was "virtually identical to wording [the Eighth Circuit] previously upheld" in *Ristine*.[149] Similarly, *Ristine* held that conditions prohibiting the defendant from owning a camera and restricting his computer usage did not constitute plain error,[150] and subsequent Eighth Circuit cases explicitly relied on *Ristine* to affirm similar restrictions where the defendant did preserve his objection below.[151]

As another example, deference mistakes have also resulted from the Fourth Circuit's decision in *United States v. Hernandez*, which rejected a defendant's procedural challenge to his sentence based on the district court's failure to provide an adequate individualized assessment.[152] The court noted that while "the district court in this case might have said more," the defendant had "lodged no objection to the adequacy of the district court's explanation," and he "has simply not demonstrated

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[147] 335 F.3d 692, 694-95 (8th Cir. 2003).

[148] *Id.* at 695.

[149] United States v. Mefford, 711 F.3d 923, 928 (8th Cir. 2013) (citing *Ristine*, 335 F.3d at 694-95).

[150] *Ristine*, 335 F.3d at 695-96.

[151] *See* United States v. Koch, 625 F.3d 470, 481 (8th Cir. 2010) ("We have previously upheld the imposition of [conditions including a ban on owning a camera] . . . ." (citing *Ristine*, 335 F.3d at 696)); United States v. Boston, 494 F.3d 660, 668 (8th Cir. 2007) ("A restriction on computer usage does not constitute an abuse of discretion . . . ." (citing *Ristine*, 335 F.3d at 696)).

[152] 603 F.3d 267, 271-73 (4th Cir. 2010).

that the district court's explanation constituted plain error."[153] It thus would be a mistake to rely on *Hernandez* when reviewing a sentence under a more stringent standard. The Fourth Circuit itself recognized as much in a later nonprecedential case, rejecting the government's reliance on *Hernandez*—even though "the district court's reasoning in *Hernandez* was essentially identical to the district court's reasoning in this case"— because the review was not for plain error.[154]

And yet numerous other Fourth Circuit cases have erroneously relied on *Hernandez* while affirming sentences under the less deferential abuse-of-discretion standard. One case cited *Hernandez* as "finding no procedural error" under similar circumstances and affirmed a sentence even though "it would have been preferable for the district court to have specifically mentioned" certain sentence-related factors.[155] Another panel wrote, "[T]he district court's explanation was more than sufficient. *See Hernandez* . . . ," with no mention of the differing standard of review.[156] Numerous other abuse-of-discretion cases have made the same mistake.[157] *Hernandez* also has little applicability for district courts imposing sentences in the first instance, but a district court relied on *Hernandez* as having found "the district court's 'sparse explanation' legally sufficient,"[158] with no mention of the highly deferential standard of review or *Hernandez*'s hint that "the district court . . . might have said more."[159]

2. Pro-Prosecutor Evidentiary Determinations

Deference mistakes in criminal cases do not require confusion between two different standards of review, such as plain error and abuse of discretion. They also arise in cases that are reviewed under a single standard when district courts mistake deferential appellate precedents for more binding guidance. For example, as we have noted, just because an evidentiary holding is not an abuse of discretion does not mean that the contrary holding would not also be allowed. If litigants are more likely to appeal rulings admitting a certain type of evidence than excluding it, appellate caselaw would be skewed toward deferential affirmances (and reversals) of those admissions. Subsequent courts might then be biased toward admitting this evidence. And while a shift toward admitting more evidence might not systematically favor either criminal defendants or prosecutors—after all, each side often has evidence to present—certain kinds of evidence might be more likely to be offered by one side.

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[153] *Id.* at 272-73.

[154] United States v. Jackson, 397 F. App'x 924, 926 (4th Cir. 2010) (per curiam).

[155] United States v. Bennett, 439 F. App'x 278, 280 (4th Cir. 2011) (per curiam).

[156] United States v. Hood, 487 F. App'x 69, 70 (4th Cir. 2012) (per curiam).

[157] *E.g.*, United States v. Messer, No. 13-4379, 2013 WL 5977339, at *2 (4th Cir. Nov. 12, 2013) (per curiam) ("[T]he district court's explanation, while brief, was legally adequate . . . ." (citing *Hernandez*)); United States v. Buczkowski, 505 F. App'x 236, 238-39 (4th Cir. 2013) (per curiam) ("The court's explanation of the within-Guideline sentence may not have been lengthy, but it was sufficient." (citing *Hernandez*)); United States v. Garner, 489 F. App'x 721, 722 (4th Cir. 2012) (per curiam) ("[T]he district court provided an adequate explanation . . . ." (citing *Hernandez*)); United States v. Clemons, 412 F. App'x 646, 649 (4th Cir. 2011) (relying on *Hernandez* as holding that the "sentence [was] not procedurally unreasonable").

[158] Pierce v. United States, No. 11-C-0781, 2011 WL 3881019, at *6 (E.D. Wis. Sept. 2, 2011).

[159] *Hernandez*, 603 F.3d at 272.

As one such example, in a sample of twenty-five appellate cases discussing the admission or exclusion of latent fingerprint evidence, twenty-four were cases in which the defendant had appealed and the appellate court affirmed the admission of fingerprint evidence against the defendant.[160] In every case, the appellate court reviewed the lower court's decision only for abuse of discretion. There are significant questions about the scientific reliability of fingerprint evidence, as summarized by the 2009 forensic science report from the National Academy of Sciences.[161] But a district court faced with this one-sided body of appellate fingerprint precedent might erroneously conclude that it has no discretion to exclude such evidence.

For example, in *United States v. Cerna*, the district court stated that a method of latent fingerprint identification "specifically has undergone *Daubert* analysis by a number of courts and has been repeatedly upheld as sufficiently reliable."[162] But the three cases cited had only held that admitting such evidence was not an abuse of discretion. The first specifically acknowledged shortcomings in the method but concluded that "[t]he district court did not abuse its discretion."[163] The second explicitly held that abuse-of-discretion review was appropriate even where the district court made no findings of fact.[164] And the third was very clear about the deferential standard of review: "Our task is not to determine the admissibility or inadmissibility of fingerprint analysis for all cases but merely to decide whether, on this record, the district judge in this case made a permissible choice in exercising her discretion to admit the expert testimony."[165] It is a mistake to conclude from these deferential precedents that fingerprint evidence clearly should be admitted, but the *Cerna* court seemed to do exactly that.

Similarly, Michael Risinger found ten post-*Kuhmo Tire* criminal appellate cases on the admissibility of handwriting identification evidence, all of which held that admission of the evidence was not an abuse of discretion.[166] And he recognized the inherent probability of deference mistakes:

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[160] A Westlaw search on February 5, 2013 for [latent /s fingerprint /s (admi! exclu!)] located 25 precedential federal appellate cases discussing the admissibility of latent fingerprint evidence, and in 24 out of 25, the criminal defendant had appealed and the appellate court affirmed the admission of finger print evidence against the defendant. *See, e.g.*, United States v. Mitchell, 365 F.3d 215, 246 (3d Cir. 2004) ("[T]he District Court did not abuse its discretion in holding the government's [latent fingerprint] evidence admissible."). In the remaining case, the government sought a writ of mandamus directing the district court to admit fingerprint evidence, which the court of appeals granted. *See In re* United States, 614 F.3d 661 (7th Cir. 2010). The district court had excluded the evidence because of concerns about government tampering, not concerns about reliability, and the court of appeals reassigned the case because of the district judge's "unreasonable fury toward the prosecutors." *Id.* at 664-66.

[161] NATL'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 8 & n.7, 139-45 (2009); *see also* Robert Epstein, *Fingerprints Meet* Daubert*: The Myth of Fingerprint "Science" Is Revealed*, 75 S. CAL. L. REV. 605 (2002).

[162] No. CR 08-0730, 2010 WL 3448528, at *6 (N.D. Cal. Sept. 1, 2010).

[163] United States v. Pena, 586 F.3d 105, 110-111 (1st Cir. 2009).

[164] Mitchell, 365 F.3d at 233.

[165] United States v. Baines, 573 F.3d 979, 989 (10th Cir. 2009).

[166] D. Michael Risinger, *Goodbye to All That, or A Fool's Errand, by One of the Fools: How I Stopped Worrying About Court Responses to Handwriting Identification (and "Forensic Science" in General) and Learned to Love Misinterpretations of* Kumho, 43 TULSA L. REV. 447, 467 (2007).

> [T]he overwhelming problem [with] these appellate decisions . . . is their inevitable skew. . . . The skew problem arises because appeals by the government challenging exclusion or limitation of prosecution-proffered expert testimony (including handwriting testimony) are virtually non-existent. . . . So the only cases appellate courts see involve situations where the testimony was admitted and the defendant was convicted. What appellate courts would have to say about exclusion or limitation [of handwriting identification evidence] under an abuse of discretion standard is unknown, but it seems likely that, given an appropriate hearing and findings, that result would be most likely be affirmed also.[167]

Deference mistakes can also arise from deferential affirmances of decisions to exclude evidence. In *United States v. Frazier*, the Eleventh Circuit affirmed the district court's decision to exclude a forensic investigator's testimony on behalf of the defendant.[168] The Eleventh Circuit did not state that allowing the expert to testify would have been an abuse of discretion; to the contrary, it stressed "the basic principle that an appellate court must afford the district court's gatekeeping determinations 'the deference that is the hallmark of abuse-of-discretion review.'"[169] When discussing "the central issue" of whether the reliability of the testimony had been established, the Eleventh Circuit "reiterate[d] that the district court has the same broad discretion in deciding how to assess the reliability of expert testimony that it has in its ultimate reliability determination."[170]

Despite the Eleventh Circuit's explicit explanation of the role of deference in its decision, a subsequent district court managed to misread its opinion. Wrote this district court in a case decided two years later, "The Eleventh Circuit held that, although the witness was qualified as an expert in forensic investigations, he had not offered a reliable foundation."[171] And another district court rejected a defense expert's testimony that it found to be "similar to the expert testimony that the Eleventh Circuit decided was properly excluded in *United States v. Frazier*."[172]

3. Deference Mistakes and Doctrinal Development

We have given some examples of actual deference mistakes in the area of criminal law and procedure, but determining the net effect of such mistakes on doctrine is far more complicated and ripe for empirical study.[173] In some cases, courts

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[167] *Id.* at 468-69.

[168] 387 F.3d 1244 (11th Cir. 2004) (en banc).

[169] *Id.* at 1248 (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997)).

[170] *Id.* at 1264.

[171] Landrin v. MGA Entm't, Inc., No. 05-21145, 2006 WL 5249735, at *4 (S.D. Fla. Jan. 5, 2006); *see also* R.K. v. Kanaskie, No. 02-61534, 2007 WL 2026388, at *4 (S.D. Fla. July 9, 2007) (making a similar assertion).

[172] United States v. Certantes-Perez, No. EP-12-CR-217, 2012 WL 6155914, at *6 (W.D. Tex. Dec. 11, 2012).

[173] Designing such studies is difficult, in large part because of the difficulty identifying deference mistakes, as discussed in the following section on employment discrimination. We think the best approach may be to begin with an area of doctrine that may plausibly have shifted due to deference mistakes and then

have explicitly distinguished precedents based on differing standards of review.[174] In others, the effect of precedents' deference regimes on the outcome may be far subtler.

The cases described above are clear examples of deference mistakes because the subsequent courts appear to have honestly mistaken deferential precedents as binding. But even where a district court understands the deference regime of each precedent and makes no formal legal error, we would still classify it as a "deference mistake" if the court reaches a different conclusion than it otherwise would due to risk-aversion and uncertainty about the appellate court's unqualified position. For example, a district court might survey the appellate caselaw on fingerprint evidence and conclude, "I don't think this evidence is sufficiently reliable, and maybe the court of appeals would agree, but I'll admit it anyway because I know that is within my discretion and I don't know if I would get reversed for excluding it." These strategic deference mistakes may be even more pernicious than honest deference mistakes in that they are harder to detect, but are just as likely to skew doctrine for reasons that have little to do with normatively outcomes (such as who appeals more often). We will explain that point further in the next Part.

Of course, the effect of deference mistakes on doctrinal development may be overwhelmed by other systematic factors. For example, a number of commentators have suggested that the asymmetry in criminal appeals will cause trial judges to favor defendants to avoid reversal.[175] This effect might be outweighed by a competing desire to "preserve reviewability,"[176] although Professor Kate Stith has argued that this pro-prosecution bias is generally implausible, and she has presented a number of other mechanisms by which the asymmetry in appeals may systematically push doctrine in a pro-defendant direction.[177]

Stith briefly notes, however, that a contrary pro-prosecution effect could result from appellate deference, through a mechanism similar to the one we propose. As she explains, "deference toward the legal evaluations of the trial court" could result in "a tendency to affirm" convictions, and "[i]f observers (including the trial court) do

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to have someone with substantive expertise in the area trace out the development of that doctrine to see whether any of the significant cases seem attributable to the problem we identify.

[174] *See, e.g.*, Collins v. Alco Parking Corp., 448 F.3d 652, 658 (3d Cir. 2006); United States v. Aguilera, 106 F. App'x 892, 896 (5th Cir. 2004); Marshall v. United States, 436 F.2d 155, 157 n.4 (D.C. Cir. 1970); Highmark Fed. Credit Union v. Hunter, 2012 S.D. 37, ¶ 19, 814 N.W.2d 413, 418; State v. Reed, 21 S.W.3d 44, 46 (Mo. Ct. App. 2000). *But see* United States v. Shelton, 937 F.2d 140, 143-44 (5th Cir. 1991) (rejecting a defendant's argument that a precedent was "not controlling because it was decided under a different standard of review," and choosing to treat the precedent as "controlling" anyway).

