

## *Articles*

# **Judicial Magic: The Use of Dicta as Equitable Remedy**

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### **Introduction**

**F**IRST-YEAR LAW STUDENTS are often shocked to discover that following the law routinely leads to injustice. Litigation, they learn, is a zero sum game: a plaintiff claims injury; the defendant denies legal responsibility; when the defendant triumphs, the plaintiff is left empty handed, regardless of the equities. By pleading contributory negligence, or the statute of limitations, or the business judgment rule, a defendant, even a seemingly culpable defendant, can escape liability.

Justice is not handmaiden to the law in this scenario. The plaintiff may well have suffered injury—blameworthy injury in fact. But where the law does not recognize a legally cognizable wrong, the plaintiff has no remedy. What is “fair” has no necessary relation to what is “legal.” Inevitably this sparks outrage in the classroom. Students raise their hands to protest that the outcome is “not right.” They soon realize, however, that morality and law have little in common. In time—a remarkably short time in fact—most stop questioning this at all.

The Securities and Exchange Commission’s 2010 civil complaint against Goldman Sachs is but one illustration of the kind of case that breeds cynicism in budding attorneys. The investment bank, “infamously dubbed the ‘great vampire squid wrapped around the face of humanity,’” was accused of defrauding clients by selling them a complex financial instrument without disclosing that it was designed to

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fail.<sup>1</sup> Knowingly selling junk to customers that you're expecting to bust seems obviously wrong. Yet, as a number of journalists and commentators have observed, it's unclear whether Goldman's employees broke any laws.<sup>2</sup> Strange as it seems, structured credit finance is a new area of law with few precedents.<sup>3</sup> Under the law, "it may not be illegal for a bank to put together a package of toxic synthetic derivatives" for sale to one customer, while simultaneously assisting another customer in placing short bets that those same investments will blow up.<sup>4</sup> And no court has yet weighed in on this issue. In July 2010, Goldman—without admitting any wrongdoing—agreed to pay \$550 million to settle the lawsuit, leaving only a single twenty-eight-year-old midlevel banker, Fabrice Tourre, the self-proclaimed "Fabulous Fab," on trial for the crimes of an entire industry.<sup>5</sup> To date, no high-profile participants in the 2008 financial meltdown have been prosecuted.<sup>6</sup> And while Fabrice Tourre's fate remains unclear,<sup>7</sup> the problem his case raises is timeless. What, if anything, can judges do when faced with a lawful injustice?

One notorious case provides an example. In *Korematsu v. United States*, the Supreme Court, while upholding the wartime relocation and internment of Japanese Americans, declared in dicta that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."<sup>8</sup> A decade later, when the Court struck down

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1. Shahien Nasiripour, *Goldman Sachs Fraud Charges Could Be Just the Beginning*, *Say Analysts*, HUFFINGTON POST (Apr. 16, 2010), [http://www.huffingtonpost.com/2010/04/16/goldman-sachs-fraud-charg\\_n\\_540934.html](http://www.huffingtonpost.com/2010/04/16/goldman-sachs-fraud-charg_n_540934.html).

2. See, e.g., Miles Mogulescu, *Comparing Goldman Sachs to a Casino Is an Insult to Casinos*, HUFFINGTON POST (Apr. 28, 2010), [http://www.huffingtonpost.com/miles-mogulescu/comparing-goldman-sachs-t\\_b\\_555275.html](http://www.huffingtonpost.com/miles-mogulescu/comparing-goldman-sachs-t_b_555275.html); Gillian Tett, *Financial Reform in US Could Be Buried Under a Mound of Paper*, FIN. TIMES (Apr. 30, 2010), <http://www.ft.com/cms/s/0/5c8b517e-53f0-11df-aba0-00144feab49a.html>.

3. Tobin Harshaw, *Goldman's Stacked Bet*, N.Y. TIMES OPINIONATOR (Apr. 16, 2010 8:50 PM), <http://opinionator.blogs.nytimes.com/2010/04/16/goldmans-stacked-bet/>.

4. Mogulescu, *supra* note 2.

5. Rich Blake, *Goldman Sachs' 'Fabulous Fab' Tourre Hung Out to Dry?*, ABC NEWS (July 22, 2010), <http://abcnews.go.com/Business/goldman-minion-faces-charges-powerhouse-bank-paid-make/story?id=11229193>; Louise Story & Gretchen Morgenson, *S.E.C. Case Stands Out Because It Stands Alone*, N.Y. TIMES, June 1, 2011, at A1.

6. See Gretchen Morgenson & Louise Story, *A Financial Crisis with Little Guilt*, N.Y. TIMES, Apr. 14, 2011, at A1; Editorial, *On the Trail of Mortgage Fraud*, N.Y. TIMES, Jan. 16, 2012, at A22; Edward Wyatt, *S.E.C. Is Avoiding Touch Sanctions for Large Banks*, N.Y. TIMES, Feb. 3, 2012, at A1.

7. As of February 1, 2012, the SEC's civil lawsuit against Tourre remains pending in the Southern District of New York. See *SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147 (S.D.N.Y. 2011) (granting in part and denying in part Tourre's motion to dismiss the amended complaint).

8. 323 U.S. 214, 216 (1944).

segregation in *Brown v. Board of Education* and *Bolling v. Sharp*, it drew upon this dicta to argue that racial classifications were inherently suspect and required judicial scrutiny.<sup>9</sup> Today, despite its status as dicta, *Korematsu's* language remains the standard justification for the strict scrutiny of suspect categories.<sup>10</sup>

*Korematsu* offered a powerful new vocabulary for combating racial discrimination,<sup>11</sup> but a close reading of the opinion reveals significant dissonance—a discordance that both shocks and puzzles. Indeed, the Court's dicta produces a decision seemingly at odds with itself. At first blush, the outcome's very logic is called into question. What explains this paradoxical use of dicta? Is this just muddy thinking—or a legal *aporia* with deeper significance?<sup>12</sup>

Despite its pervasive and longstanding survival in common law, dicta is subject to serious criticism.<sup>13</sup> It has been characterized as “trivial,” “superfluous,” “ill-considered,” or worse—an abuse of judicial discretion that inevitably results in “bad law” and “confusion.”<sup>14</sup> Other

9. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); see also Neil Gotanda, “Other Non-Whites” in *American History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1191 (1985) (reviewing PETER IRONS, *JUSTICE AT WAR* (1983)).

10. See, e.g., Gotanda, *supra* note 9, at 1192 (describing *Korematsu* as “the standard precedential reference for strict judicial scrutiny of suspect categories”); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 758 (2007) (citing *Korematsu* as the origin of the Supreme Court's strict scrutiny language).

11. Jordan Steiker, *American Icon: Does It Matter What the Court Said in Brown*, 81 TEX. L. REV. 305, 329 (2002) (reviewing JACK M. BALKIN, *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* (2001)).

12. In philosophy, an *aporia* is a seemingly insoluble contradiction in an inquiry, arising as a result of equally plausible yet inconsistent premises. It can also denote the state of being perplexed, or at a loss—thinking itself helpless before a critical impasse. The notion of an *aporia* is principally found in Greek philosophy, but it also plays a role in post-structural philosophy, as in the writings of Jacques Derrida and Luce Irigaray. See, e.g., Alan Bass, *Introduction to Jacques Derrida, Writing and Difference* at xviii (Alan Bass trans., Routledge Classics 2d ed. 2001) (1980) (“Philosophy is founded on the principle of the archia, on regulation by true, original principles; the deconstruction of philosophy reveals the differential excess which makes the archia possible. This excess is often posed as an *aporia*, the Greek word for a seemingly insoluble logical difficulty: once a system has been ‘shaken’ by following its totalizing logic to its final consequences, one finds an excess which cannot be construed within the reasons of logic, for the excess can only be conceived as neither this nor that, or both at the same time—a departure from all rules of logic.”).

13. E.g., JOYCE J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 242 (4th ed. 2000) (“[D]icta in opinions . . . [is] not encouraged.”). Technically, dicta is the plural of the singular dictum. But to avoid dozens of grammatically correct but otherwise clunky “dicta are” constructions, this Article will treat “dicta” as singular throughout, except where specifically noted.

14. See generally Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006).

critics have dismissed dicta as mere rhetorical flourish, an indicia of judicial vanity.<sup>15</sup> Indeed, one might surmise from its many critics that dicta is the worst of all possible utterances—an *un*-necessary evil, whose very existence lacks any coherent justification.

Yet dicta persists. The admonition to eschew dicta is frequently broken.<sup>16</sup> Given the limits that case-or-controversy requirements place on courts' ability to make law in the abstract, this phenomenon appears troubling. For instance, "[c]onsiderations of judicial restraint counsel that a federal court should not announce a rule broader than necessary to decide the case before it."<sup>17</sup> This doctrine compels minimalism: just facts and holdings, leaving no space for dicta.<sup>18</sup> Any excess language is no more than ad hoc speculation without precedential value. From this perspective, dicta is trivial at best and potentially hazardous at worst—the judicial equivalent of an attractive nuisance. But moderation is a very dull, dreary affair. And judges habitually chance negligence, authoring and citing propositions that bear little relation to holdings.<sup>19</sup>

What accounts for this strange pattern? Judicial obstinacy is an unlikely explanation for this phenomenon. The decision-making freedom that judges have is a *constrained* freedom, subject to norms that require impartiality, commitment to stability, and a due regard for the demands of the judicial craft.<sup>20</sup> As noted jurist Richard Posner observes, "[m]ost judges, like most serious artists, are trying to do a 'good job,' with what is 'good' being defined by the standards for the 'art' in question."<sup>21</sup> While there are no fixed, incontestable criteria of judicial excellence, few judges are likely to risk their reputations by cavalierly breaking the "rules" internal to the judicial game.<sup>22</sup> Certainly, technical confusion regarding the distinction between holding

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15. See Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 255 (2008) ("Dicta—often added to placate, or even impress, the opinion's audience—distracts the reader from the issues."); Richard J. Neuhaus, *Rebuilding the Civic Public Square*, 44 LOY. L. REV. 119, 125 (1998).

16. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 662 (2001).

17. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2005 (1994).

18. *Id.* at 2005–06.

19. Hathaway, *supra* note 16, at 662–63.

20. RICHARD A. POSNER, HOW JUDGES THINK 11–13, 125 (2008) [hereinafter POSNER, HOW JUDGES THINK] (arguing that even judges with more or less complete freedom to decide cases are constrained by concerns for their reputation among fellow members of the bar "but even more by their having internalized the norms and usages of the judicial 'game'").

21. *Id.* at 12.

22. See *id.* at 125.

and dicta is widespread.<sup>23</sup> This might explain dicta's presence in marginal instances, but not its exercise by the most egregious offenders. In those cases, dicta clearly and powerfully exceeds the logic of any purported holding.

Another explanation does better: perhaps previous commentators have been looking through the wrong end of the telescope. What if the persistence of dicta is explained not as a gratuitous contingency, but as a kind of *necessity*? The prevailing view of dicta contrasts its insignificance with the importance of predictable legal rules. This view neglects the inherent paradox of rules themselves (i.e., that following the "rules" will sooner or later lead to distinctively unjust outcomes). Can the persistence of dicta be explained by its necessity in securing justice exactly where the law falls short? If so, then all these suspect indulgences—the seemingly trivial aside, the ad hoc counsel, the slapdash digression—are conceivably more than what they appear.

Scholars have traditionally asked, "What is the distinction between dictum and holding?" And more recently, "How can the abuse of dicta be curtailed?" These critics see a problem but are blind to what gives rise to this vision. Consequently, the mystery vanishes before our eyes. No one, it seems, has asked the right questions: Why does dicta exist? And what is the meaning of this seemingly ineradicable mischief?

This Article attempts to answer these questions. In what follows, I criticize the conventional view of dicta and offer another in its place. My point of entry into this investigation is an important, but little observed, phenomenon: the use of dicta as equitable remedy. I explore the mystery of dicta by giving a close reading of a handful of opinions, each illuminating previously undisclosed aspects of this phenomenon. Above all, the focus of this Article is the unique role that dicta plays as a remedy for harms that seemingly have no legal prohibition. The proposed account takes dicta seriously as a vehicle for the law's subterranean commitments. My goal is to explain not just *how* judges use dicta, but *why*.