[175] *See, e.g.*, Justin Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 511 (1927); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 38 (1990).

[176] Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 520 n.22 (1973); *see* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS 64 (1987) (arguing that allowing government appeals "of jury instructions might at times work in the defendant's favor" by eliminating the incentive to "not frame questionable jury instructions that would favor the defendant, since judges know that the government cannot appeal instruction on the ground of legal error after an acquittal").

[177] Stith, *supra* note 175, at 15-42.

not recognize and adjust for any such tendency, they will infer from appellate decisions a constitutional standard below the original standard."[178] Such mistakes could then propagate: "If the appellate court defers in each successive round of appeals, the apparent precedential standard of law could continually shift in a pro-government direction, absent countervailing bias or correction . . . ."[179] Other commentators have similarly argued that the asymmetry in appeals results in a one-sided body of precedent, causing pro-government doctrinal shift.[180]

This pro-prosecution deference effect is independent from the other sources of bias Stith describes, and all of these effects could be concurrently pushing doctrine in different directions. Although Stith finds the sources of pro-defendant bias more plausible, we see no a priori reason to conclude that one of these effects dominates the development of criminal law—indeed, all of these effects might be swamped by the shifting political views of the judiciary.[181] As Stith acknowledges, "we need further empirical research on the extent of pro-defendant—or pro-government—bias resulting from the present asymmetry in criminal appeal rights."[182] But even if the effects of deference mistakes are mitigated or even overwhelmed by other trends within the law, that does not mean that deference mistakes are unimportant. They will exert influence, even if that influence is not the sole or primary driver of doctrinal development.

C. Employment Discrimination

The opposite asymmetry in appeals may be responsible for a pro-defendant shift in employment discrimination law, including cases brought under Title VII of the Civil Rights Act of 1964.[183] Unlike in criminal law, there is no legal barrier to appeals from either side. However, empirical work has shown that in practice plaintiffs file the vast majority of federal employment discrimination appeals.[184] This asymmetry exists because few employment discrimination cases survive to trial,[185] and most

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[178] *Id.* at 27-28 (footnote omitted).

[179] *Id.* at 28.

[180] *See* Adam Harris Kurland, *Court's in Session: A Law Professor Returns to the Majestic Chaos of a Criminal Jury Trial*, 52 HOW. L.J. 357, 369-70 (2009); Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1, 8 n.15 (2008).

[181] *Cf.* Martin Bonventre & Amanda Hiller, *Public Law at the New York Court of Appeals: An Update on Developments, 2000*, 64 ALB. L. REV. 1355, 1382-83 (2001) (describing how pro-defendant outcomes at New York's highest court fluctuated with political changes); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1423 (2006) ("[T]he Burger and Rehnquist Courts . . . demonstrate a clear and unmistakable shift from a liberal, pro-defendant position prior to 1968 to a conservative, pro-state position after 1968.").

[182] Stith, *supra* note 175, at 55.

[183] Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2012)).

[184] *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 109 (2009) (reporting that from 1988 to 2004, "plaintiffs' appeals . . . are ten times more frequent in absolute numbers than defendants' appeals").

[185] *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 66, at tbl.C-4 (showing that of 745 federal employment discrimination cases terminated in 2013, only 3.8% reached trial).

dispositive pretrial motions are made by defendants.[186] Plaintiffs, who have the burden of establishing factually intensive issues such as intent, can rarely succeed on summary judgment.[187] If the defendant's motion to dismiss or summary judgment motion is denied, the defendant cannot appeal,[188] and the case often settles before trial.[189] Thus, most employment discrimination appeals are by plaintiffs after the district court has ruled for the defendant on summary judgment.[190]

In a recent essay, Judge Nancy Gertner argues that this asymmetry has led to shifts in substantive discrimination law.[191] She notes that even though the standard of review for summary judgment orders is formally de novo, appellate courts generally defer to district court judgments in employment discrimination cases because "[i]t takes substantial work, not to mention a motivated decisionmaker, to dig into the voluminous summary judgment record and find a contested issue of fact," and "few appellate court judges are so motivated in this area."[192]

Indeed, only about ten percent of district court judgments for defendants in employment discrimination cases are reversed on appeal.[193] As "[t]he body of precedent detailing plaintiffs' losses grows," future "[a]dvocates seeking authority for their positions will necessarily find many more published opinions in which courts granted summary judgment for the employer than for the employee."[194] This dynamic, Judge Gertner argues, has caused judges to develop rules "that have effectively gutted Title VII."[195] Other commentators have noticed a similar pro-defendant trend in employment discrimination doctrine.[196]

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[186] *See* Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson, U.S. Dist. Court for the E. Dist. of Pa. 4 tbl.1 (Nov. 2, 2007), http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf (noting that plaintiffs file only eight to nine percent of summary judgment motions in employment discrimination cases).

[187] *See* Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 113 (2012) ("Plaintiffs rarely move for summary judgment. They bear the burden of proving all elements of the claim, particularly intent, and must do so based on undisputed facts. Defendants need only show contested facts in their favor on one element of a plaintiff's claim." (footnotes omitted)).

[188] *See* Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011) ("Ordinarily, orders denying summary judgment do not qualify as 'final decisions' subject to appeal."); Jackson v. City of Atlanta, 73 F.3d 60, 62 (5th Cir. 1996) ("Denials of motions to dismiss and motions for summary judgment in the Title VII context are non-final pretrial orders.").

[189] *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Cases Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004) ("[A]lmost 70 percent of employment discrimination and other cases are terminated by settlement.").

[190] *See* Clermont & Schwab, *supra* note 184, at 110 display 2.

[191] Gertner, *supra* note 187.

[192] *Id.* at 114.

[193] *See* Clermont & Schwab, *supra* note 184, at 110 display 2. More precisely, appellate courts reverse in 8.7% of cases in which defendants won at trial and 10.7% of cases in which defendants won at pretrial. *Id.* These rates are lower than the 11.8% reversal rate for all private civil cases, *see supra* note 66, even though review of pretrial decisions is formally de novo and review of many other civil issues is with deference to the decision of the trial court.

[194] Gertner, *supra* note 187, at 115.

[195] *Id.* at 123.

[196] *See, e.g.*, Lee Reeves, *Ragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 482 & n.1 (2008) (citing scholars who have addressed the "judiciary's decreasing receptivity to employment discrimination claims"); Kerri Lynn Stone, *Shortcuts in Employment*

Our model of deference mistakes makes explicit what is perhaps implicit in Judge Gertner's argument: a specific explanation of precisely how the problem of asymmetric employment discrimination precedent can lead to substantive doctrinal shifts. If appellate courts generally defer to pro-defendant district court judgments in employment discrimination appeals, future litigants and courts might rely on these precedents without appreciating the underlying implicit deference regime. This type of error is not quite the same as the typical deference mistake we describe. Here, it is unstated deference by the first court, not an error in reading the precedent by a subsequent court, that is causing the problem. Nonetheless, we think this category of situation fits our model in a general sense because here, as with a typical deference mistake, the second decisionmaker is using the precedent in a way that the initial decisionmaker may not have intended. These deference mistakes have the capacity to lead to a pro-defendant doctrinal shift.

Employment discrimination is thus an area in which someone who has closely studied the development of doctrine believes that deference mistakes have had an appreciable impact. But note that the relevant deference regime is *informal*: Judge Gertner argues that the problem arises from appellate courts' tendency to defer to district courts that find for employers on summary judgment, even though the formal standard of review is de novo. This example illustrates that eliminating formal legal errors will not solve the deference mistake problem—and it may serve as a cautionary tale for those who would eliminate formal deference regimes, such as the presumption of patent validity discussed in the following section.

D. Patent and Trademark Inflation

When the PTO grants a patent or registers a trademark, those intellectual property rights are entitled to presumptions of validity. A granted patent may only be invalidated by meeting the higher evidentiary burden of clear and convincing evidence (rather than a preponderance of the evidence).[197] Similarly, a registered trademark is entitled to a presumption that it is protectable—that it is either inherently distinctive (such that consumers are unlikely to view it as merely descriptive) or that it has secondary meaning (such that consumers in fact view it primarily as designating a particular source of goods or services).[198] Judicial evaluations of granted patents and trademarks thus involve some deference to the PTO's validity determinations, and this deference might cause a court to hold patents valid or trademarks protectable even though the court would have refused to recognize an intellectual property right without these evidentiary presumptions.

It would thus be a mistake for the PTO or courts considering *new* applications for patents or trademarks (or reevaluating patents during reexamination) to rely on

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Discrimination Law, 56 ST. LOUIS U. L.J. 111, 168 (2011) (discussing the "movement of the judiciary toward foreclosing employment discrimination plaintiffs' cases").

[197] *See* 35 U.S.C. § 282 (2012); Microsoft Corp. v. i4i Ltd. Partnership, 131 S. Ct. 2238, 2243 (2011).

[198] *See* 15 U.S.C. § 1115(a) (2012) (stating that registration "shall be prima facie evidence of the validity of the registered mark"). Note that while U.S. patent rights exist only when the PTO has granted a patent application, U.S. trademark rights stem from *use* of the mark—registration merely results in some legal advantages, such as the presumption of validity. *See* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 19:1.25, 19:9 (4th ed. 1994 & Supp. 2012).

precedents from the infringement context in which *granted* patents and trademarks were held valid.[199] Just because there is not clear and convincing evidence that a patent is invalid does not mean that a similar patent application should not be denied under the lower preponderance standard that operates in the examination context.[200] As we will explain in more detail in Part III, the cumulative effect of these mistakes would tend to be an expansion in the boundaries of patentability and of what kinds of marks are inherently distinctive. Indeed, commentators have observed this expansion in both the patent[201] and the trademark[202] contexts, though they did not recognize or consider the possibility that the expansion might be driven by deference mistakes.

These mistakes could also occur in the opposite direction: it would be a mistake to rely on precedents rejecting applications for *new* patents or trademarks in order to invalidate *granted* patents or trademarks—and these errors would tend to contract the boundaries of patentability and of inherent distinctiveness. Although these "reverse mistakes" are more plausible than in the habeas context,[203] we suspect that they are still relatively less frequent, both because there are more precedents involving granted patents and trademarks to be erroneously applied and because the PTO has the chance to erroneously rely on these precedents when granting hundreds of thousands of patents and trademark registrations each year. (Of course, both of these effects might be swamped by other doctrinal pressures, including other kinds of deference mistakes.[204])

Despite the error inherent to relying on cases out of context, courts[205] and the PTO[206] regularly cite cases from one context to the other without considering whether this is appropriate in light of the different evidentiary standards. For example, in *Mintz v. Dietz & Watson, Inc.*, the Federal Circuit concluded that the

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[199] *See* Ouellette, *supra* note 10, at 368-71.

[200] *See In re* Oetiker, 977 F.2d 1443, 1445 (Fed. Cir. 1992) ("[P]atentability is determined on the totality of the record, by a preponderance of evidence . . . ."); *In re* Caveney, 761 F.2d 671, 674 (Fed. Cir. 1985) ("Because it is the only standard of proof lower than clear and convincing, preponderance of the evidence is the standard that must be met by the PTO in making rejections . . . .").

[201] *See generally* Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 473 & n.6 (2011) (citing sources).

[202] *See, e.g.*, Ann Bartow, *The True Colors of Trademark Law: Greenlighting a Red Tide of Anti Competition Blues*, 97 KY. L.J. 263, 264 (2009) ("The decision to recognize colors alone as protectable, defensible trademarks is an iconic example of reflexive expansion of trademark rights by members of the judiciary."); Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J.L. & TECH. 36, 69 (2011) ("The scope of what can be a trademark today has expanded [by courts] beyond the typical word, phrase, or unique design that comprises most trademarks."); Joseph Cockman, *Running from the Runway: Trade Dress Protection in an Age of Lifestyle Marketing*, 89 IOWA L. REV. 671, 690 (2004) (describing "the judicial expansion of trade dress protection").

[203] *See supra* note 86.

[204] For example, patent law is similar to the employment discrimination context discussed above in that defendants are likely to settle if they do not win on summary judgment, making patent plaintiffs more likely to appeal. This may push the law in a defendant-friendly direction.

[205] *See, e.g.*, *In re* Vaidyanathan, 381 F. App'x 985, 994 (Fed. Cir. 2010) (citing Perfect Web Techs. v. InfoUSA, Inc., 587 F.3d 1324, 1329 (Fed. Cir. 2009)); *In re* Bond, 910 F.2d 831, 835 (Fed. Cir. 1990) (per curiam) (citing Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1050-51 (1988)).