Part I of this Article explores the nature of equity. The focus is on the inherent contradiction arising from the substantiation of justice through a body of strict rules. Here, I argue that the conflict between justice and law can best be understood as a form of equitable dissonance. In Part II, I suggest that dicta plays a crucial role in resolving

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23. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 957–59 (2005) ("While no satisfactory definition [of dicta] has yet to emerge, legal scholars have largely turned their attention elsewhere.").

this conflict. This section sets out the theory of dicta as equitable remedy, explaining dicta's omnipresence in the law as a function of its singular utility for expressing and resolving legal contradiction.

Part III applies this theory to a close reading of paradigmatic cases in torts, contracts, and civil rights. This section elaborates the theory of dicta as equitable remedy by demonstration of its three principle features: (1) dicta as a form of punishment and symbolic remedy through noncontrolling decisional language; (2) dicta as a source of evolving legal standards in which the court announces a new rule while refusing to apply it to the case at hand; and (3) dicta as a kind of quasi-prophylactic remedy, whose reach extends beyond the immediate litigants.

Part IV addresses the criticism that dicta is an abuse of judicial discretion by explaining dicta's unique role in legal reasoning. Finally, the Article concludes with an examination of the necessity of dicta and explores what this phenomenon reveals about the deep structure of the law.

Dicta is the most elusive of subjects: it conceals its nature even as it discloses other essential truths. Like passage through a veritable hall of mirrors, the study of dicta reveals previously unseen aspects of the law. Lost in these reflections, most critics have neglected the mirror itself. But understanding the significance of dicta requires a steady gaze. Like the denizens of Plato's cave, we must begin by learning to see the truth of what is, not what appears to be.

## I. Equity, Dissonance, and the Rule of Law

Judges have a narrow range of options when confronting legally sanctioned injustice. Among their alternatives are resignation, dissent, public protest, or silent acquiescence.<sup>24</sup> One underappreciated strategy is the use of dicta as moral indictment and prophylactic remedy. But this strategy is best understood through dicta's relationship to other forms of equitable remedy generally.

Remedial issues arise whenever the law tells us that a plaintiff's rights have been infringed in a way that gives rise to a legal claim.<sup>25</sup> This remedial authority is inherent in the judicial power extended to courts, embodying the common law maxim of *ubi jus, ibi remedium*—

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24. Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 *FORDHAM URB. L.J.* 131, 139–45 (2004).

25. DAN B. DOBBS, *DOBBS LAW OF REMEDIES* 25 (2d ed. 1993).

where there is a right, there must be a remedy.<sup>26</sup> When plaintiffs' rights are infringed, a court sitting in equity has broad powers of discretion for shaping appropriate relief.<sup>27</sup> However, that discretion is not unlimited. A court's decision to grant equitable relief must be supported by the facts and the law; that is, a judge may not impose conditions or grant relief without regard to precedent and established principles of equity jurisprudence.<sup>28</sup> What's more, "equity has no jurisdiction over imperfect obligations resting upon conscience or moral duty only, unconnected with legal obligations."<sup>29</sup>

The longstanding suspicion of equity in American law is understandable since Western legal systems emphasize justice according to law rather than personal fiat.<sup>30</sup> As Eric Zahnd observes, "A judge's [unrestrained] use of equity, if it were to entail ignoring established legal principles in favor of . . . individualized case-by-case adjudication, [w]ould destroy a system [grounded in] universally applicable rules."<sup>31</sup> Consequently, judges often find themselves in the position of enforcing laws they regard as unjust. Even where great harm has been done, judges are typically powerless to provide a remedy for innocents lacking corresponding legal rights, without overstepping their defined role.

As we shall see, dicta offers judges a way out of this dilemma; it provides a unique tool for addressing injustice, without *doing* injustice. Dicta is thus essentially a manifestation of equity. But to suggest that dicta is best understood as a form of equitable remedy should not be confused with the claim that dicta is available only to courts sitting in the exercise of traditional equity jurisdiction.<sup>32</sup> That is far from the

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26. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*109 ("[I]t is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury it's proper redress."); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 262 (1998) ("The principle that for every right there is a remedy—*ubi jus, ibi remedium*—was a rule at English Common Law which the Supreme Court recognized as being central to American constitutional law beginning with *Marbury v. Madison*.").

27. 3 BLACKSTONE, *supra* note 26, at \*114.

28. *Claussen v. City of Lauderdale*, 681 N.W.2d 722, 726 (Minn. Ct. App. 2004).

29. *Linville v. Ripley*, 173 S.W.2d 687, 690 (Mo. Ct. App. 1943).

30. Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, LAW & CONTEMP. PROBS., Winter 1996, at 263, 264 (1996).

31. *Id.*; cf. Weinstein, *supra* note 24, at 140–45.

32. The authority exercised by courts sitting in equity jurisdiction has historically included such powers as entering injunctions, enforcing titles to land, and settling bankruptcies. See generally Richard H.W. Malloy, *Expansive Equity Jurisprudence. A Court Divided*, 40 SUFFOLK U. L. REV. 641 (2007).

case. Indeed, dicta is least necessary when a court enjoys broad discretion to balance the interests of the litigants according to the exigencies of the case. Rather, the description of dicta as a form of equitable remedy must be understood metaphorically. It alludes to the power of dicta to fashion remedies precisely where the law offers no other recourse for a court faced with obvious injustice.

Chief Justice John Marshall's opinion in *Marbury v. Madison* is perhaps the most celebrated, while simultaneously notorious, example of this strategy.<sup>33</sup> That case arose from the Jefferson administration's refusal to honor the undelivered judicial commissions of the previous Congress. Seeking to avoid a direct confrontation with the executive branch, Marshall analyzed the merits at length before declaring that the Court lacked jurisdiction to issue a writ of mandamus. Jefferson was outraged that Marshall would publicly criticize him for many pages in what amounted to obiter dicta preliminaries.<sup>34</sup>

The political and tactical genius of Marshall's opinion was that it separated legal questions from political ones while simultaneously crafting a cogent argument for the exercise of judicial review.<sup>35</sup> Today, the opinion is universally acknowledged as a constitutional landmark for its pronouncement that "[i]t is emphatically the province and the duty of the judicial department to say what the law is,"<sup>36</sup> despite the absence of any explicit constitutional language granting such power to the Court. As generations of first-year law students have learned, Marshall and his Court may have lost the battle over *Marbury's* commission, but they won the war by advancing the principle of judicial review.<sup>37</sup>

*Marbury v. Madison* is a classic example of the remedial power of dicta. But this power is best appreciated as a manifestation of equity's

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33. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); see also David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 738 (2007).

34. CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835*, at 244 (rev. ed. 1926) (noting that the dicta in *Marbury* "aroused severe criticism and attack by President Jefferson and his adherents"); Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1181 n.332 (2000).

35. Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 434 (2004).

36. *Id.* at 391; see also *Marbury*, 5 U.S. (1 Cranch) at 177.

37. Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 771 (2005) ("The *Marbury* decision advances a series of propositions, all of which Marshall claimed were demanded by the rule of law. The application of these principles actually limited the potential scope of the Supreme Court's jurisdiction. That, of course, was a small price for greatly expanding the 'judicial power' of constitutional review over the President and Congress.").

traditional function as a mediation between the rule of law and the demand for justice. Because I argue that dicta is a critical vehicle for this mediation, understanding dicta as a form of equitable remedy requires a familiarity with the roots of equity in the Western tradition.

### A. The Historical and Philosophical Tradition of Equity in Anglo-American Law

Equity has been said to be the principle by which justice may be attained in cases where the prescribed or customary forms of law are inadequate.<sup>38</sup> For the ancients, the function of equity was to supplement or correct the civil law.<sup>39</sup> As Vernon Palmer points out, “Within the English system, equity softened or abated the rigor of the common law through the Conscience of the Chancellor.”<sup>40</sup>

But equity has not been without its critics.<sup>41</sup> Consider John Selden’s notorious invective:

Equity is a roughish thing, for [in] law we have a measure [and] know what to trust too. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. Tis . . . as if they should make the standard for the measure we call a foot, to be the Chancellor’s foot; what an uncertain measure this would be; one Chancellor has a long foot another a short foot a third an indifferent foot; tis the same thing in the Chancellor’s conscience.<sup>42</sup>

And equity—however great its past triumphs—continues to be assailed by challenges to its legitimacy in the present.<sup>43</sup>

Equity has its roots in the legal theory of Aristotle.<sup>44</sup> In Book V of the *Nicomachean Ethics*, Aristotle argues that, while all law is universal, no rule can be formulated to cover every possible situation. Therefore, “the law chooses the [universal rule] that is usually [correct], well aware of the error being made.”<sup>45</sup> That error is neither the fault of the law nor the legislature, but lies instead with the nature of reality

38. 27 AM. JUR. 2D *Equity* § 1 (2008).

39. Zahnd, *supra* note 30, at 265–67.

40. Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 8 (1994).

41. Zahnd, *supra* note 30, at 263–64.

42. JOHN SELDEN, THE TABLE TALK OF JOHN SELDEN 64 (William Pickering 1847) (1689) (capitalization modernized).

43. See, e.g., Deborah A. DeMott, *Foreword*, LAW & CONTEMP. PROBS., Summer 1993, at 1 (1993).

44. Joseph Hendel, *Equity in the American Courts and in the World Court: Does the End Justify the Means*, 6 IND. INT’L & COMP. L. REV. 637, 638 (1996).

45. ARISTOTLE, NICOMACHEAN ETHICS 83 (Terence Irwin trans., Hackett Publ’g Co. 2d ed. 1999) (alterations in original).

itself, which defies such general categorizations.<sup>46</sup> Equity, on this theory, is adaptive or corrective, rather than arbitrary or wholly creative—a prudential doctrine, employing the hypothetical wisdom of the legislator to correct deficiencies stemming from the law’s problematic generality.<sup>47</sup>

The dominant modern interpretation of Aristotle’s theory is that equity functions to fill gaps in the law. “[T]hat is,” as Zahnd comments, “equity enables a judge to adjudicate correctly a case presenting a novel issue on which the legislature has enacted no law or that law is incomplete.”<sup>48</sup> This does not mean, however, that a judge sitting in equity has unbridled discretion.<sup>49</sup> Legal scholars have identified two types of cases in which equity properly fills such gaps. The first is a situation in which no enacted law covers the controversy at hand. These are what modern theorists call “cases of first impression.” Such cases present issues for which a judge has no relevant law or precedent to apply.<sup>50</sup>

The second, more controversial, type of case addressed by equity arises when the enacted law sweeps too broadly; while appearing to apply, the law itself falls into error by dictating a different outcome than what justice demands. Aristotle remarks that in these cases “what happens violates the [intended scope of] the universal rule.”<sup>51</sup> The role of equity in this situation is to fill the gap between what is legal and what is just.

The exercise of this second kind of Aristotelian equity is anathema to the modern American legal system, grounded as it is in precedent and the rule of law. Whereas in traditional English law, equitable adjudication was informed by a desire “to do the right thing,” American courts are honor bound “to follow the rules.”<sup>52</sup> This tradition valorizes “objectivity and judicial duty over achievement of substantially just results in the case at bar.”<sup>53</sup> When confronted with a conflict be-

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46. *Id.*

47. Zahnd, *supra* note 30, at 267.

48. *Id.* at 268.

49. *See id.*

50. *Id.* at 269.

51. ARISTOTLE, *supra* note 45, at 84.

52. John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 34 Hous. L. Rev. 1425, 1455 (1998) (“In traditional equity, and for the pre-Marshall Court, equitable adjudication was informed by the desire to do the right thing: to decide a case according to ‘justice and honor,’ so that the rights of the party with the ‘highest equity’ were vindicated. This goal disappears from early Marshall Court equity. Instead of seeking justice, the Court sought to apply the rules.”).

53. *Id.*

tween law and right, American judges are counseled, in essence, to sacrifice the interests of justice on the altar of consistency.

This conflict exposes a significant paradox. That judges must obey the law is axiomatic, but this obligation inevitably frustrates the legal system's underlying purpose (i.e., doing justice). This is the law's equivalent of a Catch-22. The judge's responsibility with regards to this paradox is unclear. Indeed, judges appear stranded between Scylla and Charybdis—the prisoner of equally binding, yet inconsistent, demands.