[206] *See, e.g.*, *Ex parte* Kim, No. 2009-010047, 2010 WL 3827134, at *2-4 (B.P.A.I. Sept. 28, 2010) (reversing an obviousness rejection, and relying in part on the Federal Circuit's affirmance of a district court nonobviousness finding in *In re* Omeprazole Patent Litigation, 536 F.3d 1361 (Fed. Cir. 2008)); *Ex parte* Albritton, No. 2008-5023, 2009 WL 671577, at *16 (B.P.A.I. Mar. 13, 2009) (reversing an obviousness rejection in a "close case" based on *Arkie Lures, Inc. v. Gene Larew Tackie, Inc.*, 119 F.3d 953 (Fed. Cir. 1997)).

evidence did not meet the clear-and-convincing hurdle for invalidity, despite a "simple" meat-encasing invention that appeared obvious under the district court's "common sense" view, where the patentee presented evidence such as initial skepticism by experts followed by commercial success.[207] *Mintz* arguably made it more difficult to invalidate patents for obviousness in the context of a suit for infringement,[208] but the meat-encasing invention at issue may well have been obvious under the preponderance standard of a PTO proceeding, so *Mintz* should have limited precedential value in that context. And yet the Patent Trial and Appeal Board within the PTO has repeatedly cited *Mintz* when reversing examiner rejections of patents for obviousness.[209]

Deference mistakes also may be responsible for an expansion in the kinds of claims that pass the "definiteness" requirement for patentability,[210] under which claims must "particularly point[] out and distinctly claim[]" the invention.[211] In 2001, the Federal Circuit held that whether a claim is invalid for indefiniteness is a pure question of law, but that to "accord respect to the statutory presumption of patent validity," it would find granted claims indefinite "only if reasonable efforts at claim construction prove futile" and the claim is "insolubly ambiguous."[212] (This standard was abrogated by the Supreme Court last term in *Nautilus v. Biosig*.[213]) But this high barrier to invalidating a patent for indefiniteness was at times improperly imported into the examination context, as illustrated by decisions of the reviewing board within the PTO.[214] Even after the PTO explicitly clarified that examiners should use "a lower threshold of ambiguity" such that claims are indefinite if "amenable to two or more plausible constructions,"[215] other PTO decisions continued to improperly apply the higher standard.[216] And once these unclear patent applications are granted, they

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[207] 679 F.3d 1372, 1377-79 (Fed. Cir. 2012).

[208] *See* Jason Rantanen, Mintz v. Dietz & Watson*: Hindsight and Common Sense*, PATENTLY-O (May 30, 2012), http://patentlyo.com/patent/2012/05/mintz-v-dietz-watson-hindsight-and-common-sense.html.

[209] *See* Switech Medical AG Requester & Respondent v. Sanuwave, Inc., 2013 WL 4636443, at *6 (P.T.A.B. Aug. 28, 2013); *Ex parte* Werner Montabaur, 2013 WL 5273983, at *3 (P.T.A.B. June 6, 2013); *Ex parte* Kueppers, 2012 WL 6772030, at *4 (P.T.A.B. Dec. 19, 2012).

[210] *Cf.* Christa J. Laser, *A Definite Claim on Claim Indefiniteness: An Empirical Study of Definiteness Cases of the Past Decade with a Focus on the Federal Circuit and the Insolubly Ambiguous Standard*, 10 CHI.-KENT J. INTELL. PROP. 25 (2010) (finding that the Federal Circuit increasingly holds claims not indefinite).

[211] 35 U.S.C. § 112 (2012).

[212] Exxon Research & Eng'g Co. v. United States, 265 F.3d 1371, 1375 (Fed. Cir. 2001) (citation omitted); *see id.* at 1376 ("A decision holding a patent invalid for indefiniteness presents a question of law, which we review de novo.").

[213] Nautilus, Inc. v. Biosig Instruments, Inc., 134 S. Ct. 2120 (2014).

[214] *See, e.g.*, *Ex parte* Crenshaw, No. 2008-4083, 2008 WL 6678100, at *8 (B.P.A.I. Nov. 18, 2008) ("Claims are indefinite 'if reasonable efforts at claim construction prove futile,' that is, if a claim 'is insolubly ambiguous, and no narrowing construction can properly be adopted.'" (quoting *Exxon*, 265 F.3d at 1375)); *Ex parte* Spina, No. 2008-2016, 2008 WL 4768094, at *2-3 (B.P.A.I. Oct. 31, 2008) (reversing an examiner's rejection for indefiniteness because the claims were not "insolubly ambiguous"); *Ex parte* Saaski, No. 2008-3989, 2008 WL 4752052, at *4 (B.P.A.I. Oct. 28, 2008) (same); *Ex parte* Machida, No. 2008-2096, 2008 WL 4449324, at *2, 5 (B.P.A.I. Sept. 4, 2008) (same).

[215] *Ex parte* Miyazaki, 89 U.S.P.Q.2d (BNA) 1207, 1211 (B.P.A.I. Nov. 19, 2008).

[216] *See, e.g.*, *Ex parte* Golle, No. 2011-005718, 2012 WL 5937546, at *4 (P.T.A.B. Nov. 23, 2012) (reversing an examiner's rejection for indefiniteness because the claims were not "insolubly ambiguous"); *Ex parte* Kessel, No. 2011-004050, 2012 WL 4165616, at *3 (B.P.A.I. Sept. 17, 2012) (same); *Ex parte* Coble,

receive the presumption of validity, making them even less likely to be struck down as indefinite.

A review of all 324 Federal Circuit patentability decisions over five years found only one that distinguished a precedent based on the different standards.[217] Indeed, there is even some dissent within the Federal Circuit regarding whether the contexts are really different: when affirming a nonobviousness judgment in *Fresenius v. Baxter*, Judge Dyk noted that "[i]t is entirely possible that the [PTO] will" invalidate the claims on reexamination,[218] while Judge Newman disputed that "a PTO decision on reexamination [could] override a judicial decision."[219] The PTO did find the claims obvious on reexamination, and the Federal Circuit affirmed, noting the different evidentiary standards.[220] Judge Newman dissented from the panel decision and from the denial of rehearing en banc, describing the PTO's decision as "administrative nullification of a final judicial decision."[221] The three-judge concurrence in the rehearing denial explained the different standards:

> In a court proceeding, a patent is not found "valid." A judgment in favor of a patent holder in the face of an invalidity defense or counterclaim merely means that the patent challenger has failed to carry its burden of establishing invalidity by clear and convincing evidence in that particular case—premised on the evidence presented there.[222]

But the opinion was still criticized as an example of the PTO overruling Federal Circuit, as if there were no difference between validity decisions in the two contexts.[223] As long as some patent decisionmakers treat infringement and examination precedents equivalently, the potential for patent-related deference mistakes will continue.

Trademarks might raise the same sorts of issues that we see in the patent context. A trademark is only valid if it is "distinctive," and if a mark does not have "inherent" distinctiveness—i.e., if it is merely descriptive of the product it signifies—it must have "acquired" distinctiveness (known as "secondary meaning"), such that

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No. 2011-004125, 2012 WL 4483292, at *2 (B.P.A.I. Sept. 17, 2012) (same); *Ex parte* Dionne, No. 2011-003995, 2012 WL 3613695, at *4 (B.P.A.I. Aug. 21, 2012) (same).

[217] *See* Ouellette, *supra* note 10, at 369 & n.119; *In re* Swanson, 540 F.3d 1368, 1379 (Fed. Cir. 2008) ("[T]he court's final judgment and the examiner's rejection are not duplicative—they are differing proceedings with different evidentiary standards for validity.").

[218] Fresenius USA, Inc. v. Baxter Int'l, Inc., 582 F.3d 1288, 1306 (Fed. Cir. 2009) (Dyk, J., concurring).

[219] *Id.* at 1305 n.1 (Newman, J., concurring).

[220] *In re* Baxter Int'l, Inc., 678 F.3d 1357, 1364 (Fed. Cir. 2012).

[221] *Id.* at 1366 (Newman, J., dissenting); *see In re* Baxter Int'l, Inc., 698 F.3d 1349, 1351-55 (Fed. Cir. 2012) (Newman, J., dissenting from denial of rehearing en banc).

[222] *Baxter*, 689 F.3d at 1351 (O'Malley, J., concurring). The parties subsequently disputed the effect of a PTO reexamination proceeding on a pending infringement action. Fresenius USA, Inc. v. Baxter Int'l, Inc., 721 F.3d 1330 (Fed. Cir.), *reh'g en banc denied*, 733 F.3d 1369 (Fed. Cir. 2013).

[223] *See, e.g.*, Kevin E. Noonan, In re Baxter International, Inc. *(Fed. Cir. 2012)*, PATENT DOCS (May 17, 2012, 11:59 PM), http://www.patentdocs.org/2012/05/in-re-baxter-international-inc-fed-cir-2012.html; Matthew R. Osenga, *PTO Overrules Federal Circuit*, INVENTIVE STEP (May 18, 2012, 10:23 AM), http://inventivestep.net/2012/05/18/pto-overrules-federal-circuit.

buyers view the mark as uniquely distinctive of a particular source of goods.[224] The PTO's refusal to register a mark—based on either lack of inherent distinctiveness or lack of secondary meaning—is reviewed for substantial evidence.[225] Registration creates a rebuttable presumption that a mark is distinctive.[226] And when a court of appeals considers a challenge to trademark validity in infringement litigation, it must consider both this evidentiary presumption and the deferential standard of review, as distinctiveness is a factual issue that can only be reversed if clearly erroneous.[227]

For example, in *Nautilus Group, Inc. v. ICON Health & Fitness, Inc.*,[228] the Federal Circuit affirmed the grant of a preliminary injunction in a trademark infringement suit, including the finding that "Bowflex" is a strong mark (i.e., is inherently distinctive). The Federal Circuit said that it "cannot say that . . . the court clearly erred in preliminarily finding Bowflex to be a suggestive mark," and that it "d[id] not think the court clearly erred in finding that [the mark owner] has strengthened a presumptively weak suggestive mark through its advertising." *Nautilus* was then cited by the PTO as support for the conclusion that the unregistered BEST REST was not merely descriptive.[229]

If the presumptions of validity for granted patents and trademarks are indeed contributing to doctrinal inflation in these contexts, one solution might be to change the formal legal rules, such as by eliminating the presumption of validity—a route the Supreme Court recently rejected in the patent context in *Microsoft v. i4i*,[230] contrary to the urgings of patent law academics.[231] But the nebulous impact of mandatory sequencing in the qualified immunity context illustrates that simply changing the formal rules might not help, depending on the source of deference.[232] In the patent context, even without a formal presumption of validity, courts might simply be more reluctant to invalidate issued patents and disrupt settled expectations than to reject a new patent application. For example, we have argued that the Supreme Court's statement in *Nautilus v. Biosig* that the presumption of validity does not affect the legal standard for indefiniteness[233] might have the perverse effect of undermining the PTO's

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[224] *See generally* Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law* 3 (Working Paper, Jan. 15, 2013), *available at* http://ssrn.com/abstract=2195989 (summarizing the requirements for a trademark to be protectable).

[225] *See In re* Bayer Aktiengesellschaft, 488 F.3d 960, 964 (Fed. Cir. 2007) ("The determination that a mark is merely descriptive is a factual finding, and this court reviews the [PTO's] fact finding for substantial evidence."); *In re* Pacer Tech., 338 F.3d 1348, 1349 (Fed. Cir. 2003) ("Whether an asserted mark is inherently distinctive is a factual determination made by the [PTO].").

[226] *See* 2 MCCARTHY, *supra* note 198, § 11:43.

[227] See *id.* § 11:3. Distinctiveness cannot be challenged for registered marks that have become "incontestable" through five years of use, *see id.* § 11:44, so it is also possible that a court evaluating a contestable mark might mistakenly rely on a decision on the strength of an incontestable mark.

[228] 372 F.3d 1330 (Fed. Cir. 2004).

[229] Dreamwell, Ltd. v. Kittrich Corp., No. 91188186, 2011 WL 1495462 (T.T.A.B. Mar. 29, 2011).

[230] Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238 (2011) (affirming a heightened evidentiary standard for establishing invalidity of a granted patent).

[231] *See* Brief Amici Curiae of 37 Law, Business, and Economics Professors in Support of Petitioner, Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238 (No. 10-290).

[232] *See supra* notes 137-138 and accompanying text.

[233] Nautilus, Inc. v. Biosig Instruments, Inc., 134 S. Ct. 2120, 2130 n.10 (2014) (stating that the "presumption of validity does not alter the degree of clarity that § 112, ¶ 2 demands from patent

recent efforts to demand greater clarity in the examination context.[234] We discuss this option of eliminating formal deference variations further in Part IV.

* * *

This Part has shown that deference mistakes are far from theoretical. Habeas precedents holding that a federal right was not "clearly established" have been relied on in standard criminal cases to conclude that the right does not exist. Criminal appeals holding that an error did not rise to the level of "plain error" have been used to justify affirmances where the standard of review was supposed to be more searching. Opinions holding that evidentiary rulings were not abuses of discretion have been read as stronger statements on whether the evidence should be allowed. And decisions upholding patents in the infringement context have been used to justify granting new patents that are not entitled to the same presumption of validity. In short: courts make deference mistakes. Such mistakes are unlikely to be limited to the few doctrinal areas we have surveyed, or to judicial or agency decisionmakers. Indeed, Trevor Morrison has argued that a similar effect may influence decisionmaking at the Office of Legal Counsel in a pro-executive direction.[235]

Of course, deference mistakes are important (and problematic) even if they never exert a lasting influence on doctrine. Any deference mistake has the potential to lead to an erroneous result in the case in which it occurs. But deference mistakes can play an even more pernicious role when they lead to long-term shifts in legal doctrine. In the following Part, we develop a model of judging and error that demonstrates how cumulative deference mistakes can lead to systematic doctrinal shifts.

III. A Model of Deference Mistakes and Their Influence

A single deference mistake, by itself, may be a significant matter. A judge may decide a case incorrectly, or litigants may settle a case for more or less than it is worth (or incorrectly decide to pursue or not pursue the case in the first place), because of such a misinterpretation. Misinterpretations might also propagate if a court incorrectly cites a prior opinion and subsequent courts rely upon the mistaken citation without noticing the mistake.[236] But courts and parties make errors of many types on a

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applicants"). Shortly before *Nautilus* was decided, the Federal Circuit affirmed the PTO's use of a different indefiniteness standard in the examination context, *In re* Packard, 751 F.3d 1307, 1312 (Fed. Cir. 2014), but this conclusion appears incompatible with the Supreme Court's statement in *Nautilus*.

[234] *See* Lisa Larrimore Ouellette & Jonathan Masur, *How Will* Nautilus *Affect Indefiniteness at the PTO?*, PATENTLY-O (June 5, 2014), http://patentlyo.com/patent/2014/06/nautilus-affect-indefiniteness.html.

[235] Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1719-20 (2011) (book review) (noting that the OLC only produces written opinions about policies it deems lawful, so "new OLC lawyers might overread certain written opinions to support the legality of policies or actions OLC had earlier deemed unlawful in oral advice," resulting in "a jurisprudence that is more one-sided than OLC itself has intended").

[236] *Cf.* EEOC v. Serv. Temps Inc., 679 F.3d 323, 332 (5th Cir. 2012) ("[I]n neither case does the chain of citations and authorities lead to any substantive support for the proposition that those courts apply."); Adam D. Chandler, Comment, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 YALE L.J. 2183, 2191 (2011) ("[T]he First Circuit's now-settled holding on Puerto Rico's Eleventh Amendment immunity is ultimately based on a judicial game of 'telephone.'").

regular basis.[237] There is no reason to believe that deference mistakes are more common or more severe than any other type of error.

Yet, as we have suggested, the effect of these errors will not necessarily be confined to the cases in which they occur. Over time, across large numbers of cases, deference mistakes can systematically skew legal doctrine. Any type of judicial error could, of course, affect legal doctrine. But errors will only exert a systematic skew on doctrine if they are biased in one direction or another. Most types of judicial errors will be randomly distributed.[238] But that is not the case for deference mistakes, which could point systematically in one direction or another depending upon how courts and doctrine are structured. In the sections that follow, we set forth a model of deference mistakes and describe the mechanisms that could generate systematic evolution of the law.

A. Deference Regimes: A Typology

As we explained above, we are interested in situations in which, at time t_1, court C_1 decides a particular legal issue. At time t_2, court C_2 is confronted by a similar legal issue in a different case, and C_1's opinion is either binding or persuasive precedent.[239] As we described, a deference mistake occurs when C_2 relies on C_1's opinion without fully accounting for the deference regime under which C_1 decided the prior case, thereby using the precedent in a way C_1 may not have intended.

The cases that interest us can arise in multiple ways. There are cases in which the deference regime is a deferential burden of proof or standard of evidence, such as "clear and convincing evidence" or "clearly established federal law." In these cases, C_1 applies the particular burden of proof, which may include deference to a prior decisionmaker C_0. C_2 later misunderstands (or intentionally mischaracterizes) the standard applied by C_1. Alternatively, there are cases in which the deference regime arises from a standard of review. That is, there is a lower court C_0 that produces a judgment at t_0. This judgment is then reviewed—under some standard of deference—by C_1 at t_1. C_2 later misunderstands the deference regime applied by C_1. The interaction between C_0 and C_1 is very important to the mechanisms we describe, but fundamentally it is the relationship between C_1's precedent and C_2's interpretation of that precedent that can drive long-term evolution in the law. We do not differentiate

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[237] *See, e.g.*, Saldana Iracheta v. Holder, 730 F.3d 419, 423-24 (5th Cir. 2013) (noting that the government had "conceded that Article 314 of the Constitution of Mexico," which it had relied on in numerous prior cases, "does not exist and never did"); Nancy Morawetz, *Convenient Facts:* Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600 (2013); Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, July 2, 2008. *See generally* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013) (arguing that judicial attention is a scarce resource and that error correction will never be perfectly achieved).

[238] It is of course possible that random errors will not be evenly distributed, particularly if the overall number of errors is low. But in expectation, they will be evenly distributed.

[239] As we noted previously, C_1 and C_2 could be any combination of decisionmakers: appellate courts, trial courts, administrative bodies, or other legal institutions. All that is necessary is that C_2 would consider C_1's opinion to be at least persuasive on the issue. *See supra* note 71.

between deferential burdens of proof and standards of review in our model because they are analytically similar.[240]

Courts can generate deference mistakes in three distinct circumstances. First, some areas of law are governed by what we call "asymmetric" deference regimes, in the sense that legal issues sometimes reach appellate courts under a more deferential standard that *always* favors one type of party. For example, Section II.A described the legal regimes for habeas and § 1983, which are biased toward the government (as compared with direct criminal appeals), and Section II.D described the legal regimes for granted patents and trademarks, which are biased toward the IP holder (as compared with cases involving IP rights that the PTO has not yet approved). We describe these areas of law as being governed by asymmetric deference regimes because only the government, and only IP rightsholders, will ever be the beneficiaries of the more deferential standard of review.

Second, some legal issues arise under what we call "symmetric" deference regimes. Consider, for example, evidentiary questions, which can arrive at the courts of appeal under either of two deference regimes: abuse of discretion or plain error. A court mistaking a precedent governed by one regime for the other would be making a deference mistake. Importantly, however, either deference regime can attach to either side of an evidentiary question: evidentiary admissions and exclusions can each be reviewed for either abuse of discretion or plain error.[241] Accordingly, as a conceptual matter both sides could benefit equally from the various deferential standards of review, though as we will see the practical situation may be quite different.

Third and finally, courts can generate deference mistakes even if there is only one applicable deference regime. For instance, when a party loses a motion for change of venue or forum non conveniens and appeals, review is for abuse of discretion.[242] Even if appellate courts were only ever confronted with change of venue appeals governed by an abuse of discretion regime, deference mistakes might nonetheless result, as we will explain below in Part III.C. We hesitate to claim that the law of venue and forum (or any other legal issue) is "governed" by this sort of "unitary" deference regime, because it is always possible that a case might reach the appellate

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[240] Consider, for instance, "arbitrary and capricious" review of agency rulemaking by federal courts. 5 U.S.C. § 706. This could be thought of as a unitary burden of proof: a party challenging a rulemaking must always prove that the agency's decision was arbitrary and capricious. Or it could be thought of as a standard of review: the federal court (C_1) is reviewing the agency's decision (C_0) with deference and will overturn it only if it was arbitrary and capricious. The two ideas can be modeled identically, and so we do not differentiate between them here.

[241] While plain error review of evidentiary exclusions might seem unusual, there are many cases in which the court of appeals has found that the party offering the evidence failed to preserve the proper argument. *See, e.g.*, Perkins v. Silver Mountain Sports Club & Spa, LLC, 557 F.3d 1141, 1147 (10th Cir. 2009); United States v. Roti, 484 F.3d 934, 936 (7th Cir. 2007); Watson v. O'Neill, 365 F.3d 609, 615 (8th Cir. 2004); United States v. Thompson, 279 F.3d 1043, 1048 (D.C. Cir. 2002).

[242] *See* United States v. Lipscomb, 299 F.3d 303, 338 (5th Cir. 2002) ("We review all questions concerning venue under the abuse of discretion standard."); Windt v. Qwest Commc'ns Int'l, Inc., 529 F.3d 183, 189 (3d Cir. 2008) ("This Court reviews a district court's dismissal of a complaint on forum non conveniens grounds for abuse of discretion.").

courts under a plain error standard if one party failed to object below.[243] Rather, our claim is that courts may generate deference mistakes even if they only ever review cases under a single standard of review.

In the sections that follow, we present a model of judicial decisionmaking that explains how systematic asymmetries in the law might allow deference mistakes to propagate and eventually influence the long-term evolution of the law. We begin with areas governed by asymmetric deference regimes in Section III.B. Rather than proceed to symmetric deference regimes, we then detour to consider a model of unitary deference regimes in Section III.C. The reason for this is that unitary regimes are actually a special case of symmetric deference regimes, and our model of symmetric deference regimes will draw upon and build from our model of unitary deference regimes. Finally, in Section III.D we address symmetric deference regimes.

One last note is in order. It is perhaps evident that C_0, C_1, and C_2, the various actors in our models, all might be multi-member bodies. C_0 might be a district court composed of multiple different district judges, or an agency with many decisionmakers. C_1 is often an appellate court composed of multiple judges who sit in panels. And C_2 may well be the same (or a similarly situated) appellate court, or the same district court or agency as C_0. For ease of explication we will generally refer to C_0, C_1, and C_2 as unitary actors, but our analysis generalizes fully to the case of multi-member actors. That is, when we discuss how C_1 or C_2 would decide a case, we are really describing how the median member of that court (or agency) would vote. When we describe the possibility that C_0 or C_1 might make random errors, we also mean to include the possibility that one judge (or a three-judge panel) of those courts will have a different view of the law than the court itself holds. Our use of unitary-actor shorthand is not meant to obscure any substantive consideration. We now turn to our model of deference regimes and deference mistakes.

B. Asymmetric Deference Regimes

As described above, some legal questions can arise under a deferential burden of proof or legal standard that systematically favors a particular class of litigants. Here, we use patent law as our paradigm case to illustrate our model of deference mistakes.

For ease of explication we employ a linear model of judicial decisionmaking, in which all cases can be arrayed along a single dimension. Here, in our patent example, the cases range from strongest (for the patent holder) to weakest—that is, from the least likely to be invalid to the most likely. Following attitudinal models of judging, we assign the Federal Circuit two "ideal points" or "cutpoints": one for cases governed by a clear-and-convincing evidence standard, and one for cases governed by a preponderance-of-the-evidence standard.[244] (That is, along any given dimension of patentability, each judge, were she left to her own devices, would draw a line at a

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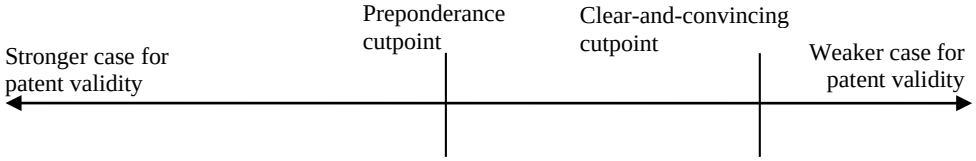
[243] *See, e.g.*, United States v. McCorkle, 688 F.3d 518, 522 (8th Cir. 2012) (reviewing a venue challenge for plain error).

[244] *See, e.g.*, Masur, *supra* note 201, at 483 (employing such a model); GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946-1963, at 220 (1965); *see also* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989) (quantifying Justices' ideological preferences).

given point and allow patents up to that point and no further.[245]) The further to the right, the more permissive the standard. Figure 1 displays this graphically:

Figure 1: The Federal Circuit's Patent Cutpoints



Each time a federal court or the PTO (C_2) reviews a patent's validity (or a patent application's patentability), it will inevitably turn to some precedents, primarily from the Federal Circuit (C_1). Suppose C_2 misreads a clear-and-convincing evidence case (either invalidating or upholding a patent), as having been decided instead under a preponderance standard. It will have misunderstood that precedent as more favorable to the patent than it actually was. The misunderstood precedent may then affect C_2's decision, causing the court to err in a patent-favoring direction. Or suppose instead that C_2 misreads a case decided under a preponderance standard as a clear-and-convincing evidence case. It will have misunderstood that precedent as *less* favorable to the patent than it actually was. The misunderstood precedent may then cause C_2 to err in an anti-patent direction if the precedent influences its eventual decision.

Crucially, that new C_2 precedent will then influence subsequent decisions *even if future courts never make the same deference mistake that C_2 made*. By integrating its deference mistake into an opinion, C_2 has effectively enshrined the mistake while simultaneously sanitizing it, making it much more difficult for a subsequent court to recognize and correct the mistake.[246]

Thus, each deference mistake can alter the overall shape of the law. The C_2 precedent, which includes the deference mistake, will influence the law in one direction or another—in a patent-favoring direction, in our example. This means that all courts that would treat C_2's decision as precedential *or influential* will adjust their cutpoints in light of it. In theory, if C_2 made repeated mistakes of a single type—either pro-patent or anti-patent—these mistakes could push the law further and further in one direction. This would be a highly significant development. Individual mistakes in particular cases are naturally important, but they occur frequently and for a wide variety of reasons. An overall long-term trend in the law, which will naturally influence hundreds or thousands of subsequent cases, is a much more serious matter.

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[245] *See* Masur, *supra* note 201, at 483; Nicola Gennaioli & Andrei Shleifer, *Judicial Fact Discretion*, 37 J. LEGAL STUD. 1, 18-20 (2008) (employing an ideal point-based model); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1347 (2009) (employing an ideal point model of judging); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 780-82 (2008) (explaining the use of ideal points in decision models).

[246] C_2's decisions can enshrine deference mistakes even if it lacks formal precedential value. For example, if C_2 is the PTO, and it repeatedly makes deference mistakes to grant patents that should not have been granted, those granted patents will then be entitled to the presumption of validity and will be more likely to survive challenges in the infringement context.

We wish to stress that C_2's deference mistakes can exert a gravitational influence on the law even if C_2 is not an appellate court or other body with the power to create binding precedent. So long as C_2's decisions will be influential or persuasive to future legal decisionmakers, repeated deference mistakes will have a lasting impact upon the evolution of doctrine. That impact will surely be greater if the C_2 making deference mistakes is an appellate court, but it will exist even if C_2 is a district court or an administrative agency, as in our discussion of the PTO and patent validity.