In actual practice, of course, the law survives this contradiction. The demand that courts enforce even those laws that render unjust results does not result in the breakdown or immobilization of the legal system. We therefore need an account that preserves the distinction between equity and law but that depicts their relationship more accurately than the prevailing view. I now propose such an alternative account.

## B. The Model of Equitable Dissonance

Mozart's wife famously struck an unresolved piano chord to rouse the composer from bed in the morning.<sup>54</sup> A half-finished melody was a torment for the composer, like a fly buzzing inside his ear. Only by resolving the chord progression to its tonic, the "home base" of the entire sequence, could Mozart restore harmonic order and quell the dissonant cacophony ringing in his head.<sup>55</sup>

Music, however, is not the only realm in which dissonance and consonance play key roles. The starting point of Charles Sanders Peirce's pragmatism, for instance, is "the idea that people hate being in a state of doubt and will do whatever is necessary to move from doubt to belief."<sup>56</sup> This is as true of judges as of anyone else,<sup>57</sup> and the model I intend to sketch regarding the interaction of justice and the law is best illustrated by an analogous set of concepts.

Any complex system of thought inevitably gives rise to contradiction. Within the system this phenomenon is experienced as *dissonance*—the uncomfortable sensation of simultaneously holding two

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54. *Opera Background: The Twelve-Tone System*, METROPOLITAN OPERA: INT'L RADIO BROADCAST INFO. CENTER, <http://archive.operainfo.org/broadcast/operaBackground.cgi?id=85&language=1> (last visited Mar. 24, 2012).

55. *Id.*

56. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 192 (1990) [hereinafter POSNER, *THE PROBLEMS OF JURISPRUDENCE*].

57. *Id.*

contradictory ideas.<sup>58</sup> Social psychology teaches that when individuals experience “cognitive” dissonance, they have a strong motivational drive to reduce this uncomfortable sensation by changing or rationalizing their attitudes, thoughts, or behaviors.<sup>59</sup> Dissonance occurs when a person perceives a logical inconsistency among his or her beliefs. This happens, for instance, when one belief entails the contradiction of another.<sup>60</sup> For example, a belief in the importance of good health could be interpreted as inconsistent with smoking cigarettes or overeating. Noticing this contradiction leads to dissonance, which can be experienced as guilt, shame, anxiety, anger, stress, and other negative emotional states.<sup>61</sup> By contrast, when people’s ideas are consistent with each other, they are in a state of harmony or *consonance*. As Leon Festinger first proposed, “The existence of dissonance, being psychologically uncomfortable, will motivate a person to try to reduce dissonance and achieve consonance.”<sup>62</sup> Indeed, a failure to reduce dissonance, in extreme cases, can result in mental illness, breakdown, or even death.<sup>63</sup>

This dynamic exists within systems as well as people. When an intellectual system’s flaws give rise to significant contradiction, either the system must be abandoned or the contradiction must be resolved.<sup>64</sup> The challenge confronting the system is how to preserve its fundamental principles while resolving this dissonance.

The process by which a contradiction between two conflicting insights is resolved in a synthesis that incorporates the truth-value of both is commonly described as a dialectic. This concept is best understood in terms of one of its key principles: *sublation*, an English term

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58. See 5 MARIO AUGUSTO BUNGE, *TREATISE ON BASIC PHILOSOPHY* 200–01 (1983); GREGG HENRIQUES, *A NEW UNIFIED THEORY OF PSYCHOLOGY* 133–35 (2011).

59. LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 2–3 (Stanford Univ. Press 1962) (proposing that individuals are strongly motivated to reduce psychological discomfort caused by the recognition of inconsistencies within their own belief systems).

60. *Id.*

61. ELIZA AHMED, NATHAN HARRIS, JOHN BRAITHWAITE & VALERIE BRAITHWAITE, *SHAME MANAGEMENT THROUGH REINTEGRATION* 187 (2001).

62. FESTINGER, *supra* note 59, at 3.

63. See generally R.D. HINSHELWOOD, *SUFFERING INSANITY: PSYCHOANALYTIC ESSAYS ON PSYCHOSIS* 76–77 (2004); JOHN H. RIKER, *HUMAN EXCELLENCE AND AN ECOLOGICAL CONCEPTION OF THE PSYCHE* 82 (1991); see also Peter S. Bearman, *The Social Structure of Suicide*, 6 *SOC. F.* 501, 512–16 (1991) (discussing Durkheim’s theory of the relationship between social anomie and suicide).

64. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 77–79 (2d ed. 1970) (arguing that the transition to alternate scientific paradigms—necessitating the abandonment of existing systems of thought—occurs whenever an intellectual crisis is so severe that the logic internal to the existing dominant system can no longer provide answers).

used to translate the German word, *aufhebung*.<sup>65</sup> *Aufhebung* has the apparently contradictory implications of both preserving and changing its object (the German verb *aufheben* means “to cancel,” “retain,” and “raise up”).<sup>66</sup> In a genuinely dialectical process, sublation is the vehicle by which a lower conceptual stage “is both annulled and preserved in a higher one.”<sup>67</sup>

As in a Socratic dialogue, the dialectical process functions by making implicit contradictions explicit.<sup>68</sup> Consider Marx’s favorite example, democratic capitalism. Marx argued that consolidation of production in the hands of a few capitalists led to crises of overproduction where the resulting slump in sales forced businesses to suspend operations and condemn millions of their laid-off workers to stark poverty, precisely because of the relative abundance of goods.<sup>69</sup> Marx thought that the very essence of the capitalist system—its tendency to extend production without limits in the pursuit of profit—reflected a fundamental contradiction that would lead to its destruction.<sup>70</sup> The insight of genuinely dialectical thinking is that the contradictions that emerge do not arise from a clash of competing interests or principles; rather, they are *in and internal* to systems.<sup>71</sup>

The law is one such system. The foundation of law is justice, but justice is an abstraction. While its pursuit explains much judicial behavior, the concept of justice provides little concrete guidance. Justice is like a country with few discernable borders and no reliable maps. We discover the contours of justice one case at a time, as an explorer might chart rivers in a vast wilderness. But the application of that understanding in the form of strict legal rules produces frustration. No particular rule can ever substantiate a universal concept like justice.

65. STEPHEN DAVID ROSS, METAPHYSICAL APORIA AND PHILOSOPHICAL HERESY 253 (1989) (noting that to supersede through sublation “is at once to negate and to preserve”).

66. QUENTIN LAUER, ESSAYS IN HEGELIAN DIALECTIC 105 (1977).

67. See ANDREW HUSSEY, THE INNER SCAR: THE MYSTICISM OF GEORGES BATAILLE 12 (2000) (describing Hegel’s concept of sublation as the “dialectical transition in which a lower stage is both annulled and preserved in a higher one”).

68. MICHAEL N. FORSTER, HEGEL AND SKEPTICISM 172 (1989).

69. ERNEST MANDEL, AN INTRODUCTION TO MARXIST ECONOMIC THEORY 47, 65–67 (2d ed. 1973); see also BERTELL OLLMAN, DANCE OF THE DIALECTIC: STEPS IN MARX’S METHOD 162–65 (2003).

70. OLLMAN, *supra* note 69, at 164–65.

71. Traditionally, the dialectical process has been explained in terms of the categories of thesis, antithesis, and synthesis. This model is associated with Hegel’s *The Science of Logic* but does not capture the intricate nature of Hegelian dialectic, which emphasizes the fundamental contradictions inherent within systems of thought. The familiar model is actually derived from the work of Hegel’s contemporary, Johann Gottlieb Fichte. See generally 7 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY (1965).

The inherent deficiency of legal rules thus inevitably gives rise to contradictory outcomes.

Consider Blackstone's famous observation that the law of Bologna "that whoever drew blood in the streets should be punished with the utmost severity" should not be interpreted to make punishable a surgeon "who opened the vein of a person that fell down in the street with a fit."<sup>72</sup> As this example makes clear, sometimes the purpose of a law can be achieved only by ignoring its command. Even in simple cases, however, this paradoxical duty can lead judges astray. Judge Posner notes the struggles of a French court that, had it obeyed the emphatic French commitment to formal legalism, would have been compelled to read literally a statute which nonsensically forbade train passengers to get on or off the train when it was *not* moving.<sup>73</sup> More complicated cases often result in outright error.

In *Olmstead v. United States*, for instance, the Supreme Court ruled that the natural reading of the Fourth Amendment protected one's person, home, papers, and effects from being searched but not one's private speech.<sup>74</sup> Wiretapped phone conversations, obtained by the government without a warrant and subsequently used as evidence, were held constitutional. This decision remained on the books for forty years until it was reversed by *Katz v. United States* in 1967—a decision which itself largely relied upon the logic of the dissenting opinion (i.e., the dicta) of Justice Brandeis from the original *Olmstead* case.<sup>75</sup>

Likewise, a defendant who commits a novel or unanticipated harm against innocent victims creates a paradox for the legal system. In this scenario, where an obvious harm has been done to an innocent victim, the defendant is simultaneously guilty and not guilty: guilty of doing an injustice, but at the same time not guilty of violating any of the laws enacted to prevent such crimes. This contradiction is problematic. In extreme cases, it calls the entire legal system into question,

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72. BLACKSTONE, *supra* note 26, at \*60.

73. POSNER, HOW JUDGES THINK, *supra* note 20, at 199.

74. 277 U.S. 438 (1928); *see also* POSNER, HOW JUDGES THINK, *supra* note 20, at 200–01.

75. 389 U.S. 347, 350–54 (1967). Many scholars see Brandeis' dissent not only as the origin of communications privacy but also as the foundation of modern Fourth Amendment privacy law. *See, e.g.*, William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 772 (1995) ("[T]he origin of modern constitutional privacy law is to be found in a passage Justice Louis Brandeis included in his 1928 dissent in *Olmstead v. United States* . . ."); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 804 (2004) (noting that Brandeis' dissent "provides the guiding light" for proponents of the view that the Fourth Amendment should be interpreted broadly as communications technology advances).

begging a more adequate resolution.<sup>76</sup> Accordingly, the question arises: How does the legal system evolve, rather than collapse, under the weight of such contradiction?

To answer this question, we must return to our starting point: dissonance. What is the device within a binding legal opinion that allows a judge both to express dissonance but then to resolve that dissonance, like a complex symphonic movement, within a higher and more complete consonance? It would have to be a rhetorical device that simultaneously contradicts the logic of the holding, while creatively transforming that contradiction into something more than the sum of self-negating propositions. It would be something “trivial,” yet undoubtedly “significant,” a “throwaway” that proved itself “necessary.” In other words, it would be a device that embodies all the seemingly paradoxical qualities of a concept we have already explored—*dicta*.<sup>77</sup>

## II. *Dicta* as Equitable Remedy

*Dicta*, like *vice*, takes many forms.<sup>78</sup> *Obiter dictum* is roughly translated from the Latin as a statement made “by the way.”<sup>79</sup> The legal definition of *dicta* is a remark or observation made by a judge

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76. The infamous first Rodney King trial and the riots that followed provide one such example. See Vernon E. Jordan, Jr., Speech to the 1992 Convention of the Washington, D.C. Bar Association (June 25, 1992), in 34 B.C. L. REV. 1, 5 (1992) (“[The] justice system . . . has been called into question in the aftermath of the Rodney King verdict.”).

77. The comparison of *dicta* to musical dissonance in this context is illuminating. Musical dissonance creates feelings of instability, tension, and conflict. We experience a sense of aural relief when dissonant tones logically progress to consonant tones. Composers compare this reharmonization of conflicting strains of melody to a sense of “coming home.” See, e.g., IGOR STRAVINSKY, POETICS OF MUSIC 34 (Arthur Knodel & Ingolf Dahl trans., Vintage Books 1947) (1942) (“[D]issonance is an element of transition, a complex or interval of tones which is not complete in itself and which must be resolved to the ear’s satisfaction into a perfect consonance.”).

78. Legal scholars have traditionally attributed a variety of uses to *dicta*, including: (1) a limiting device used by courts to narrow the perceived breadth of a holding to avoid future overexpansion, (2) nonbinding comments provided as a predictive guide to courts and litigators regarding future rulings in related cases, (3) nonbinding guidance offered by appellate courts to lower courts regarding reoccurring procedural problems, and (4) a harmless outlet for the frustrated philosophical and literary pretensions of certain particularly loquacious judges. See, e.g., Leval, *supra* note 14, at 1253–56 & n.17 (commenting that *dicta* can serve valuable purposes despite the tendency of courts to abuse it by engaging in “flawed, ill-considered judgment”). These forms of *dicta* are generally considered valid by courts and scholars and are not substantially addressed within the context of the current Article. Rather, in discussing *dicta*, my goal is to shed light on the previously little noticed use of *dicta* as remedy and the role it plays in expressing and resolving *equitable dissonance* within the law.

79. See RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 41 (4th ed. 1991).

that, although included in the body of the opinion, does not form a necessary part of the court's decision.<sup>80</sup> But like gossip, these remarks take on a life of their own. Trying to silence dicta is like trying to unring a bell.

Every case presents questions of fact and law. At the appellate level, these questions are raised in the briefs, like a series of exam problems for the court. The holding of an opinion provides answers to these questions. However, when deciding cases, courts do not always limit themselves to the questions raised by the litigants. We find marginalia scattered throughout opinions: hypotheticals, conjectures, and observations of all kinds. These remarks are the judicial equivalent of formulas scratched in the margins of exam blue books—not so much answers, but more a part of the process of arriving at answers. Technically, these remarks do not count towards a court's final grade. Courts may be criticized for such observations, but they cannot be reversed.<sup>81</sup> This is because, as a matter of law, any statement made in excess of the specific controversy before the court is not binding.<sup>82</sup> These statements are the stuff of dicta.

Judge Pierre Leval has described dicta as “an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner.”<sup>83</sup> If the court's judgment would remain unchanged, regardless of the proposition in question, then that proposition is dicta—it plays no role in explaining the direct outcome of the case.<sup>84</sup> In an opinion, obiter dicta include, but are not limited to, words introduced “by way of illustration, analogy, or argument.”<sup>85</sup> Unlike *rationes decidendi*, obiter dicta are not considered part of a case's holding, even if they happen to be correct statements of the law. For instance, once a court determines that a statute does not apply to a case, any statement concerning that statute's constitutionality is dictum.<sup>86</sup> Similarly, the arguments and reasoning of dissenting opinions also constitute dicta.<sup>87</sup>

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80. 21 C.J.S. *Courts* § 227 (2008).

81. Leval, *supra* note 14, at 1262 (“No appeal may be taken from the assertion of an erroneous legal rule in dictum.”).

82. *Id.*

83. *Id.* at 1256–57.

84. *Id.* at 1256.

85. BLACK'S LAW DICTIONARY 1100 (7th ed. 1999) (quoting WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 304 (3d ed. 1914)).

86. *Avants v. Kennedy*, 752 So. 2d 150, 151 (La. 2000).

87. *See, e.g., Singleton v. Comm'r*, 439 U.S. 940, 944–45 (1978) (Stevens, J., concurring) (describing dissents from denial of certiorari as “totally unnecessary” and “the purest form of dicta”).

The distinction between dictum and holding is best understood as the product of the common law's reliance on precedent. This distinction becomes necessary as judges and commentators attempt to elicit rules from prior decisions. The holding is whatever has precedential value for future courts. (This is why dissenting opinions have traditionally been considered *all dicta*.) The dictum is whatever is left over (i.e., the *excess*). Consequently, many critics argue that dicta should be disposed of entirely.<sup>88</sup> For these strict legalists, dicta is like the horror movie monster that just won't die.

While statements constituting dicta are not binding on future courts, they can be persuasive.<sup>89</sup> In drafting opinions, judges routinely quote passages of obiter dicta found in prior cases to reach a legal conclusion. Typically, such quotations are made without even an acknowledgement of the passage's status as dicta. In this manner, dicta often becomes part of the holding in subsequent cases, depending upon what the latter court decided and how the principle embodied in the quoted passage was treated.<sup>90</sup>

The power of well-crafted dicta to influence future outcomes is illustrated by allusion to the better-known practice of judicial dissent. In the course of American legal history, several dissenting opinions have succeeded in changing the law, either by persuading Congress to enact new legislation or by persuading a new court majority.<sup>91</sup> Among the most famous, and certainly the most dramatic, was Justice Storey's dissent in *Cary v. Curtis*, which became law only thirty-six days after its publication, upon passage of congressional legislation regarding the collection of customs duties.<sup>92</sup> Other dissents, like Justice Harlan's impassioned rejection of the separate but equal doctrine in *Plessy v. Ferguson*, were forced to await redemption by a future generation.<sup>93</sup> These cases are examples of dissent as earnest, principled, and eloquent. But this process of transforming dissent into positive law applies as equally to dicta as to its more heroic judicial cousin.

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88. See, e.g., Leval, *supra* note 14.

89. See *McDaniel v. Sanchez*, 452 U.S. 130, 141–42 (1981).

90. Hathaway, *supra* note 16, at 662 (describing lawmaking by dicta as a pernicious phenomenon that judges should stamp out).

91. Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307, 310 (1988).

92. *Id.*; *Cary v. Curtis*, 44 U.S. (3 How.) 236, 252 (1845) (Story, J., dissenting) (arguing that executive functionaries cannot have power to determine constitutional limit of the Act).

93. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (arguing in dissent that the Constitution does not condone separate but equal facilities).

Dicta is a particularly subtle weapon in the hands of judges confronting legally sanctioned injustice. Although rarely acknowledged, the use of dicta as a form of equitable remedy appears in the margins of many important opinions. For example, it is well known that courts often employ dicta to comment directly on policies they regard as foolish or unethical. Less observed, however, is the use of dicta to establish remedies for injuries that might otherwise go uncorrected.

Consider, for example, dicta's utility to courts engaged in prospective overruling.<sup>94</sup> It has often been recognized that, when persons have acted in reliance on a subsequently overruled decision, such reliance should receive protection, even at the expense of plaintiffs with an otherwise just claim.<sup>95</sup> When a court desires to overrule an earlier case or announce a significantly different standard, it may conclude that justifiable reliance on the court's earlier decisions has been so great that any decision overruling precedent must operate prospectively only. In such circumstances, the court may hold that the parties before it are bound by the earlier case's rule. But the court may also, by means of dictum, indicate its disapproval of the earlier decision and suggest that any subsequent reliance on that rule henceforth will be considered unjustified.<sup>96</sup>

In this manner, dicta serves as both warning and prophecy. By employing dicta to announce a prospective new rule, the court advances the interests of justice while reconciling tensions in legal doctrine. But what's more, this act allows a judge to avoid many of the problems associated with prospective overruling. On the one hand, the court sidesteps the injustice that would follow from the new rule's

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94. See Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 7-25 (1960) (discussing the history of the origin and development of the idea of prospective overruling); see generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 147-49 (1921); Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977).

95. See, e.g., *Lyons v. Westinghouse Elec. Corp.*, 235 F. Supp. 526, 536-38 (S.D.N.Y. 1964) (finding the retroactive application of a Supreme Court decision overruling a prior doctrine to be "manifestly unjust").

96. There are in fact at least three types of prospective overruling. See Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 646 (1967) (discussing types of prospective overruling advocating careful development of technique). First, in an instance of purely prospective overruling, the newly announced rule will not apply to the litigants at bar or to any event occurring before the effective date of the decision. See *Linkletter v. Walker*, 381 U.S. 618, 639-40 (1965). Second, the court may announce that the new rule will not take effect until some future date. See *Molitor v. Kane-land Cmty. Unit Dist. No. 302*, 163 N.E.2d 89, 97-98 (Ill. 1959). Finally, the court may overrule prospectively but apply the old rule to the litigants at bar. See *United States v. Wade*, 388 U.S. 218, 242 (1967).

immediate application to those justifiably relying on precedent. But on the other hand, employing dicta allows courts to avoid the injustice associated with providing the benefit of a new rule only to the plaintiff at the bar while denying relief to all similarly situated plaintiffs. By providing a remedy in the form of dicta, the court advances all of its equitable goals simultaneously: rectification, the preservation of doctrinal stability, and the transformation of outworn rules into standards capable of achieving real justice.

So too, the use of dicta as remedy resembles another familiar practice: the prophylactic injunction. Like other equitable remedies, injunctions aim at preventing harm. In the case of a typical injunction, the court must decide whether the facts reveal a probable threat, because injunctive relief is available only in the face of an imminent, irreparable injury.<sup>97</sup> Before granting such relief, however, the court must consider the competing interests of both plaintiffs and defendants. Prophylactic injunctions follow a similar logic, but typically reach much further into the social landscape. Brian Landsberg describes a prophylactic injunction as “one issued because of ‘risk of a future violation’ but forbidding ‘conduct that is not itself a violation of anything.’”<sup>98</sup>

Prophylactic remedies are fundamentally oriented towards the future. Legal scholar, David Luban, refers to this kind of “*ex ante*” remedy as an “activist” remedy—one which seeks to secure rights by forestalling future violations, rather than merely punishing offenses.<sup>99</sup> By imposing a prophylactic injunction, the court lays down a code of conduct designed to prevent such injuries from occurring in the first place.<sup>100</sup> “These measures,” Tracy Thomas insists, “convert previously legal conduct into prohibited conduct by virtue of the injunctive remedy backed by the court’s contempt power.”<sup>101</sup> Not only is unlawful behavior prohibited, but positive duties are often created and im-

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97. Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 960–61 (1998–1999); see also Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 702 (1990).

98. Landsberg, *supra* note 97, at 960–61 (quoting DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 272 (2d ed. 1994)).

99. David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 11–13 (1999). Further, “[a] court order to a legislature to budget funds for a new prison in order to remedy Eighth Amendment violations is *ex ante*, because it aims to prevent future violations rather than compensating or punishing past ones.” *Id.* at 11.

100. See generally Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343, 351 (2002) [hereinafter Thomas, *Understanding Prophylactic Remedies*].

101. *Id.* at 352.

posed on defendants and innocent third-parties alike.<sup>102</sup> Thus, the consequence of prophylactic remedies is a reordering of structural relations among a wide variety of institutional actors—many often at a great distance from the scene of the original crime.<sup>103</sup>

A classic example of this kind of prophylactic remedy is the Supreme Court's decision in *Miranda v. Arizona*.<sup>104</sup> By requiring *Miranda* warnings, the Court sought to reduce in advance the likelihood of coerced confessions, bullied suspects, and grueling interrogations outside the presence of an attorney.<sup>105</sup> The goal, in short, was not mitigating such harms but preventing them in the first place. This *ex ante* approach is the hallmark of the prophylactic strategy. As we shall see, courts routinely employ dicta in analogous fashion in an effort to curb wrongs before they can occur.

In short, dicta possesses a multifaceted capacity to provide relief from legally sanctioned injustice. First, dicta provides courts with the ability to comment directly on behavior that might otherwise escape public notice. Like the opinion in *Marbury*, this provides courts with a powerful opportunity to heap scorn upon conduct which they find "legal" but morally contemptible. Such opprobrium acts as both punishment and symbolic acknowledgment of wrongdoing, a last ditch alternative when no other remedies present themselves.

Second, dicta allows courts to evolve new standards against which subsequent offenders' conduct can be judged. While unable to punish directly those who have infringed a plaintiff's extra-legal rights, courts may nevertheless provide guidance to future courts and legislators by articulating wrongs and ruminating on proper legal standards.<sup>106</sup> What passes as dicta the first time may well confront a defendant as law in subsequent lawsuits.

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102. *Id.*

103. See Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 314–22 (2004) [hereinafter Thomas, *The Prophylactic Remedy*].

104. 384 U.S. 436 (1966) (holding that statements obtained from defendants during police interrogations, without a full warning of constitutional rights, were inadmissible as having been obtained in violation of Fifth Amendment privilege against self-incrimination).

105. Luban, *supra* note 99, at 12.

106. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 75 (1994) ("[L]ower courts frequently give considerable, and sometimes even dispositive, weight to nonbinding but well-considered dicta when addressing novel legal questions. Given such dicta's probative value in predicting future higher court behavior, in effect this practice maximizes the probability of correspondence between lower and higher court decisions. Thus, reliance on dicta acts as a partial proxy, as it were, for employing the predictive model forthrightly.").

Third, such public shaming acts not only as a form of corrective punishment but as a deterrent against future harms. Potential tortfeasors are warned that their behavior will be subject to similar scrutiny and ridicule if they cross the line drawn by the court in the dicta of its opinion. This is a serious threat because, as we shall see in our examination of *In re Walt Disney Co. Derivative Litigation*,<sup>107</sup> such reputational damages can be far more costly than money damages.<sup>108</sup> In short, dicta's potential as a source of punitive damages and prophylactic remedies is a powerful weapon in the court's judicial arsenal.