Nonetheless, this long-run trend in legal change will only materialize if courts produce more of one type of error than another—more pro-plaintiff mistakes than pro-defendant ones, or the reverse. Suppose, however, that equal numbers of cases reach the appellate court C_1 under each standard. That court will create equally many opportunities for C_2 to err in expansionary or restrictive directions. Over long periods of time, we would expect no net effect on overall legal doctrine. Courts may make occasional mistakes, but those mistakes will be random, rather than biased. Thus, we can say that deference mistakes related to differing legal standards will generate no net legal change so long as two conditions hold:

> 1) C_1 reviews the same number of cases under the deferential standard as under the non-deferential standard.
>
> 2) C_2 is equally likely to misread a case's deference regime whether it was decided with or without deference.

In the sections that follow, we propose a variety of reasons why those conditions may not hold and describe the ramifications for long-term evolution in the law.

1. Unequal Numbers of Cases

There are a number of simple and straightforward reasons why deferential and non-deferential cases might arise in different numbers. First, one type of case might simply be more common than another due to structural factors endogenous to the case types. For instance, criminal prosecutions—in which constitutional rights are evaluated with zero deference—are far more common than § 1983 suits for damages, in which the plaintiff must prove that the right violated was "clearly established."[247] Similarly, many more patent infringement lawsuits than direct PTO appeals reach the Federal Circuit each year.[248]

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[247] In 2013, federal district courts saw 68,080 new criminal cases, as compared with 17,722 prisoner civil rights suits. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 66, at tbls.C-2, D.

[248] A review of Federal Circuit cases on patent validity found that 73% of all written opinions (237 out of 324), or 80% of precedential opinions (181 out of 226), arose in the context of infringement actions. Ouellette, *supra* note 10, at 359 tbl.2. The reason for this is somewhat unclear, as there are hundreds of thousands of patent applications filed every year and "only" thousands of infringement suits. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 66, at tbl.C-2 (reporting that 6,401 patent cases were commenced in 2013); U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2013, at 189 tbl.2 (2013) (showing that in recent years the PTO has received over 500,000 patent applications each year).

One explanation is that if the patent applicant eventually prevails before the PTO, there is no opposing party to appeal, whereas in patent litigation, one side or the other will always be aggrieved. In addition, the cost of pursuing a Federal Circuit appeal might exceed the expected value of the median individual patent that has not yet been granted. If patents amount to lottery tickets, with potentially great or small value, the value of a typical lottery ticket may be well below the known fixed cost of an appeal. On the other hand,

In other instances, one type of case may be a subset of the other type, ensuring that asymmetric numbers of cases reach the courts. For instance, within the criminal justice system every petition for habeas corpus must be preceded by a criminal prosecution. An individual cannot petition for habeas unless she has first been convicted and imprisoned. Moreover, prisoners are required to exhaust their direct appeals before a court will entertain a habeas petition. Thus, habeas petitions almost always arise only after there has been a full trial on the merits and a full complement of appeals.[249]

In sum, in the criminal procedure context, far more cases reach the courts under non-deferential standards than under deferential ones, creating more opportunities for pro-rights (anti-state) deference errors. In the patent context, on the other hand, far more cases reach the courts under the deferential standard than under a non-deferential standard, creating more opportunities for pro-patent errors. More generally, under any area of law that involves asymmetric deference regimes, it would be surprising (and quite coincidental) if there happened to be equal numbers of cases decided with and without deference. Accordingly, we believe that there will always be unequal numbers of cases and asymmetric opportunities for C_2 to generate false positives and false negatives.

2. Asymmetric Errors by a Subsequent Court

The second assumption needed to generate unbiased (which is to say, zero net) legal change is that a subsequent decisionmaker (C_2) is equally likely to mistake a given case decided with deference for one decided without deference, as it is to mistake a case decided without deference for one decided with deference. As with the prior assumption of equal numbers of cases, we believe that this assumption is entirely unrealistic. We relax it here.

We first note that it seems unlikely that C_2 would make a deference mistake involving a precedent that involved the same deference regime that C_2 is applying. Such a mistake would require C_2 to distinguish a precedent by explicitly misstating its deference regime, such as by writing, "In the present clear-and-convincing evidence case, this precedent decided by C_1 is inapplicable because it was decided under a preponderance standard," when it was in fact decided under the clear-and-convincing evidence standard. Mistakes seem far more likely to occur when C_2 simply ignores a precedent's deference regime. But is C_2 more likely to err by relying on a clear-and-convincing evidence precedent in a preponderance case, or vice versa?

Although it is impossible to know for certain, we suspect that two distinct effects influence the likelihood of C_2 making a deference error of one type or another. The first is the *majority effect*: C_2 is more likely to err when confronted with a case that

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once litigation has begun, the expected value of taking an appeal may far outstrip the cost of turning to the Federal Circuit.

[249] The exception to this rule is when the habeas petition involves a claim that the defendant has been deprived of the right to effective assistance of counsel. The Supreme Court has indicated that such claims are better heard in the context of habeas petitions than direct appeals because of the difficulty in bringing an ineffective assistance claim while represented by the same attorney alleged to have been ineffective. Accordingly, the ineffective assistance of counsel claim is the lone type of constitutional criminal procedure claim that might arise more frequently in habeas petitions than in direct non-deferential appeals.

employs a less common deference regime. This effect should seem intuitive. If C_2 is habituated to relying on precedents that use a clear-and-convincing evidence standard or some other deferential rule, it may come to treat that standard as a default. C_2 will reflexively expect that any given case it seizes upon must have employed such a standard.

The second effect is the *non-deferential effect*: C_2 will default to believing that every case was decided by C_1 under the non-deferential legal standard. This effect draws upon several related phenomena. First, it seems likely that when a court examines a precedential prior case, it looks first for the legal rule and holding, and only secondarily (if at all) for the operative deference regime. In the absence of any information regarding the deference standard, the court will likely default to the "neutral" position, which is zero deference. Second, C_2 may believe, correctly or incorrectly, that deference standards are irrelevant to judicial decisionmaking and that C_1 decided its case without deference, regardless of what C_1 wrote in the opinion.[250] Third and finally, evaluating a precedent decided under a deference standard will be more cognitively taxing for a court than evaluating a precedent decided non-deferentially. The legal result and the deference standard employed may sometimes conflict, as when C_1 decides for the party deserving deference but appears to indicate that it does not believe that party had the stronger case. There is ample psychological evidence demonstrating that individuals shy away from cognitively difficult tasks.[251] Accordingly, C_2 may attempt, consciously or unconsciously, to shirk the difficult job of navigating these two ideas. All told, courts will tend to default to viewing prior precedents through non-deferential prisms.

In some contexts, the majority effect and the non-deferential effect will point in the same direction. For instance, criminal trials are much more common than habeas and § 1983 proceedings, and so questions of federal criminal procedure arise much more commonly in a non-deferential posture than a deferential one. Accordingly, both the majority and non-deferential effects suggest that courts are more likely to err when confronted with deferential ("clearly established") precedents, treating them as non-deferential precedents—and biasing courts in an anti-rights direction. In other contexts, however, the effects pull in opposite directions. As we have previously noted, the vast majority of the patent cases that reach the Federal Circuit are appeals in infringement lawsuits. In these cases, a defendant must put forth clear and convincing evidence to prove a patent invalid. Accordingly, when the Federal Circuit (or the PTO) reads precedents, it most frequently comes across precedents decided according to a deferential standard.

When these two effects conflict, which will dominate? This is ultimately a difficult empirical question, and one to which there will likely be different answers in different contexts.

3. Effects in Combination

In combination, the breaking of both symmetries—the number of deferential and non-deferential precedents, and the likelihood of a deference mistake given a

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[250] If C_2 is correct, then it has effectively avoided a mistake. *See infra* note 253.

[251] *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

particular precedent—might produce counter-intuitive results. Asymmetries in case numbers and in types of deference mistakes will not necessarily be mutually reinforcing. Rather, in some cases they may mitigate one another.

The example of federal criminal procedure questions in the context of habeas and § 1983 illustrates this point. As we noted above, there are many more cases in which criminal procedure issues reach the courts under a low deference regime than a high deference regime. Accordingly, there are many more opportunities for C_2 to generate pro-rights deference mistakes. However, both the majority effect and the non-deferential effect would seem to make it much more likely that C_2 would err when faced with a deferential precedent than when faced with a non-deferential one. A deferential precedent from C_1 is much more likely to lead to an anti-rights deference mistake than a non-deferential precedent is to lead to a pro-rights deference mistake. On the side of pro-rights errors, then, there is a low probability of error coupled with a large number of opportunities to err; on the side of anti-rights errors there is a higher probability of error coupled with a smaller number of opportunities.

Which of these effects will dominate is ultimately another empirical question, and one we are not yet prepared to answer. Based on the discussion above and the examples presented in Section II.A, it seems likely that there will be more anti-rights deference mistakes than pro-rights deference mistakes.[252] But the more general observation is that it would be quite a remarkable happenstance if these factors cancelled each other out and resulted in zero net legal movement. It is almost certain that for any such regime involving biased deferential legal standards, deference mistakes will drive the law in one direction or another.

C. Unitary Deference Regimes

We now turn to the possibility that deference mistakes might occur even if every single case on a given legal question is governed by the same deference regime. Again, it may be that no legal issue is ever limited to a single deference regime. There is always the possibility that a party will fail to preserve its objection at trial, leading to review for plain error. Our point is simply that courts can generate deference

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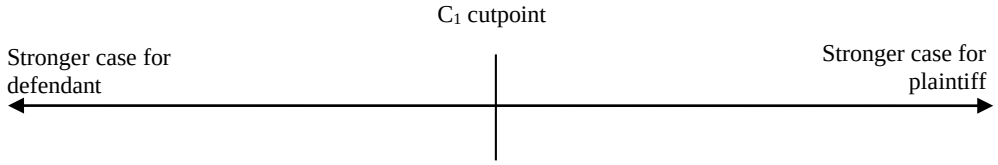
[252] It is worth noting that a "false positive" will not drive the law in the direction one might expect. In criminal procedure cases, deference (if it is appropriate) is awarded to state actors—police and state courts, for the most part—who are opposing the right in question in the context of a § 1983 lawsuit or habeas petition. By consequence, a predominance of false positives will lead to a contraction in the underlying criminal procedure right at issue.

This gives rise to an interesting set of hypotheses regarding the expansion and contraction of criminal procedure rights in the United States. During the 1960s, the Warren Court engaged in a well-documented expansion of substantive criminal procedure rights. This expansion was accompanied by a concomitant expansion in individuals' rights to bring habeas and § 1983 lawsuits. These procedural mechanisms often served as the vehicles for bringing substantive constitutional claims into federal court, particularly in the face of hostile state actors. Since the end of the Warren Court era, criminal procedure rights have gradually contracted along nearly every dimension. Scholars have attributed this contraction to the work of more ideologically conservative subsequent courts, who disagreed with the Warren Court and sought to undo much of its work. This is very possible, but it is also possible that the trend was helped along by the types of deference mistakes we describe here. The growth of § 1983 and habeas cases could have introduced into the case law ever-increasing numbers of deferential precedents. Those precedents could then have given rise to false positive deference mistakes. Those deference mistakes would then have led over time to contraction in the underlying substantive criminal rights.

mistakes even if they saw only cases governed by a single deference regime. Additionally, the model we present here will serve as the foundation for our model of symmetric deference regimes in Section III.D.

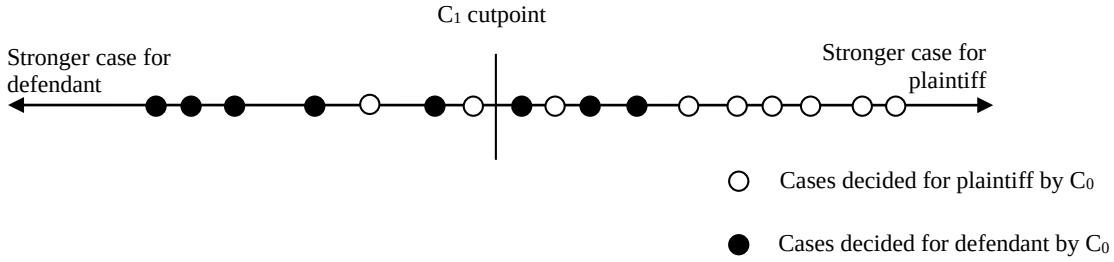
Consider a legal issue that is decided in the first instance by a district court (C_0) and then reviewed by an appellate court (C_1). Our paradigm case is a motion for change of venue or forum non conveniens, though the possibilities are legion. The appellate court C_1 will have its own idea of what the law should be—its own view as to when the plaintiff should prevail and when the defendant should prevail. That is, it will have in mind some legal cutpoint that divides the two sets of cases. We use the words "case," "plaintiff," and "defendant" for ease of explication, but more generally, the appellate court will have a view regarding which *issues* (rather than cases) should be decided in favor of the *moving party* (rather than the plaintiff), and which issues should be decided in favor of the *non-moving party* (rather than the defendant). Figure 2 displays C_1's cutpoint graphically:

Figure 2: The Appellate Court's Cutpoint



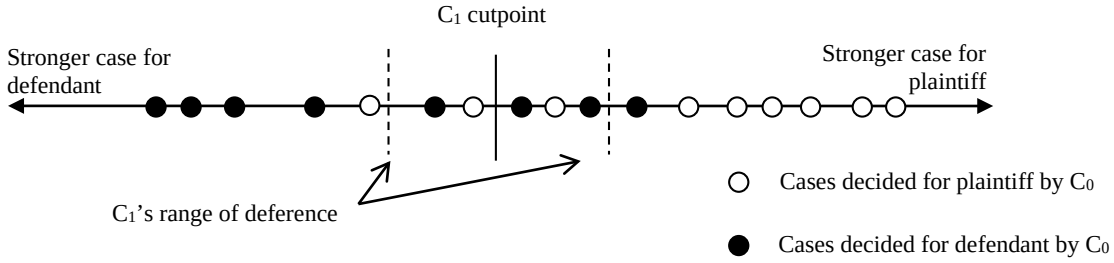
If C_0 has a different cutpoint, or simply because of random errors or assignments to different district judges, C_0 may not decide every case in the same way that C_1 would. C_0 may decide in favor of the plaintiff in a few cases where C_1 would decide in favor of the defendant, and vice versa. Figure 3 illustrates this phenomenon.