There are at least three distinct features, then, of the use of dicta as an equitable remedy: (1) the punishment of bad actors through noncontrolling decisional language; (2) the evolution of legal standards; and (3) the imposition of quasi-prophylactic remedies which, while not legally binding, cut more broadly than a defendant's alleged wrongs.<sup>109</sup>

The tripartite structure of dicta as remedy reflects its temporal horizons: past, present, *and* future. In this, it mirrors the process of judicial reflection. The resolution of a lawsuit confronts the judge along multiple temporal dimensions: the harm arising from prior events, the immediate demand for rectification, and the future consequences following from any decision. When crafting an opinion, the judge must deal in all three dimensions at once.

The employment of dicta as remedy exhibits this same temporal structure: dicta as punishment corresponds with the past; dicta as source of new rules adapted to social need corresponds with the present; dicta as prophylactic remedy corresponds with the future. Rather

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107. *In re Walt Disney Co. Derivative Litig. (Disney IV)*, 907 A.2d 693 (Del. Ch. 2005).

108. See *infra* Part III.C (discussing the *Disney* litigation in depth).

109. It is important to distinguish what I mean by a "quasi-prophylactic remedy" from prophylactic remedies generally. The term "prophylactic remedy" derives from the Supreme Court's label for a specific type of injunctive relief, used both descriptively and pejoratively by the Justices. As defined by Tracy Thomas, there are three definitive attributes of a prophylactic remedy: it is "(1) injunctive relief with a preventive goal, (2) that imposes specific measures reaching affiliated legal conduct that contributes to the primary harm," (3) enforced by the court's contempt power. Thomas, *The Prophylactic Remedy*, *supra* note 103, at 312–15. Dicta as a "quasi-prophylactic remedy" lacks certain of these characteristics. Most obviously, dicta as a quasi-prophylactic remedy is not supported by threat of contempt. But there are vital similarities. Most critically, dicta is "prophylactic" because it aims to prevent future harms, rather than simply rectify past injuries. And dicta, like prophylactic injunctions, can function to constrain not just the actions of "guilty" parties, but often has significant effects on a variety of "innocent actors"—prison guards, school administrators, office managers, etc.—who are forced to transform existing practices to avoid potential liability. The nature of dicta as quasi-prophylactic remedy is explored more fully below.

than being synonymous with ad hoc adjudication, in the sense of only having regard for the immediate consequences to the parties, dicta is a manifestation of equity, a tool enabling the court to consider matters systematically, including the long-term institutional consequences of injustice. As James Booth insists, justice is in one of its key dimensions the memory of evil past: “Memory seizes the crime, keeps it among the unforgotten, and insists on retribution.”<sup>110</sup> But if dicta is the voice of equity, this memory work is also a testament, because the remembrance of the past carries with it the promise of a future redemption.

If this hypothesis is correct, then dicta plays a crucial role in the model of equitable dissonance. Dicta does not emerge contingently as an exercise of arbitrary judicial discretion, but necessarily as a manifestation of contradiction within the law. Like the better known practice of judicial dissent, dicta is a rhetorical device that not only allows a judge to speak out against legally sanctioned injustice, but also allows her to resolve equitable dissonance in a higher and more perfect consonance. This transformative moment—the moment of sublation—occurs when a judge uses dicta as remedy to articulate a superior legal standard. This is a standard that both preserves the law while transcending its contradictions.

### III. The Equitable Complex Writ Large

The pattern of legal contradiction giving rise to injustice runs deep in the law. Because this pattern is so persistent, equitable dissonance abounds in the legal landscape. Likewise, the use of dicta as remedy is not an exceptional phenomenon. As we shall see, courts have employed dicta to resolve seemingly intractable conflicts in areas of law as diverse as torts, property, contracts, and civil rights.

On the basis of the foregoing discussion, the following hypothesis may now be proposed: We may expect judges to utilize dicta (1) as a response to lawfully sanctioned injustice; such that (2) a legal contradiction is exposed; and (3) an equitable remedy is provided when an innocent plaintiff has suffered harm for which no other form of remedy exists. In what follows, I undertake to illustrate this hypothesis by examining a series of decisions across a broad range of doctrinal categories. My aim is inductive, not synthetic. Instead of collecting cases to

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110. W. James Booth, *The Unforgotten: Memories of Justice*, 95 AM. POL. SCI. REV. 777, 779 (2001); see also Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 1999 (2003) (arguing that courts are “mnemonic institutions *par excellence*”).

prove my points, my method is to choose a small number of opinions for investigation—opinions that display what I take to be the essentially dialectical nature of equitable adjudication. More precisely, I contend that the appearance of dicta in these cases is best understood as a manifestation of equitable dissonance: a process through which legal contradiction is simultaneously acknowledged and transcended.

**A. The Judge as Magician: The Evolution of Legal Doctrine in *Beatty v. Guggenheim***

Equity cases are rich in examples of the dynamic synthesis of justice and law.<sup>111</sup> Among the outstanding practitioners of equity in the twentieth century, none surpassed the achievement of Justice Benjamin Cardozo in showing how the common law could be adapted to serve society's needs.<sup>112</sup> His project of bringing law into phase with ordinary moral practices and expectations is epitomized by *Beatty v. Guggenheim Exploration Co.*<sup>113</sup> Perhaps the seminal case in the history of American constructive trust doctrine, *Beatty* illustrates the conflict between ossified legal doctrine and broad equitable concerns from which the necessity of dicta arises.

*Beatty* confronted New York's Court of Appeals with a classic example of the so-called "faithless fiduciary." The Guggenheim Company employed an agent, Robert Beatty, to investigate and acquire desirable mining claims; the agent subsequently acquired a series of competing claims for himself, ultimately realizing a large profit, likely at the expense of his employers.<sup>114</sup> Despite the existence of a contract specifically forbidding him from engaging in speculation, Beatty nevertheless pursued his own interests while working for Guggenheim in Alaska. The issue before the court was "whether the plaintiff ever 'lawfully' acquired a right to the profits at issue."<sup>115</sup>

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111. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 105 (1990) [hereinafter POSNER, *CARDOZO: A STUDY IN REPUTATION*].

112. See BERNARD SCHWARTZ, *A BOOK OF LEGAL LISTS* 23 (1997); Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 S. ILL. U. L.J. 405, 424–28; see generally Bernard Weissman, *Cardozo: "All Time Greatest" American Judge*, 19 CUMB. L. REV. 1 (1988).

113. *Beatty v. Guggenheim Exploration Co. (Beatty II)*, 122 N.E. 378 (N.Y. 1919).

114. This was the second time this case had come before the New York Court of Appeals. For a fuller description of the facts, see *Beatty v. Guggenheim Exploration Co. (Beatty I)*, 119 N.E. 575, 576–77 (N.Y. 1918); see also Kenneth E. Burdon, Note, *Accounting for Profits in a Copyright Infringement Action: A Restitutionary Perspective*, 87 B.U. L. REV. 255, 280 n.157 (2007) (commenting that this case presented "a common fact pattern in restitution").

115. H. Jefferson Powell, "Cardozo's Foot": *The Chancellor's Conscience and Constructive Trusts*, LAW & CONTEMP. PROBS., Summer 1993, at 7, 25 (quoting *Beatty II*, 122 N.E. 378).

At *Beatty*'s core was a controversial legal issue: the propriety of exercising constructive trust doctrine as a remedy for plaintiffs' losses.<sup>116</sup> The doctrine is an exercise in legal fiction: when a court decides that a defendant may not in good conscience retain an unjust gain, it first declares her to be a "constructive trustee," then orders her to make a transfer of money or property to the "beneficiary" of the newly created trust—the plaintiff.<sup>117</sup> Today, the constructive trust doctrine is perhaps the most common form of equitable remedy in the United States.<sup>118</sup> But this doctrine's triumph was not a matter of historical or logical necessity.<sup>119</sup>

The constructive trust doctrine has long been rejected by English courts, which cling to the traditional view that a trust is proper only where there has been some prior confidential or fiduciary relationship between the parties.<sup>120</sup> Liability in restitution was historically regarded as an equitable claim.<sup>121</sup> But the traditional understanding of the constructive trust significantly curtailed the scope within which a court could exercise its discretion. A court's focus under this approach was on the presence or absence of evidence showing the existence of a quasi-fiduciary relationship and its abuse—not on the substantive equities between plaintiff and defendant.<sup>122</sup>

Like their English counterparts, American courts historically were unwilling to transform the constructive trust from a substantive legal

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116. See Roscoe Pound, *The Progress of the Law, 1918–1919: Equity*, 33 HARV. L. REV. 420, 420–21 (1920).

117. Mark A. Thurmon, *Ending the Seventh Amendment Confusion: A Critical Analysis of the Right to a Jury Trial in Trademark Cases*, 11 TEX. INTELL. PROP. L.J. 1, 40 (2002); see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(3) cmt. a (2011) [hereinafter RESTATEMENT (THIRD)] ("A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." (quoting *Beatty II*, 122 N.E. at 380)).

118. See Thurmon, *supra* note 117, at 40. American constructive trust doctrine is notoriously confusing and unwieldy. The most nuanced discussions of American constructive trust law can be found in HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 74–80 (2004); Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265 (1998); Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297, 313–29.

119. See Powell, *supra* note 115, at 15. Even Pound reluctantly acknowledged that many U.S. courts had rejected this liberal interpretation of the constructive trust doctrine. See *id.* at 13.

120. See Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993, 1024–25 (2008) ("Because English trust law clings to its traditional association with equity, [it] contains two limitations that substantially narrow the scope of constructive trust remedies.").

121. RESTATEMENT (THIRD), *supra* note 117, § 1 cmts. b, f.

122. See Powell, *supra* note 115, at 11.

relationship grounded in fiduciary duty into a liberal remedial device designed for rectifying unjust enrichment of all kinds.<sup>123</sup> Because of this, many otherwise culpable defendants escaped liability. A defendant's breach of loyalty may have been both cynical and blatant, but courts enforced forfeitures only when plaintiffs could demonstrate the violation of a preexisting right. Regardless of the equities, chancery courts simply would not manufacture a duty out of thin air.<sup>124</sup> The result was that "faithless agents" like *Beatty* routinely escaped liability because they were not considered to fall within any analogous confidential relationship to their employer, such as a trustee, executor, guardian, or the like.

Cardozo's opinion in *Beatty* represents a wholesale rejection of the constructive trust doctrine's origins in trust-by-analogy situations. At the time, while the law held that an agent who broke a covenant to refrain from other business was not chargeable as a constructive trustee for the profits of the forbidden venture,<sup>125</sup> equity recognized an exception for fraud or concealment in contract formation, and this provided Cardozo with the necessary rhetorical leverage for transforming the doctrine's nature.<sup>126</sup>

Analyzing precedent, Cardozo declared that the rule derived from prior cases was merely an "illustration of a principle still larger."<sup>127</sup> It is in this context that Cardozo proclaimed the maxim, which subsequently came to define the modern understanding of the constructive trust: "A constructive trust is the formula through which the conscience of equity finds expression. When property has been

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123. See, e.g., *Campbell v. Drake*, 39 N.C. (4 Ired. Eq.) 94, 96–97 (1845) (refusing to apply the doctrine to a thieving employee); *Peixouto v. Peixouto*, 181 P. 830, 833–34 (Cal. Dist. Ct. App. 1919); *Stewart v. Todd*, 173 N.W. 619, 622–24 (Iowa 1919).

124. Chancery court opinions from this period often comment upon the tremendous disagreement and splits in authority among various jurisdictions regarding this issue. See, e.g., *Harrop v. Cole*, 95 A. 378, 378 (N.J. Ch. 1915) (discussing splits of authority among various high courts on the subject of constructive trusts, and noting that in "volume 15 of the American & English Encyclopedia of Law (2d Ed.) at page 1187, cases on both sides of this question are cited, and it is stated that: 'It seems to be held by the weight of authority that a court of equity cannot grant relief' by holding the agent 'a constructive trustee.'").