Figure 3: C_0 Adjudication of Cases



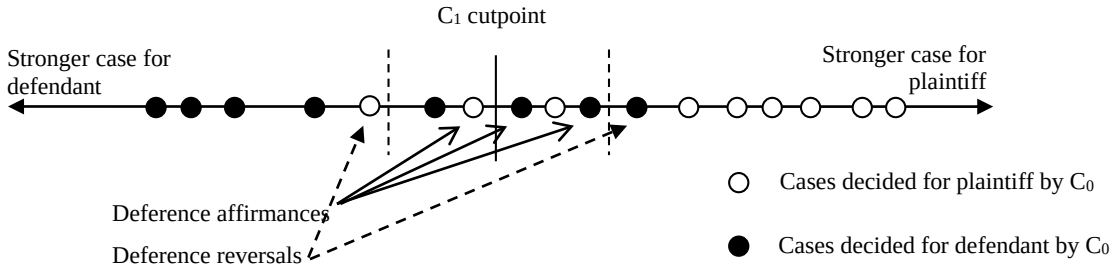
The prior section focused on deferential legal standards, under which C_1 effectively has two cutpoints. Deference mistakes can also arise out of C_1's deference to the initial decisionmaker, C_0. Even if C_0 does not decide every case as C_1 would, C_1 may have some range of outcomes within which it will defer to C_0's decision and affirm the outcome, even if it would have made a different one were it writing on a clean slate. Figure 4 displays this type of deference regime graphically.

Figure 4: C_1 Zone of Deference



If C_1 affirms a decision by C_0 despite the fact that it would have decided the case differently in the absence of deference, we label that decision a "deference affirmance." These cases are represented in Figure 4 (above) and Figure 5 (below) by the black circles to the right of C_1's cutpoint and the white circles to the left of C_1's cutpoint that fall within C_1's range of deference. White circles to the left of the cutpoint and black circles to the right of the cutpoint that fall outside C_1's range of deference will be reversed. These reversals, which occur despite the deference afforded C_0's decision by C_1, are "deference reversals." In Figure 5, we label the deference affirmances and reversals explicitly.

Figure 5: Deference Affirmances and Reversals



Each time C_1 affirms a case it would have decided differently under a de novo standard, it should write an opinion explaining that its decision is based at least in part on the fact that it was obliged to defer to the lower court, C_0. And each time C_1 reverses a case despite the fact that it is affording deference to C_0, it should write an opinion explaining that it has reversed despite that deference. A subsequent court C_2 that reads the opinion carefully should have a good sense as to where C_1 stood on the underlying issue. However, deference affirmances and reversals also represent opportunities for C_2 to err. If C_2 reads a C_1 deference affirmance and mistakenly believes it to be an unqualified affirmance—the outcome C_1 would have reached if deciding the case de novo—it has misunderstood the underlying law. Likewise for a deference reversal: if C_2 believes the reversal is an unqualified statement of C_1's own view of the law, rather than the much stronger statement that the case must be reversed despite C_1's deference to C_0, it has misunderstood the import of C_1's precedent.

Suppose C_1 affirms a dubious ruling in favor of a plaintiff. If C_2 believes that this is C_1's unqualified view of the law, it will have mistakenly interpreted the law as more plaintiff-friendly than C_1 meant it to be. The same is true if C_1 reverses a ruling in favor of a plaintiff and C_2 misunderstands this as C_1's de novo view, rather than the

very strong pro-defendant statement it is: that too means that C_2 will have interpreted the law as more plaintiff-friendly than C_1 meant it to be. In very concrete terms, C_2 might think to itself: "I see that C_1 affirmed a ruling in favor of the plaintiff in an analogous case. C_1 must have believed that the plaintiff deserved to win given the operative law and facts." Or, in the case of a deference reversal: "I see that C_1 reversed a ruling in favor of the plaintiff in an analogous case. But here the operative law and facts are slightly more pro-plaintiff, so C_1 might believe that the plaintiff deserves to win on this issue." Similarly, in cases where C_0's ruling favored the defendant, C_2 might misunderstand C_1's deference affirmance or deference reversal as more defendant-friendly than C_1 meant.

It may seem peculiar or counter-intuitive to imagine a plaintiff losing on appeal, and that precedent then giving rise to a mistaken interpretation that *favors* the plaintiff. But such a result is entirely possible. The question is how a precedent is perceived relative to what the court actually decided. If C_1 reverses a decision favoring a plaintiff, despite the deference due to that decision, it has made a very strong statement about the wrongness off the earlier decision and how far it diverges from governing law. If C_2 then mistakenly believes that C_1 was applying something like a *de novo* standard, it will miss the full import of this statement and C_1's judgment as to how incorrect C_0's decision really was. It is the difference between a case falling outside of C_1's deference range (what has actually occurred) and believing only that a case falls to one side of C_1's cutpoint (what C_2 might think).[253]

The deference mistakes described above can give rise to erroneous outcomes in individual cases. Suppose that C_0 decides an issue for the plaintiff, C_1 upholds that judgment under a deference standard, and then C_2 commits a deference mistake by interpreting C_1's affirmance as that court's unqualified view (absent any deference). Believing that C_1's precedent is very plaintiff-friendly on account of this error, C_2 might then decide its case in favor of the plaintiff rather than the defendant. This creates a new precedent, one that would not have existed (at least in that form) but for C_2's deference mistake. Again, that new C_2 precedent will then influence subsequent decisions *even if future courts never make the same deference mistake that C_2 made*. C_2 has integrated its mistake into existing doctrine while stripping it of any outward indications of error.

As we have already described, these mistakes can systematically shift doctrine over time. Each case in which C_2 makes a deference mistake stands as a precedent for future courts, whether or not they make their own deference mistakes. This means that all courts that would treat C_2's decision as precedential or influential will adjust their cutpoints in light of it. In theory, if C_2 made repeated mistakes of a single type—

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[253] Courts could conceivably make equal and opposite mistakes if it is C_1, rather than C_2, which employs the incorrect standard of review. Suppose C_1 decided (consciously or unconsciously) to review a decision by C_0 without deference, instead of affording it the deference it was due. Suppose C_2 then looked to C_1's decision as precedent and paid close attention to the standard of review that C_1 employed. This would be an error, in that C_2 would have misinterpreted the holding of C_1's precedent. However, we would not exactly consider it a deference mistake, because the error would have arisen not because of the failure to understand a precedent's deference regime but because of C_1's failure (or refusal) to apply the law correctly. Nonetheless, it is useful to bear in mind that just as C_2 can generate errors in one direction by misunderstanding C_1's precedent, C_1 can generate errors in the opposite direction by misrepresenting exactly what it has decided.

either pro-plaintiff or pro-defendant—these mistakes could push the law further and further in one direction.

This long-run trend in legal change will only materialize if courts produce more of one type of error than another along any given legal dimension. For instance, courts could generate long-run evolution in the law if they made more pro-plaintiff mistakes than pro-defendant ones (or the reverse) with respect to some aspect of the law of forum non conveniens—the importance of litigating in a plaintiff's chosen forum, for instance. Indeed, we should expect there to be approximately equivalent numbers of mistakes in each direction—and thus no long-run bias in the law—so long as four assumptions hold true:

> 1) C_0's errors or deviations from C_1's cutpoint—what C_1 believes the law should be—are distributed evenly around C_1's cutpoint.
>
> 2) Plaintiffs and defendants appeal similarly situated cases at equivalent rates.
>
> 3) C_1's zone of deference is symmetric around its cutpoint.
>
> 4) C_2 is equally likely to make mistakes with respect to cases appealed by plaintiffs and defendants.

If the first three assumptions hold, there will be approximately equivalent numbers of deference affirmances for plaintiffs and defendants, and approximately equivalent numbers of deference reversals for plaintiffs and defendants. And because each deference affirmance or reversal presents an opportunity for C_2 to mistakenly interpret the law, there will be equivalent numbers of opportunities for C_2 to interpret the law mistakenly in a pro-plaintiff direction or a pro-defendant direction. The net overall effect on the law should be neutral.

In the sections that follow, we relax these assumptions. In addition, we introduce a number of other potential complications that can give rise to asymmetries and create the potential for long-term movement in the law.

1. Biased Lower Decisionmaker

We begin by relaxing assumption #1. If C_0 is a faithful agent of C_1, then C_0's deviations from C_1's cutpoint should all be random errors. These errors should be randomly distributed around C_1's cutpoint. But what if C_0 is not a faithful agent but instead biased in one direction or another? C_0's bias might be the result of ideological predilection,[254] or a non-ideological normative view of what the law should be.[255] It

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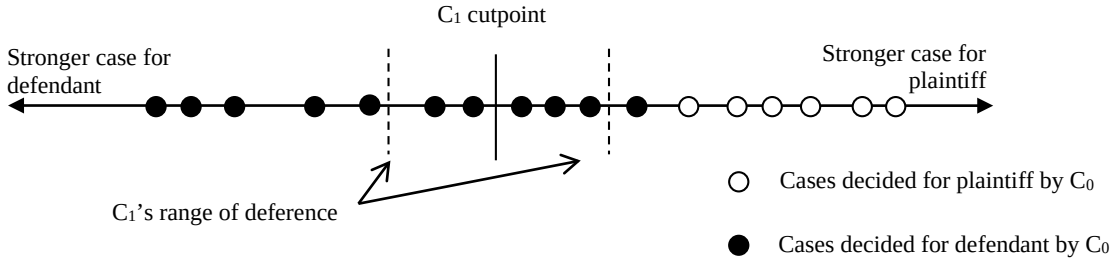
[254] A geographically or politically diverse judicial jurisdiction might have multiple sub-jurisdictions with widely divergent ideological or judicial philosophies. For instance, the Ninth Circuit includes both the Northern District of California and the District of Idaho. The two district courts (C_0) might have very different cutpoints, as well as cutpoints that differ from the Ninth Circuit (C_1). If, for instance, the District of Idaho deviates from the Ninth Circuit's cutpoints while the remaining districts adhere to it, then C_0 as a whole will have deviated from C_1's view of the law. The same could be true within a large state. The Supreme Court of Texas (C_1) might have a cutpoint that differs significantly from the cutpoints of local courts in Austin (C_0) or Dallas (C_0).

[255] *See* Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting) ("Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like.").

could also reflect C_0's systematic misinterpretation of C_1's view of the law. C_1 may not have clearly specified the legal standard, or C_0 may simply have misunderstood C_1's holdings. If C_0 is biased, its errors will be skewed in one direction. Suppose, for instance, that C_0 is more pro-defendant than C_1. The mixture of cases reaching C_1 might appear as follows:

Figure 6: Biased Lower Court Decisionmaker



Because C_0 is pro-defendant in comparison to C_1, it will tend to decide most close cases in pro-defendant fashion, creating far more opportunities for C_1 to issue pro-defendant deference affirmances and reversals than pro-plaintiff ones. (In Figure 6, the three black dots to the right of the cutpoint but within the zone of deference will be deference affirmances, while the right-most black dot will be a deference reversal.) This skew will exist whether plaintiffs and defendants appeal all cases or only those that are relatively close to the ends of C_1's range of deference, as long as C_0's pro-defendant bias is sufficiently strong that plaintiffs regularly decide it is worthwhile to appeal cases that fall to the right of C_1's cutpoint.[256]

Crucially, deference mistakes resulting from both deference affirmances and deference reversals of cases appealed by plaintiffs will operate as pro-defendant errors. Regardless of how C_1 decides an issue that a plaintiff has appealed, its result will appear more pro-defendant than it actually was if C_2 forgets that C_1 was deferring to C_0's original judgment in favor of the defendant. If C_1 affirms C_0's pro-defendant ruling, C_2 may mistakenly think that C_1 actually believes the defendant had the stronger case. If C_1 reverses C_0's ruling, C_2 may fail to appreciate what a strong statement C_1 is making by reversing a case to which it owed deference.

Thus, if C_0 is biased in a pro-defendant direction, this bias can generate long-term pro-defendant doctrinal evolution. The equal and opposite effect would of course occur if C_0 were biased in a pro-plaintiff direction: long-term pro-plaintiff evolution in the law. What is striking about this result is that our model generates biased legal evolution based entirely upon a bias in a *lower court* (C_0), even in the presence of a neutral appellate court (C_1).[257]

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[256] We are currently holding to assumption #2 and assuming that plaintiffs and defendants appeal similarly situated cases at equal rates.

[257] Note, however, that this mechanism relies upon quite a strong bias on the part of C_0. In order to present a meaningfully greater number of opportunities for plaintiffs to appeal, C_0 must be deciding cases in favor of the defendant that fall at or near the right-most boundary of C_1's deference range. These are cases in which the plaintiff would have a significant advantage under typical circumstances. Accordingly, a relatively

2. Differential Rates of Appeal

Similar long-term effects result if parties are differentially likely to appeal decisions handed down by C_0. Consider again Figure 3, which displays approximately equal numbers of cases that C_0 decided in favor of plaintiffs and defendants that are near the outer boundaries of C_1's deference range. These are the black dots (pro-defendant cases) near the right-most dashed line and the white dots (pro-plaintiff cases) near the left-most dashed line. This is to be expected, if C_0 is an unbiased (but potentially error-prone) decisionmaker.

Consider now the possibility that plaintiffs and defendants will appeal different proportions of similarly situated cases. Scholars have suggested numerous reasons why one side might be more likely to appeal in certain types of cases. For instance, in tort lawsuits, defendants might be better-capitalized than plaintiffs and thus better able to bear the costs of appeals.[258] Defense attorneys typically work on an hourly-fee basis, while plaintiff attorneys are often paid on contingency, which might alter the incentives of the attorneys and the parties to continue litigating past the initial stages.[259] Defendants might also be more likely to be repeat players, giving them incentives to appeal that extend beyond the case at hand.[260] Alternatively, any number of these factors could lead to higher rates of appeal by plaintiffs. The point is that there is no reason that these rates need be the same.

Each appeal presents an opportunity for a deference affirmance or reversal by C_1, which in turn presents an opportunity for a deference mistake by C_2. Accordingly, if defendants appeal more cases, there will be more deference mistakes involving defendant appeals. And as we have explained, appeals by defendants will be from C_0's decisions in favor of plaintiffs and will thus lead to *pro-plaintiff* deference mistakes. If C_1 issues a deference affirmance or reversal, and then C_2 makes a deference mistake, C_2 will have mistakenly understood C_1's precedent as more *plaintiff-friendly* than it actually was. Thus, by appealing with greater frequency, defendants may actually end up nudging the law in a more plaintiff-friendly direction. Plaintiffs would create the opposite effect if they were to appeal more frequently.

Of course, that effect would have to be balanced against whatever overall movement in the law plaintiffs or defendants could generate by appealing with greater frequency in the first place. That is, if parties on one side of an issue appealed more

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weak bias in one direction or another may not be enough to generate significant long-term biased evolution in the law.

[258] *See* Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 123, 125 (2001); Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis*, *Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 881.

[259] *See* Robert E. Litan & Steven C. Salop, *Reforming the Lawyer-Client Relationship Through Alternative Billing Methods*, 77 JUDICATURE 191, 192 (1994).

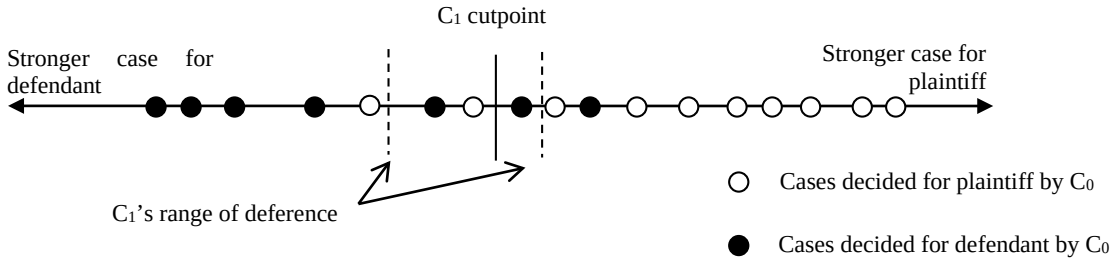
[260] *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 75 (2010); Joel B. Grossman, Herbert M. Kritzer & Stewart Macaulay, *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 803, 804 (1999); Susan Brodie Haire, Stefanie A. Lindquist & Roger Hartley, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 LAW & SOC'Y REV. 667, 668 (1999); Brian Ostrom, Roger Hanson & Henry Daley, *So the Verdict Is in-What Happens Next? The Continuing Story of Tort Awards in the State Courts*, 16 JUST. SYS. J. 97, 103 (1993); William H. Simon, *The Prudent Jurist*, LEGAL AFF., March/April 2005, at 17.

regularly, and selected appeals carefully in order to generate favorable precedents, that side might be capable over time of shifting the law in a direction favorable to its interests. Deference mistakes might generate some contrary movement in the law but may not counter-act the secular trend created by parties' efforts to affect the law.[261]

3. Asymmetric Zone of Deference

Now consider the possibility that C_1 may not defer equally to decisions by C_0 in favor of the plaintiff and defendant. Suppose that C_1 is very deferential when C_0 decides a case in favor of the plaintiff and much less deferential when C_0 decides a case in favor of the defendant. This might be modeled as C_1 having a smaller deference range on the plaintiff side of its cutpoint and a larger deference range on the defendant side of its cutpoint.[262] Figure 7 displays this in graphical form:

Figure 7: An Asymmetric Zone of Deference for C_1



This asymmetry could arise for a variety of reasons. Perhaps most straightforwardly, C_1 might have an ideological preference for one side of the issue. Or C_1 might believe that C_0 is biased and mistrust its decisions favoring one side. C_1 might also believe that one side generally has a more difficult time proving its cases for evidentiary reasons. Accordingly, it might be more strongly inclined to defer when parties on that side do succeed.

This asymmetry will produce results very similar to what will occur if one party appeals more than the other. If C_1 is less deferential to decisions favoring defendants, then plaintiffs will appeal greater numbers of cases. A party will be most inclined to appeal cases falling outside (or near) C_1's deference range, because those are the appeals it has the greatest chance of winning. If C_1's deference range is smaller when it comes to cases decided in favor of the defendant, then there will be more promising appeals for plaintiffs to bring. As in the above analysis, this will result in greater numbers of defendant-friendly deference mistakes and thus a long-term skew in the law that favors defendants. And if C_1 is more deferential to defendants than to plaintiffs, the same principle will apply, mutatis mutandis, and we should expect long-term legal evolution in favor of defendants. Of course, as before, this long-run bias will act only as a counter-weight to any other secular trend that might be created by greater numbers of appeals by one side.

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[261] *See* Gertner, *supra* note 187 (describing this phenomenon in the context of discrimination cases).

[262] This is functionally equivalent to symmetric deference around a cutpoint that has been shifted, but we describe it as asymmetric deference in order to better capture the reasons why C_1 might adopt such a posture.

4. Asymmetric Errors by a Subsequent Court

The foregoing subsections have dealt with asymmetries in how C_0, C_1, and private parties make decisions. Our final subsection contemplates the possibility that C_2 may make asymmetric errors when reading and relying upon prior decisions by C_1. That is, C_2 may be more likely to make a deference mistake with respect to an affirmance of a pro-defendant decision than with respect to an affirmance of a pro-plaintiff decision.[263] The results dictated by such an asymmetry should be clear from what we have written above. Greater numbers of deference mistakes in pro-defendant appeals will lead to biased evolution in the law in a direction favoring defendants; greater numbers of deference mistakes in pro-plaintiff appeals will lead to biased evolution in the law favoring plaintiffs.

Alternatively, it is possible that C_2 is more likely to make a deference mistake when C_1 issues a deference reversal than when it issues a deference affirmance. When an appellate court upholds a lower court decision under a deference standard, it is likely to emphasize the deference that it owes to the lower court.[264] In contrast, when issuing a deference reversal, C_1 is likely to deemphasize the deference it owes to C_0 precisely because it is reversing C_0 despite that deference. As C_1 obscures its deferential posture, C_2 becomes more likely to miss that legal hook or misunderstand C_2's stance. The probability of a deference mistake rises.

Of course, we might be entirely incorrect, and C_2 might be more likely to err with respect to deference affirmances. Regardless, this particular asymmetry by itself will not be enough to generate long-term legal evolution. The reason is that both pro-plaintiff errors and pro-defendant errors can arise from either deference reversals or affirmances. However, if any other factor were to disturb the equality between deference reversals favoring plaintiffs and defendants, that asymmetry in combination with the greater propensity of reversals to generate mistakes could lead to longer-term biased development in the law. For instance, suppose that C_1 is more deferential to plaintiffs than defendants, as in Section III.C.3 above. Suppose further that C_2 is more likely to err with respect to deference reversals by C_1. Many of the additional appeals that plaintiffs bring will result in reversals. The counter-intuitive result is that this will accentuate the long-term legal bias favoring defendants.

5. Effects in Combination

It is important to note that the mechanisms described in the previous four subsections are all independent of one another and conceivably complementary. That is, consider an evidentiary objection related to hearsay, which is reviewed for abuse of

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[263] It is difficult to specify why this might occur, but we can speculate. C_2 might mistakenly believe that different standards exist to govern cases decided in favor of defendants or plaintiffs. There might be something about the way those cases are written that obscures the standard of review more frequently when it comes to one type of case than another. C_2 might believe that C_1 is biased in favor of one side or another and impute different meanings to decisions by C_1 in favor of each of the two sides. Or C_2 might be biased relative to C_1 and be predisposed to make mistakes in the direction of its bias due to motivated reasoning: unconsciously or consciously, it searches for precedent to fit its preferences.

[264] This is one mechanism for defending its opinion in the eyes of parties who might disagree with it while avoiding taking its own strong stand. In addition, "deference" as a legal concept generally has a positive valence.

discretion. It is possible that (1) the trial courts (C_0) who consider these objections in the first instance are biased in favor of the non-moving party (the non-objector); (2) moving parties (objectors) appeal more frequently; (3) the appellate court (C_1) affords more deference to non-moving parties; and (4) a subsequent court (C_2) is more likely to make deference errors with respect to deference affirmances than reversals. These mechanisms would cumulatively bias doctrine in favor of non-moving parties, with each mechanism reinforcing the others.

D. Symmetric Deference Regimes

Finally, we turn to legal issues governed by symmetric deference regimes: situations in which either side to an issue might be able to receive greater or lesser amounts of deference. Our canonical example is an evidentiary objection. A trial court's decision to admit or bar evidence is reviewed on appeal for abuse of discretion,[265] but that appeal is only for plain error if the losing party failed properly to preserve its objection below.[266] This creates a situation in which a party on either side of the issue might be the beneficiary of lesser (abuse of discretion) or greater (plain error) degrees of deference on appeal. In some respects this functions as a combination of the asymmetric and unitary regimes we described above. Our analysis combines elements of those two discussions.

The added complication is that the direction in which a deference mistake shifts the law will depend upon both the side that appeals and the degree of deference afforded. Suppose that a party fails to object to the introduction of evidence at trial (C_0) and then later appeals C_0's decision to allow the evidence. C_1's review is for plain error. Suppose further that C_2 later relies upon C_1's case as precedent. Regardless of what C_1 decided, if C_2 makes a deference mistake, that mistake will push the law in an pro-evidence direction. The reason is that failing to recognize the plain error standard will make it appear as though the objecting party's argument was weaker than it really was, as C_2 will believe that the objecting party lost (or won) on an abuse of discretion standard (rather than the more stringent plain error).

The inverse is true as well. If, in this example, the party seeking to block the evidence *does* object at trial, loses, and appeals, a later deference mistake will shift the law in a pro-evidence direction. This is because C_2 will have mistakenly believed that the standard was plain error, rather than abuse of discretion (which is correct), and will thus judge the result reached by C_1 as more favorable to the objecting party than it actually was.

The parallel analysis applies when it is the party seeking to introduce evidence who loses at trial and appeals. If the party failed to preserve its argument and a plain error standard applies, a later deference mistake by C_2 will shift the law in an anti-evidence direction. If the party introducing evidence preserved its argument and an abuse of discretion standard applies, a later deference mistake by C_2 will shift the law in a pro-evidence direction.

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[265] *See supra* Part III.C.

[266] *See supra* note 241.

To state the intuition somewhat more succinctly: the higher the apparent deference standard, the stronger the apparent case of the party forced to overcome that standard. Whether that party wins or loses on appeal, the higher deference standard will make it appear as if that party faced long odds due to something other than the merits. Thus, a deference mistake will shift the law toward a given side of an issue if C_2 mistakes a lower deference standard for a higher one. And a deference mistake will shift the law away from a given side of an issue if C_2 mistakes a higher deference standard for a lower one.

In sum, then, the number of pro-evidence deference mistakes will be:

> The number of cases in which an objecting party fails to object, loses, and appeals × the probability that C_2 relies upon a plain error case and makes a deference mistake
>
> +
>
> The number of cases in which a party introducing evidence loses and appeals × the probability that C_2 relies upon an abuse-of-discretion case and makes a deference mistake

The number of anti-evidence deference mistakes will be:

> The number of cases in which a party introducing evidence does not preserve an argument, loses, and appeals × the probability that C_2 relies upon a plain error case and makes a deference mistake
>
> +
>
> The number of cases in which an objecting party loses and appeals × the probability that C_2 relies upon an abuse-of-discretion case and makes a deference mistake

Accordingly, there will be no net movement in the law so long as the following conditions hold:

> 1) C_0's errors or deviations from C_1's cutpoint are distributed evenly around C_1's cutpoint.
>
> 2) Both sides appeal cases at equivalent rates.
>
> 3) C_1's zone of deference is symmetric around its cutpoint.
>
> 4) C_2 is equally likely to make mistakes with respect to cases appealed by each side.
>
> 5) Each side fails to preserve issues at trial at the same rate.

The first four of these conditions should be familiar from our discussion of unitary deference standards. The first condition affects how many opportunities there will be for one side or the other to appeal.[267] The second and third determine the rate at which one side or the other will appeal when presented with an appealable case.[268] The fourth condition is the likelihood that any given precedent will result in a

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[267] *See supra* Section III.C.1.

[268] *See supra* Sections III.C.2 & 3.

deference mistake.[269] We have already discussed these points in depth and will not repeat our analysis except to say that the points we made in III.C are equally applicable here.