125. *Beatty II*, 122 N.E. 378, 380 (N.Y. 1919) (citing *Dean v. MacDowell*, [1878] 8 Ch.D. 345 (Eng.); *Trimble v. Goldberg*, [1906] A.C. 494, 500 (H.L.) (appeal taken from S. Afr.); *Aas v. Benham*, [1891] 2 Ch.D. 244, 255 (Eng.); *Latta v. Kilbourn*, 150 U.S. 524, 547–48 (1893)).

126. See *Farrell v. Mentzer*, 174 P. 482, 484 (Wash. 1918) (denying the imposition of constructive trust in a breach of contract matter "for the reason that the fraud that is necessary to create a constructive trust is not, as we have already stated, a mere refusal to comply with the terms of the contract").

127. *Beatty II*, 122 N.E. at 380.

acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee.”<sup>128</sup> The rhetoric of this epigram is broad, particularly the sweep of its opening statement. Cardozo cited to a Supreme Court decision, *Moore v. Crawford*,<sup>129</sup> and the leading equity treatise of his day, John Norton Pomeroy’s *A Treatise of Equity Jurisprudence*,<sup>130</sup> in support of this formula, yet without acknowledging that these sources stand for entirely different propositions.<sup>131</sup> The distinction, now lost on most courts, is that cases like *Moore* typically required either the existence of a valid contract or a confidential relationship, before the court could find a “duty” requiring the imposition of a constructive trust to remedy the fraud and provide the “benefit of the bargain.”

By contrast, the starting point of Cardozo’s inquiry was not the establishment of a fiduciary relationship and its subsequent abuse. Neither did Cardozo frame the issue in terms of fraud. Rather, Cardozo asked an entirely different question: was the agent “unjustly” enriched such that he might be subjected to an “equitable duty” to return the undeserved benefit? The issue in this mode of analysis is no longer primarily defined by formal legal duties but by simple fairness. And here, analyzing the facts in *Beatty*, Cardozo declared simply: “We think it would be against good conscience for the plaintiff to retain these profits unless his employer has consented.”<sup>132</sup> The underlying doctrinal issue—the wisdom of effectively overruling traditional constructive trust doctrine—is never explicitly addressed.

Having proclaimed this transformation of constructive trust doctrine, Cardozo proceeded to decide the case on entirely different grounds. The facts indicated that the employer had given oral consent to Robert Beatty’s purchase of the mining claims for himself. Only subsequently, did the Guggenheim Exploration Company regret this decision and sue for the lost profits. The company relied upon a provision in the written contract nullifying any waiver or amendment not evidenced in writing. Cardozo rejected this argument, declaring in a

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128. *Id.*

129. *Moore v. Crawford*, 130 U.S. 122, 128 (1889).

130. 3 JOHN NORTON POMEROY, *A TREATISE OF EQUITY JURISPRUDENCE* § 1053, at 2404 (4th ed. 1918).

131. *Beatty II*, 122 N.E. at 380. *Moore* involves the court’s equitable jurisdiction over a fraudulent land transfer where the court held the original contract enforceable despite the lack of a written contract between the parties. Similarly, Pomeroy’s treatise summarizes equity case law as applied to fraud or concealment in the formation of contracts for real or personal property. The distinction, however, is that Cardozo’s inquiry does not begin with the contract but with the offense.

132. *Beatty II*, 122 N.E. at 380.

justly famous aphorism: “Those who make a contract may unmake it. The clause that forbids a change may be changed like any other. The prohibition of oral waiver may itself be waived.”<sup>133</sup> The holding of the opinion, as explicitly announced by the court, was that the oral consent gave protection to the agent, thereby acquitting him from any breach of contract.<sup>134</sup>

This holding rendered the court’s extensive discussion of constructive trust doctrine entirely *obiter dicta*.<sup>135</sup> The irony is rich. The court that christened the maxim declined its exercise.<sup>136</sup> But there is more. Traditional legal craft values emphasize a duty to reach decisions on the narrowest grounds possible.<sup>137</sup> Here, Cardozo compromised those values in pursuit of a larger sense of judicial responsibility. It would seem Cardozo thought that making his point about equity and remedies was more useful to the bench and bar than limiting his discussion to the interpretation of a single contract.<sup>138</sup> In effect, the law could be preserved only by breaking its own rules.

*Beatty* is one of Cardozo’s most significant opinions in terms of its impact on the law. The language of its equitable maxims has subsequently been cited in almost 500 state and federal cases<sup>139</sup> and hundreds more articles and law reports,<sup>140</sup> while the Third Restatement of Restitution and Unjust Enrichment canonizes this opinion as the source of modern constructive trust doctrine in the United States.<sup>141</sup>

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133. *Id.* at 381.

134. *Id.* (“We hold, therefore, that the consent, though oral, gives protection to the agent, and acquits him of a breach of contract.”).

135. See Saiman, *supra* note 120, at 1017 (“Cardozo’s inspiring language is *obiter dicta*, as *Beatty* denied the imposition of a constructive trust . . .”).

136. Margaret A. Wilson, Comment, *New Tools for the Creditor*, 35 BAYLOR L. REV. 341, 346 n.32 (1983) (“[In *Beatty II*,] Justice Cardozo concluded that an agent had not breached his fiduciary duty to his employer, and, therefore, the employer was not entitled to a constructive trust. In effect, the court that christened the maxim denied its application.”).

137. See POSNER, *CARDOZO: A STUDY IN REPUTATION*, *supra* note 111, at 107 (discussing Cardozo’s similar approach in *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (1921)).

138. *Id.*

139. See Saiman, *supra* note 120, at 1017.

140. A Westlaw search conducted January 16, 2012 reveals that *Beatty* had been cited 1240 times since 1919, primarily for its language regarding constructive trust doctrine.

141. RESTATEMENT (THIRD), *supra* note 117, § 55(2) cmt. a (describing the current section of the restatement as little other than “offers a paraphrase of Judge Cardozo’s more eloquent statement”); see also Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 O.J.L.S. 99, 113 (2008) (attributing Cardozo’s decision in *Beatty* as the source of the “prevailing theory” of constructive trust doctrine in America).

Indeed, the Restatement describes itself as nothing more than a prosaic “paraphrase of Judge Cardozo’s more eloquent statement.”<sup>142</sup>

There is no doubt that this case’s fame owes as much to its rhetorical power as to its underlying logic.<sup>143</sup> Yet, judges and attorneys who cite to *Beatty* seldom discuss or even mention the actual holding.<sup>144</sup> Fewer still recognize that its key passages are entirely obiter dicta.<sup>145</sup> Likewise, most fail to acknowledge the radical transformation of doctrine effected by Cardozo’s opinion. *Beatty* is the quietest of “revolutionary manifestos.”<sup>146</sup>

It seems unlikely that the first appearance of this innovation in dicta was accidental on Cardozo’s part. Throughout the twentieth century, courts frequently employed dicta of this kind as a form of prospective overruling.<sup>147</sup> Cardozo himself is credited as the founder of this technique, which he first announced in his 1921 opus, *The Nature of the Judicial Process*, and then reaffirmed in a late Supreme Court decision, *Great Northern Railway v. Sunburst Oil & Refining Co.*<sup>148</sup> The courts that embraced this doctrine utilized dicta as a kind of judicial smoke signal. In this guise, dicta provides guidance for prospective

142. RESTATEMENT (THIRD), *supra* note 117, § 55(2) cmt. a (“The remedy described by § 55 is intended to be the same, in scope and in function, as the remedy described by Cardozo. The object of the present, more prosaic description is . . . [a]n application for constructive trust does not require the court to determine *a priori* what ‘equity and good’ conscience require in a particular case.”).

143. See, e.g., POSNER, *CARDOZO: A STUDY IN REPUTATIONS*, *supra* note 111, at 126 (noting that probably the most important factor in the Cardozo’s legal eminence is the “*rhetoric* of Cardozo’s opinions”).

144. Powell, *supra* note 115, at 16 (“I have not encountered a citation to *Beatty* that acknowledges that Cardozo’s opinion in that case *denied* a claim for a constructive trust. Cardozo’s influence in this area lies not in the holdings of the court for which he spoke, but in the language he used.”).

145. See *id.* (noting the absence of a single judicial opinion acknowledging this language as dicta); see also Saiman, *supra* note 120, at 1017 (noting that “few, if any, of the citing courts or scholars mention” that “Cardozo’s inspiring language is *obiter dicta*, as *Beatty* denied the imposition of a constructive trust”).

146. See Powell, *supra* note 115, at 16 (“Cardozo’s influence in this area lies not in the holdings of the court for which he spoke, but in the language he used.”).

147. See, e.g., *Spanel v. Mounds View Sch. Dist. No. 621*, 118 N.W.2d 795, 803 (Minn. 1962) (explicitly acknowledging its discussion as dicta); *State v. Jones*, 107 P.2d 324 (N.M. 1940) (prospectively overruling former decisions regarding legality of private lottery); *Mutual Life Ins. Co. of N.Y. v. Bryant*, 177 S.W.2d 588 (Ky. Ct. App. 1944) (prospectively redefining interpretation of insurance disability policies); *Hare v. Gen. Contract Purchase Corp.*, 249 S.W.2d 973 (Ark. 1952) (prospectively overruling prior decisions regarding usury); see also *Prospective or Retroactive Operation of Overruling Decision*, 10 A.L.R.3d 1371 (1966).

148. 287 U.S. 358 (1932).

plaintiffs and defendants alike regarding the evolving direction of the law. Parties who ignore such dicta do so at their own risk.<sup>149</sup>

The New York Court of Appeals wasted little time in officially declaring this revised constructive trust doctrine as the law of state. Less than ten years later, the court, in one of the most famous of Cardozo's moralistic opinions, held that the imposition of a constructive trust was not limited to conscious fraud or trust-by-analogy relationships.<sup>150</sup> Writing for the court in *Meinhard v. Salmon*, Cardozo declared that a joint venturer owed an implied duty towards his coventurer in excess of any contract or confidential relationship.<sup>151</sup> In so holding, Cardozo emphasized the fundamental ethical dimensions of this remedial inquiry: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor most sensitive, is then the standard of behavior."<sup>152</sup> This epigram, born of Cardozo's dicta in *Beatty*, is still considered the classic statement of the standard that courts should apply when addressing fiduciary relationships.<sup>153</sup>

*Beatty* is instructive for understanding how dicta functions as a manifestation of equity. In response to an intractable conflict arising from ossified legal doctrine, Cardozo utilized dicta to chart a new course for courts confronting the transgressions of so-called "faithless fiduciaries." The enormous success of *Beatty* and its subsequent canonization in *Meinhard* suggests that the doctrinal innovation Cardozo introduced into legal discourse was esteemed precisely because it elevated substantive values over rigid doctrine. No more were courts powerless to act in the face of financial duplicity or outright fraud. In a short span of years, the constructive trust was transformed in New York from a narrow category of predefined legal rules into a broad remedial catch-all, embodying policy considerations, social mores,

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149. See *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243, 250 (Mass. 1979) (holding, after disparaging certain covenants in previous case's dicta, that "parties who executed such covenants after Ouellette could not reasonably expect that the covenants would continue to be unenforceable under the [prior] rule").

150. POSNER, CARDOZO: A STUDY IN REPUTATION, *supra* note 111, at 104 ("The most famous of Cardozo's moralistic opinions is *Meinhard v. Salmon*"). A Westlaw search reveals that this case has produced some 4261 separate citations in law cases, law reviews, and treatises as of February 1, 2012, the majority citing Cardozo's well known aphorism discussed above.

151. 164 N.E. 545 (N.Y. 1928).

152. *Id.* at 546.

153. See, e.g., M. P. Narayanan, Cindy A. Schipani & H. Nejat Seyhun, *The Economic Impact of Backdating of Executive Stock Options*, 105 MICH. L. REV. 1597, 1617 (2007); Dana M. Muir & Cindy A. Schipani, *The Challenge of Company Stock Transactions for Directors' Duties of Loyalty*, 43 HARV. J. ON LEGIS. 437, 437 (2006).

and the prevailing equities of the case. The widespread adoption of this remedial device by American courts followed rapidly.<sup>154</sup>

The innovation Cardozo crafted in *Beatty* is profound—a transformation that effectively merged equity-as-jurisdiction with equity-as-fairness, anticipating the revolution in public law litigation the Supreme Court later embraced in *Brown v. Board of Education*. This innovation is consistent with “Cardozo’s project of making the law serve human rather than mandarin needs.”<sup>155</sup> Yet, he could not have accomplished this without the creative use of dicta, and if he had attempted otherwise, it is unlikely that he would have carried the court with him. His triumph in *Beatty* is the rarest of all victories—a battle won without a shot being fired.

**B. The Snowball Effect: Outrage as Prophylactic Remedy in *Deshaney v. Winnebago County Department of Child Services* and *Mary M. v. North Lawrence Community School Corp.***

The snowball effect is a figurative term for a process that starts from an initial state of insignificance and then builds on itself, becoming ever larger, and more powerful, through time. Like a snowball rolling downhill, the most trivial event may result in an avalanche of change. In the realm of the law, many such chain reactions have begun with a few lines of dicta.

Consider the strange fate of the Supreme Court’s decision in *DeShaney v. Winnebago County Department of Social Services*.<sup>156</sup> The mother of a boy who had been beaten into a coma by his father brought a § 1983 suit<sup>157</sup> against social workers, who had received

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154. See Saiman, *supra* note 120, at 1017–18. The First Restatement of Restitution canonized this interpretation, asserting unconditionally that a constructive trust is remedial. Following Cardozo, the treatise remarked “[w]here a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.” RESTATEMENT (FIRST) OF RESTITUTION § 160 (1937).

155. See POSNER, *CARDOZO: A STUDY IN REPUTATION*, *supra* note 111, at 107. Cardozo did not think that judges were free in such cases to substitute their own ideas of reason and justice for those of the people they serve. *Id.* at 28. Their standard must be an objective, pragmatic one. *Id.* “[I]n such matters,” he wrote, “the thing that counts is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right.” *CARDOZO*, *supra* note 94, at 89.

156. 489 U.S. 189 (1989).

157. *Id.* at 193. Suits under 42 U.S.C. § 1983 provide private citizens with a way to bring claims against states for damages resulting from violations of federal law under the legal fiction that one is suing a state official in his individual capacity for a violation of § 1983. The paradigm case for a § 1983 violation is a violation of a citizen’s constitutional rights.

complaints that the child was being abused, but had not removed him from his father's custody. While observing that the facts of the case were "undeniably tragic," the Court nevertheless held that the state's failure to protect an individual in the face of a known danger did not violate the Fourteenth Amendment.<sup>158</sup> Writing for the majority, Chief Justice Rehnquist concluded:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.<sup>159</sup>

Rehnquist was sympathetic but unyielding—nothing in the language of the Due Process Clause required the State to protect the life, liberty, or property of its citizens. Yet, something curious followed in *DeShaney's* wake. Many authorities interpreted this passage as dicta, creating an exception to the *DeShaney* doctrine, "The State-Created Danger Theory," which implied that under *different* circumstances liability did exist.<sup>160</sup> Lower courts were quick to put this theory into practice finding states liable in a variety of § 1983 actions.<sup>161</sup> More than two decades later, *DeShaney* continues to be controversial, prompting a great amount of literature, including at least one book and several law

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158. *Id.* at 203.

159. *Id.* at 201.

160. See Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, A Four-Year-Old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 587 (2009); Jeremy Daniel Kernodle, Note, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 174 (2001) ("The rather nebulous 'creation of danger' dicta from *DeShaney* became the seed from which the lower courts have sown and harvested the state-created danger theory."); Justin M. Rindos, Note, *Fallen on Deaf Ears: DeShaney Revisted*, 21 QUINNIPIAC PROB. L.J. 321, 327, 332–36 (2008).

161. See, e.g., *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996) (finding a "state-created" danger, which will support liability under § 1983 for harm resulting from a private actor's criminal assault on a victim, exists where state actors used their authority to create an opportunity that otherwise would not have existed for a third party's crime to occur); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) (finding "state-created danger" where a nurse working at a state prison was assaulted after being forced by her supervisor to work alone with a violent sex offender).

review articles.<sup>162</sup> And, the “Supreme Court is regularly asked to revisit the [*DeShaney*] issue, and regularly declines, without comment, to do so.”<sup>163</sup>

While the dicta of Supreme Court opinions is perhaps the most volatile of judicial compounds, the use of dicta as a form of equitable pedagogy is not limited to our nation’s highest Court. Neither does the tributary of dicta flow only in one direction. As *Beatty* testifies, an important decision always has the power to create ripple effects throughout the legal system. But revolutionary change may follow from even the most insignificant case.

How this phenomenon plays out in practice is illustrated through a relatively contemporary example. In 1997, the Seventh Circuit reversed the district court in a Title IX sexual harassment suit involving a thirteen year-old junior high student in *Mary M. v. North Lawrence Community School Corp.*<sup>164</sup> At the time of the court’s decision, the scope of Title IX liability in sexual harassment cases was still relatively ambiguous. The Supreme Court had previously held, in *Franklin v. Gwinnett County Public Schools*, that a school district could be held liable for damages in cases involving a teacher’s sexual harassment of a student; the decision, however, did not purport to define the contours of that liability.<sup>165</sup> Writing for the Seventh Circuit, Chief Judge William Bauer now addressed that ambiguity square on.

The main issue in the case was whether an eighth grade female student could welcome the sexual advances of a twenty-one year-old cafeteria employee. The trial court had instructed the jury that this was a question of fact. The jury ruled in favor of the teenager, but awarded her nothing in compensatory or punitive damages. On appeal, the Seventh Circuit held that an elementary student could not welcome the sexual advances of an adult male. Consequently, the trial court’s instructions were ruled in error. The Seventh Circuit reversed the jury verdict and remanded the case for a new trial. But, as is often the case, the scope of the opinion’s dicta was substantially broader than its actual holding.

Like *Beatty*, the remedial impulse at work in Judge Bauer’s opinion can only be understood in context. Just two days after oral argu-

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162. Linda Greenhouse, *A Second Chance for Joshua*, N.Y. TIMES OPINIONATOR (June 17, 2010, 8:00 PM), <http://opinionator.blogs.nytimes.com/2010/06/17/a-second-chance-for-joshua/?hp>.

163. *Id.*

164. 131 F.3d 1220, 1228 (7th Cir. 1997).

165. 503 U.S. 60 (1992).

ments in *Mary M.*, the Seventh Circuit had ruled in *Smith v. Metropolitan School District Perry Township* that an educational institution could not be held strictly liable for the actions of its employees in Title IX lawsuits.<sup>166</sup> The court reasoned that there was no sound policy for making a school district financially liable for the crimes of its teachers.<sup>167</sup> Instead, it declared that institutional liability existed only when a school official had “actual knowledge of the abuse,” was vested with supervisory authority over the abuser, possessed the power to end such abuse, “and failed to do so.”<sup>168</sup> But the question remained: What counted as “actual” knowledge?

At trial, the school district, adopting a then-common defense in Title IX cases, argued that nothing short of conclusive evidence of abuse satisfied Title IX’s stringent liability requirements. This posed a kind of Kafkaesque scenario. In essence, the school district insisted that it had no legal responsibility to act until a student had already been seriously injured. The threat this stance posed to children was obvious.

Bauer’s opinion treated the controversy before the court as emblematic of this dilemma. He began by noting the “disturbing facts” of the case, summarizing at length the illicit sexual relationship between the student and her abuser.<sup>169</sup> Throughout, the tone of moral disapproval is consistent and unmistakable—with the exception of the child’s mother, not a single adult, including the district court judge, escapes criticism. But this commentary was not the most striking aspect of Bauer’s decision.

The opinion’s legal analysis begins in an unexpected place. Rather than address the issue before the court, Bauer took up a different topic: the Seventh Circuit’s recent decision in *Smith v. Metropolitan School District Perry Township*.<sup>170</sup> Nowhere does the opinion comment on the fact that this entire discussion is obiter dicta, although this detail is crucial.<sup>171</sup> Employing the same strategy observed in *Marbury* and *Beatty*, Judge Bauer took advantage of the nonbinding language of dicta to communicate the direction of the law. His aim was a de-

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166. 128 F.3d 1014, 1030 (7th Cir. 1997).

167. *Id.*

168. *Id.* at 1034 (quoting *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997)).

169. *Mary M.*, 131 F.3d at 1221.

170. *Id.* at 1224.

171. See, e.g., Thomas Keefe, *Right of Action Under Title IX*, 197 A.L.R. Fed. 289, § 5(a), at 316 (2004) (noting court’s use of dicta in declaring school principal had knowledge of sexual relations between student and twenty-one year-old employee).

marcation of the line in Title IX sexual harassment suits between ignorance and willful blindness.

Bauer rejected any inference that the school, under the *Smith* standard, was somehow innocent of blame:

Here . . . there is sufficient evidence that a school official knew of the sexual harassment by one of its employees and failed to respond. Principal Pounds knew that [the girl and her abuser] were planning to skip school/work the day before they actually did. He was informed by two people the day before and failed to act on that information. While Pounds claimed not to have believed one of the sources, he said nothing as to whether he believed the second source. . . . He had the power as a school principal to take action, and failed to do so. . . . The fact that Pounds did not believe these sources did not excuse him from further investigation.<sup>172</sup>

The implication was clear: the fact that a “crime” had not yet taken place at the time administrators learned of the potential threat did not absolve the school district from responsibility for what followed. What’s more, as the opinion went on to stress, the fact that the abuser was a cafeteria employee, rather than a teacher, was immaterial for the purposes of Title IX. What mattered, Bauer observed, was the sexual discrimination—not who was “doing the discriminating.”<sup>173</sup>

While it had no bearing on the outcome of the appeal, the punitive aspect of Bauer’s dicta is striking. Principal Pounds’ actions, for example, were singled out for significant (and public) condemnation. Likewise, the opinion highlighted the many failures of the school’s teachers and staff, while emphasizing that school administrators owe their charges a heightened degree of responsibility because “[t]he ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection.”<sup>174</sup> And Bauer’s description of the district court judge, Sarah Evans Barker, is no less damning. Chastising the lower court for applying the strict requirements of Title IX in a case involving an eighth grader, the opinion observed: “It goes without saying that sexual harassment in the workplace is vastly different from sexual harassment in a school setting.”<sup>175</sup> Yet what “goes without saying” did not keep Judge Bauer from lecturing the trial court on this matter; indeed, the opinion reads at times like an angry memorandum from a senior partner to a particularly obtuse junior associate.

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172. *Mary M.*, 131 F.3d at 1225 & n.4.

173. *Id.* at 1225 n.5.

174. *Id.* at 1226.

175. *Id.*

This is not mere homily—this is dicta as equitable remedy. The opinion's tone and rhetorical structure evidence the clash between the legal and moral values at play. Most of those involved were arguably "not guilty" of anything. But the fact that none were subject to legal liability did not make them any less blameworthy. In Bauer's eyes, the general indifference of the school in light of the harm, like the moral obtuseness of the trial judge, was itself criminal.

Bauer's dicta provided a measure of symbolic punishment for the guilty parties. More critically, however, this dicta had a widespread prophylactic effect on educational institutions throughout the state, prompting immediate changes in school policy.<sup>176</sup> As an initial matter, the opinion effectively dispelled the previous doctrinal ambiguity surrounding "actual knowledge" in Title IX sexual harassment suits. Moreover, it provided notice of the potential liability to all similarly situated actors. Within the Seventh Circuit at least, *Mary M.* was the equivalent of a red flag: a warning that willful blindness would no longer stand as a viable defense against the sexual harassment of students.

Word spread quickly. Bauer's dicta was not a line drawn in the sand, but a sword hanging over the heads of every school district in the Seventh Circuit. And the message that "[i]t goes without saying that sexual harassment in the workplace is vastly different from sexual harassment in a school setting" was not lost on its relevant audience. *Mary M.* was rapidly summarized and its lessons disseminated to school boards, attorneys, parents, and other courts in the form of higher education bulletins, legal practice guides, law review articles, and citations in trial and appellate briefs.<sup>177</sup> Likewise, the "heightened" standard for school districts in sexual harassment cases suggested by Judge Bauer's dicta soon found its way into the language of

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176. See *infra* note 178.