As to the fifth condition,[270] there is every reason to believe that the two sides to a given issue will not fail to preserve arguments at the same rate. The principal reason is structural. When a party seeks to introduce evidence it is necessarily making an argument as to why that evidence is admissible. The very fact of seeking to introduce the evidence preserves at least one argument as to admissibility. It is thus much easier for a party seeking to block evidence to forfeit a key argument than for the party introducing it to do so. A quick empirical check confirms this conclusion. We ran a search on the Westlaw database of federal circuit court opinions for [evidence /s exclu! /s "plain error"], looking for cases in which evidence had been excluded but the review was for plain error. This search returned approximately 500 results. When we replaced "exclu!" with "admi!," in order to find cases in which evidence was admitted and the standard of review was plain error, the number of results jumped to 3000. We take this as a structural asymmetry in the number of times a party will fail to preserve an objection and thus an indication that deference mistakes may induce a long-term trend toward greater permissiveness in the rules of evidence.

* * *

Deference mistakes in isolation are interesting and notable; deference mistakes in combination hold the potential to affect the law in significant and perhaps pernicious ways. Our objective in this Part has been to demonstrate that deference mistakes can generate long-term evolution in the law if they fall unequally on one side of a legal issue or the other. We cannot prove definitively that deference mistakes have had this effect, as it is difficult to separate the operation of deference mistakes from other factors affecting the law over time. But in light of the theory we presented here, we think the evidence we offered in Part II is at least suggestive of the influence that deference mistakes might exert. In the Part that follows, we consider what might be done to blunt this influence.

IV. Avoiding Deference Mistakes

If we are correct that courts have been making deference mistakes, and that these mistakes are influencing doctrine, what follows? In this Part we offer some suggestions regarding the ramifications of deference mistakes, the ways in which they should alter our perceptions of certain legal doctrines, and potential corrective mechanisms.

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[269] *See supra* Section III.C.4.

[270] We note that it is neither a necessary nor a sufficient condition for generating zero net movement in the law that C_2 make deference mistakes with respect to plain error cases and abuse of discretion cases. Even if this were true, unequal numbers of cases of each type would still lead to long-term legal evolution. And even if this is not true, there will still be no net legal evolution if each side appeals equal numbers of plain error and abuse of discretion cases. Of course, as we will describe, it is unrealistic to believe that all of these conditions will hold.

As an initial matter, one might wonder whether a doctrine that has been influenced by deference mistakes is "wrong" in any normative sense, such that there is a "correction" that should be made. We express no normative view regarding any of the doctrines we discuss in this paper, and so we do not mean to critique the development of any of those doctrines on substantive terms. Yet we nonetheless believe that the process of doctrinal evolution through deference mistakes is incorrect as a substantive, normative matter. Implicit in our model of deference mistakes is a model of judicial decisionmaking under which judges' decisions are influenced to at least some degree by the legal precedent available to them.[271] Suppose, then, that there is some normatively correct outcome in each case, but that judges are not perfect—they will err and arrive at outcomes that are not necessarily ideal. Any given judicial decision will deviate from the correct outcome by some amount in some direction.

Deference mistakes may represent a simple misunderstanding of one of the inputs to a legal decision—a technical error, more or less.[272] This technical error increases the inaccuracy of the judge's decision, above and beyond whatever errors the judge might make absent a deference mistake. Thus, in expectation, any given judicial decision will deviate even further from what is optimal if the judge makes a deference mistake than it would if the judge did not. On this understanding, deference mistakes would only reduce (or at least not increase) the degree of error in judicial decisionmaking if they were negatively correlated with other errors the judge might be making. For instance, suppose that a judge of the Federal Circuit was ideologically anti-patent, such that his decisions were biased against patent rights to a degree that was normatively harmful. Suppose further that this same judge was prone to making deference errors, the vast majority of which were pro-patent because they involved infringement precedents decided under a clear-and-convincing evidence standard. In this case, the deference mistakes would mitigate the judge's tendency to err in an anti-patent direction.

Yet there is no reason to believe that deference mistakes will be negatively correlated with judicial error in general. Rather, there is likely zero correlation between the two. Deference mistakes will thus exacerbate the errors inherent to judicial decisionmaking and lead to decisions that are further from what is optimal than if deference mistakes did not occur. It is in this sense that we describe deference mistakes as normatively undesirable and search for potential correctives.

More generally, when deference mistakes occur, the evolution of doctrine is being driven by something that most observers would agree has nothing to do with the normatively correct outcomes. Regardless of one's normative view of an area of law, issues like which party appeals more frequently, or whether a lower court is biased, or whether courts are more likely to make one type of error than another should play no role in that doctrine's development. If these types of factors somehow push doctrine in a desirable direction, that would be pure, fortunate happenstance. This is not the way a well-designed legal system should operate.

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[271] *See* Masur, *supra* note 201, at 490 (citing sources); RICHARD A. POSNER, HOW JUDGES THINK 40-43 (2008) (describing the process by which judges reason to decisions).

[272] As we have previously discussed, courts may also make deference mistakes for strategic reasons, a problem that lends itself to different solutions.

So what can be done to reduce or eliminate deference mistakes?

The difficulty with legal solutions is that deference mistakes affect the evolution of doctrine through the natural, informal processes of the common law: judges read and rely upon precedent when deciding cases. Eliminating deference mistakes would seem to require significant alterations to the common law method. For instance, judges could simply do away with deferential standards of review and consider every case *de novo*. Yet this would seem too extreme a response. It may be that trial courts do not deserve as much deference as they currently receive as a substantive matter, but deference mistakes do not strike even us as so significant a problem that on their own account they would justify eliminating deferential standards of review.

Alternatively, one could imagine collapsing all deference regimes such that each legal question was governed by a unitary deference standard. For instance, patent validity might be judged by a preponderance-of-the-evidence standard, rather than a clear-and-convincing evidence standard, even when a patent has already been granted and is being asserted in a suit for infringement. This would be operationally equivalent to eliminating the deference that the PTO receives for having examined the patent in the first instance—a result advocated by numerous legal academics.[273] Again, it may be that the PTO should not receive such deference as a substantive matter, or that it should receive deference only under certain circumstances. But if deference is otherwise appropriate, deference mistakes do not strike us as a sufficiently great reason to eliminate it.

The same holds true for habeas and qualified immunity. Deference mistakes could be reduced or avoided if courts eliminated the requirement that a right be "clearly established" before it can serve as a basis for a habeas or § 1983 claim. Every case would then be a straightforward consideration of whether the right exists, with no deference to state decisionmakers. Yet this would involve a tremendous alteration to the two doctrines, one that might be warranted on substantive grounds but almost surely cannot be justified merely as a means of eliminating deference mistakes.

Even if we were to eliminate some deference regimes entirely, this might not cure the problem. As we explained above, judges might nonetheless feel compelled to defer to patents that have already been granted or state decisions that are already final. This type of sub silentio deference could generate even *more* errors—subsequent courts would have no idea whether or not to trust a precedential decision—and those errors would be even more difficult to detect or correct. Altering the formal legal rules in a fashion that judges are likely to disobey is not a viable option. And in the patent context, there is evidence that de facto deference to the PTO can be weakened where appropriate without eliminating the formal asymmetry in deference regimes that makes deference mistakes easier to detect.[274]

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[273] *See* Roger Allan Ford, *Patent Invalidity Versus Noninfringement*, 99 CORNELL L. REV. 71, 118 (2013) (arguing for "eliminat[ing] the elevated burden of proof that applies to invalidity" and citing many "[s]cholars and others [who] have long argued" the same).

[274] In *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238 (2011), the Supreme Court rejected the argument that the presumption of validity should not apply when the PTO has not considered the prior art at issue, but the Court approved the use of a jury instruction stating that the PTO had not evaluated the evidence at issue. A study then found that mock jurors were just as likely to find a patent invalid with a

Less drastic than wholesale reformulation of deference doctrine is the possibility that courts might instead use dicta to reduce deference mistakes. Courts that decide issues of qualified immunity are already encouraged, as a matter of law, to determine whether a right exists in addition to holding whether it is "clearly established." This rule could be extended to habeas and to any number of other types of deference regimes. For instance, a court considering patent's validity in the course of an infringement lawsuit could rule on validity under the clear-and-convincing-evidence standard and then announce separately what decision it would have reached had it considered the question without deference. Appellate courts reviewing lower court decisions for abuse of discretion or clear error could issue their rulings and then add advisory statements explaining what they would have done were they considering the cases without deference. These statements would be dicta, but that is not the point. They would constitute important information that future courts could use to make better decisions and avoid deference mistakes.

The greater problem is that the courts issuing such dicta might be tempted (consciously or unconsciously) to engage in motivated reasoning, as we mentioned above. A court that had decided that a particular right was not clearly established might be reluctant to declare that the right exists, thus placing all of the weight on its determination that it was not clearly established. A court that had declared a patent valid might be loath to admit that it would have reached a different result under a preponderance standard, thereby acknowledging that the case was close and opening the door for an appellate court to disagree. Or, less consciously, a court that had just decided a case one way might be more focused on evidence that confirms that view and thus more inclined to announce that the result would have been the same under any deference regime.

Accordingly, a system in which courts regularly issue deference-related dicta might be inadvisable. If the number of errors due to motivated reasoning would exceed the current number of deference mistakes, courts might actually produce *less accurate decisions* if they were forced to speculate about outcomes under standards not before them. (This is, of course, one of the reasons behind the "case or controversy" requirement and the general distaste for dicta.) Accordingly, it is difficult to recommend even so limited an intervention as requiring that courts issue dicta when deciding cases under deferential standards. Some of the more limited measures we described above, such as noting the deference standard in citations to a case, seem more likely to produce net gains.

An even more limited but potentially more effective intervention would be simply to bring the issue to the attention of judges (and their clerks) on a systematic basis. If judges are aware of their potential to make deference mistakes, they will likely pay more attention to the deference regimes involved in the precedents they are citing and become less likely to err in the first instance. If increased awareness alone is insufficient, one could imagine a set of informal procedural norms evolving to combat the problem. For instance, it might become standard practice when citing a case to

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preponderance instruction with this *i4i*-type limitation as with a clear-and-convincing-evidence instruction (and in both cases were more likely to find the patent invalid than with a preponderance instruction alone). David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J.L. & TECH. 429 (2013).

note parenthetically the deference regime governing the legal question at issue. To illustrate:

> A condition of supervised release that bars possession of any pornographic materials is not overbroad. *United States v. Ristine*, 335 F.3d 692, 694-95 (8th Cir. 2003) (plain error).
>
> A medical device patent is not obvious where the record contains no motivation to combine two similar prior art references, and where the new device was widely copied after it was introduced. *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1369 (Fed. Cir. 2012) (clear and convincing evidence).

Forcing judges to mention the deference regime specifically will make the issue much more salient and force them to consider whether they are using a case to support a legal proposition that it cannot sustain, given the deference regime under which it was decided. It might also help prevent deference mistakes from propagating by making clear when a court is relying substantially upon deferential precedents. This norm could simply be an informal practice among judges (and a requirement for the bench memos law clerks write to help judges decide cases), or it could be instantiated in local judicial rules or even *The Bluebook*.

Finally, it may simply be appropriate for courts, legislatures, litigants, and scholars to view particular doctrines with greater skepticism because of the possibility that those doctrines have evolved in biased fashion due to deference mistakes. This is especially true for doctrines governed by bifurcated deference regimes. Our model in Part III makes clear that deference mistakes can occur under both unitary and bifurcated deference regimes. But we also note that we suspect that deference mistakes will be much more common in bifurcated deference regimes, and our examples of errors are taken almost exclusively from those types of regimes. Thus, it is possible that the bifurcated deference regime governing patent validity has expanded the boundaries of patentability and made it easier to obtain a patent. And it is possible that deference mistakes in habeas and § 1983 cases have led courts to unwittingly contract the scope of federal procedural rights. Policymakers, litigants, and scholars who examine these doctrines should not necessarily treat them exclusively as the product of years of common-law wisdom, enshrining truths that may not be visible to the human eye.[275] Rather, in many cases they may be the product of the most human of mistakes.

We admit that it must be tempting to believe that any error that could be eliminated so easily—just pay closer attention to precedent!—really presents a significant problem. Perhaps it does not; we have no way of proving definitively to the contrary. But given the theory that predicts deference mistakes, and the numerous examples we have found, we believe it would be naïve to ignore the issue. Accordingly, some type of intervention—even, or perhaps especially, a very mild one—may well be warranted.

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[275] We recognize that many participants in the legal system already view existing law with a jaundiced eye, but there are of course parties who are much more deferential to the law on the books and the reasoning that underlies it.

Conclusion

The proposition that courts should understand the deference regimes at issue in the precedents they cite might seem banal, and the cases in which courts fail to do so might seem like minor errors. Yet we have shown that such deference mistakes are commonplace in areas ranging from criminal procedure to patent law, and that they can have pernicious effects on doctrinal development. The cumulative effect of deference mistakes may be partly responsible for doctrinal shifts such as the inflation in the boundaries of patentability, the retrenchment in the law of criminal procedure rights, and the pro-employer shift in employment discrimination law.

We have argued that requiring courts to be more explicit about deference might reduce the number of formal legal errors, but also (counterintuitively) might exacerbate the underlying problem due to judges' efforts to avoid cognitive dissonance. Unless judges become more comfortable admitting ambiguities, the best solution may be to increase awareness of problem of deference mistakes among actors throughout the legal system, helping these actors to recognize deference mistakes when they occur.