177. See, e.g., Thomas C. Britton & W. Bradley Colwell, *Survey of Illinois Law: Developments in Education Law 1997 & 1998*, 23 S. ILL. U. L.J. 967, 972 (1999); Angela Duffy, *Can a Child Say Yes? How the Unwelcomeness Requirement Has Thwarted the Purpose of Title IX*, 27 J.L. & EDUC. 505, 505–06, 510 (1998); Courtney G. Joslin, *Recognizing a Cause of Action Under Title IX for Student-Student Sexual Harassment*, 34 HARV. C.R.-C.L. L. REV. 201, 244 (1999); Martha McCarthy, *Students as Targets and Perpetrators of Sexual Harassment: Title IX and Beyond*, 12 HASTINGS WOMEN'S L.J. 177, 193 (2001); Martha M. McCarthy, *Students as Victims of Sexual Harassment: The Evolving Law*, 27 J.L. & EDUC. 401, 409 (1998); Leon Friedman, *New Developments in Civil Rights Litigation and Trends in Section 1983 Actions*, 618 PLI LITIG. & ADMIN. PRACTICE: LITIGATION 748 (1999); *Primary and Secondary Education*, 27 J.L. & EDUC. 462, 467–68 (1998).

other district and appellate court opinions, where it is still regularly cited with approval.<sup>178</sup>

If Bauer's dicta was the equivalent of a single snowball rolling downhill, the avalanche that followed was nonetheless impressive. Less than two years later, the issues it raised presented themselves a second time to the Supreme Court in *Gebser v. Lago Vista Independent School District*.<sup>179</sup> This time the Court addressed the liability issue directly.<sup>180</sup> Judge Bauer's opinion was cited with approval by both the petitioners as well as the supporting amicus curiae briefs.<sup>181</sup> Without explicitly referencing *Mary M.*, the Supreme Court nevertheless endorsed the implicit premise of its dicta, holding "deliberate indifference" by school officials in the face of sexual harassment constituted a violation of Title IX.<sup>182</sup> What began as dicta became the law of the land.

### C. Burning Down the House of Mouse: Dicta as Punishment and Rectification in *In re Walt Disney Co. Derivative Litigation (Disney IV)*

No case in recent memory better illustrates the use of dicta as equitable remedy than Chancellor William B. Chandler's opinion in the infamous *Disney* litigation.<sup>183</sup> The story behind the unraveling of Michael Ovitz's ill-fated fourteen-month sojourn inside Disney's Magic Kingdom has all the elements of the greatest motion pictures: greed, betrayal, lies, and the kind of Machiavellian scheming of which even Machiavelli might have been ashamed. Indeed, the greatest problem in characterizing Ovitz's downfall might simply be one of genre: it is

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178. See, e.g., *Chivers v. Cent. Noble Cmty. Schs.*, 423 F. Supp. 2d 835, 848 (N.D. Ind. 2006); see also *Hendrichsen v. Ball State Univ.*, 107 F. App'x. 680, 684 (7th Cir. 2004); *Evans v. Bd. of Educ. Sw. City Sch. Dist.*, 425 F. App'x. 432, 439 (6th Cir. 2011); *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304, 316, n.132 (S.D.N.Y. 2000); *Bostic v. Smyrna Sch. Dist.*, No. 01-0261 KAJ, 2003 WL 723262, at \*6 (D. Del. Feb. 24, 2003); *Trentadue v. Cole*, No. 06-1296, 2007 WL 1521556, at \*1 (C.D. Ill. May 23, 2007); *Doe ex rel. Doe v. White*, 627 F. Supp. 2d 905, 928 (C.D. Ill. 2009); *Doe v. Willits Unified Sch. Dist.*, No. C-09-03655-JSW (DMR), 2010 WL 2524587, at \*4 (N.D. Cal. June 23, 2010).

179. 524 U.S. 274 (1998).

180. *Id.* at 281.

181. See Brief for Petitioners, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (No. 96-1866), 1998 WL 19745, at \*18, \*20, \*37; Brief of Nat'l Women's Law Cent. et al. as Amici Curiae in Support of Petitioners, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (No. 96-1866), 1998 WL 47598, at \*\*13-14; Brief of the Nat'l Educ. Assoc. as Amici Curiae in Support of Petitioners, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (No. 96-1866), 1998 WL 19697 at \*7.

182. *Gebser*, 524 U.S. at 290.

183. *Disney IV*, 907 A.2d 693 (Del. Ch. 2005). The facts here follow from the court's summary at 697-745, a narrative whose length falls just short of the average Russian novel.

unclear whether this tale of hubris and wretched excess is best described as comedy, tragedy, or epic folly.

In 1996, Ovitz earned \$130 million for fourteen months of work as the president of the Walt Disney Company. His tenure as a Disney executive was routinely described as a disaster, and the lucrative terms of his dismissal caused outrage among Disney shareholders. Subsequently, it was discovered that his employment contract contained a series of perverse incentives, hidden like a ticking time bomb, inside the deal.<sup>184</sup> By guaranteeing full payment, even in the event Ovitz was fired, the contract created a situation in which Ovitz would maximize his profits by terminating his employment as soon as possible. The result was predictable.

Ovitz's contract had initially been vetted by a three-person troupe of Disney's compensation committee, including the actor Sidney Poitier. Mr. Poitier participated in the review by conference call, phoning from his yacht in the Mediterranean Sea. The call approving the contract took all of twenty minutes. The contract was subsequently ratified by the full board of directors. Not a single director ever read the actual contract or inquired regarding the potential for financial disaster. In the wake of Ovitz's departure, litigation ensued.

The magnitude of the board's blunder in awarding a \$130 million employment contract, whose terms perversely created a situation in which doing a bad job made more economic sense than doing a good job, outraged shareholders and formed the basis of a lawsuit against those responsible for the subsequent debacle. The shareholder plaintiffs, who pursued the case for eight years, wanted Ovitz's severance and interest returned to Disney. They accused Disney CEO, Michael Eisner, who was Ovitz's close friend, and the former board members who hired Ovitz as company president in 1995, of breaching their duties and wasting the company's money, potentially making them personally liable for up to \$262.2 million in damages, including more than \$120 million in interest.<sup>185</sup> By the time the case found its way before Chancellor Chandler of the Delaware Court of Chancery in 2005, the stage had been set for an epic showdown.

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184. *See id.* at 703–04. Under the clause, if Disney fired Ovitz, other than for gross negligence or malfeasance, Ovitz received his entire unpaid compensation as severance pay: the balance of his salary, including his \$7.5 million annual bonuses, three million shares in stock options, and \$10 million in lieu of stock earned if the contract was not mutually renewed. *Id.*

185. Jesse Hiestand, *Judge Clears Dis Board, Scolds 'Monarch' Eisner*, HOLLYWOOD REP., Aug. 10, 2005, at 1.

Like the current SEC civil lawsuit against Goldman's Fabrice Tourre, the background to the *Disney* litigation is best understood in the context of a larger national economic crisis, one involving both a failure in American corporate governance and a stunning growth in the level of executive compensation.<sup>186</sup> The spectacular, highly publicized frauds at Enron, WorldCom, and Tyco had exposed significant problems with conflicts of interest in incentive compensation practices. As a result, Delaware faced a real threat of federal authorities usurping its powers in the arena of corporate governance.<sup>187</sup> Politicians and media alike "questioned the ability of state corporate laws to prevent director misconduct."<sup>188</sup> Consequently, many legal analysts forecasted that the Delaware courts might try and preempt such an encroachment by taking a more activist approach in their historic role of setting national standards for corporate governance.<sup>189</sup> Numerous academics and practitioners predicted the court might finally enhance director accountability by enforcing the often cited, but rarely utilized, fiduciary duty of good faith.<sup>190</sup> Many expected, at last, a radical shift in Delaware law.<sup>191</sup>

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186. See, e.g., Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 44–46 (2005) (commenting that as a tsunami of corporate malfeasance devastated financial markets, "principles that had long formed the background context of corporate governance and corporate law adjudication were suddenly pushed into the foreground and sharply contested, ultimately leading to a presidential promise, federal legislation, and a host of administrative and other rulemaking proposals").

187. Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915, 985 (2003) ("[I]n terms of regulatory competition or federalism, the Sarbanes-Oxley Act could be construed as a subtle warning to Delaware to compel its own reexamination of its legal framework.").

188. Jaclyn J. Janssen, Note, *In re Walt Disney Derivative Litigation: Why Stockholders Should Not Put Too Much Faith in the Duty of Good Faith to Enhance Director Accountability*, 2004 WIS. L. REV. 1573, 1609 (2004).

189. See Griffith, *supra* note 186, at 44–47; E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 DEL. L. REV. 163, 163 (2004) ("[V]igilance is needed because Delaware's corporate preeminence is more vulnerable to a pervasive federal encroachment now than it was before [the scandals].").

190. See, e.g., Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 464 (2004) ("[G]ood faith offers powerful incentives for making better corporate governance decisions."); Leo E. Strine, Jr., *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 BUS. LAW. 1371, 1385–86 (2002) (noting that since corporations can include exculpatory provisions in their charters to prevent directors from being held personally accountable for duty of care breaches, stockholders must rely on the "state of mind (i.e. the good faith) of the outside directors" to challenge director action).

191. See, e.g., Janssen, *supra* note 188, at 1579. Traditionally, "the duties of loyalty and due care are often referred to as the core fiduciary duties [in corporate law] because Delaware courts very rarely invoke the duty of good faith." *Id.* This left players in the corporate

They were almost certainly disappointed. What observers miscalculated was the extent to which existing law tied the hands of the court. Historically in the Chancery Courts of Delaware, decisions by boards, as well as the compensation committees appointed by boards, have been protected by the “business judgment rule.”<sup>192</sup> The basic thrust of this rule is that boards must compensate their executives at levels that are “reasonable.”<sup>193</sup> However, Delaware courts grant boards broad discretion in determining what constitutes reasonable pay.<sup>194</sup> This policy is bolstered by the widely held belief that courts are no better at valuing an executive’s worth than a properly functioning board, and therefore *judicial* review of such decisions is worse than pointless.<sup>195</sup>

Owing to these prudential concerns, Delaware law weighs heavily against permitting lawsuits by disgruntled shareholders. Absent a showing of “oppression, fraud, abuse, bad faith, or other breach of trust,” Delaware courts will not substitute their judgment for that of corporate directors.<sup>196</sup> This was to prove a high bar for the plaintiffs in the Disney litigation. Like the courts in *Marbury*, *Beatty*, and *Mary M.*, Chancellor Chandler found himself in a quandary. It appeared, once again, while the defendants were blameworthy, none were guilty.

The resulting opinion embodies, but also resolves, this contradiction. In line with Delaware’s traditional policy concerns, Chandler emphasized that the Disney board could not have violated the law as long

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world without any firm sense of when and how that duty would apply. *Id.* Consequently, questions regarding good faith persisted.

192. Douglas C. Michael, *The Corporate Officer’s Independent Duty as a Tonic for the Anemic Law of Executive Compensation*, 17 J. CORP. L. 785, 803 (1992).

193. See, e.g., *West Point-Pepperell, Inc. v. J.P. Stevens & Co. (In re J.P. Stevens & Co. S’holders Litig.)*, 542 A.2d 770, 780–81 (Del. Ch. 1988) (observing that the presumptive validity of a business judgment is rebutted only in those rare cases where the decision under attack is “so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith”); see also James R. Ukropina, *Executive and Director Compensation—The Controversies Continue: How Much? Who Should Decide? What Are the Appropriate Roles for the Board and for the Courts? And What Is an “Independent” Board?*, SE039 ALI-ABA 139, 142 (1999), available at WL SE139 ALI-ABA 139.

194. *West Point-Pepperell*, 542 A.2d 770; see also *Wilderman v. Wilderman*, 315 A.2d 610 (Del. Ch. 1974) (detailing judicial roadmap for determining what is reasonable compensation).

195. *Heller v. Boylan*, 29 N.Y.S.2d 653, 679–80 (Sup. Ct. 1941) (“Courts are ill-equipped to solve or even to grapple with these entangled economic problems.”), *aff’d mem.*, 32 N.Y.S.2d 131 (App. Div. 1941).

196. Ukropina, *supra* note 193, at 144 (arguing that absent a showing of “oppression, fraud, abuse, bad faith, or other breach of trust,” courts are reluctant to substitute their judgment for that of corporate directors).

as they had followed reasonable procedures.<sup>197</sup> The “degree to which Ovitz’s compensation package was shocking” to the average shareholder was therefore not central to the good faith analysis.<sup>198</sup> Indeed, because Ovitz was considered a “superstar executive,” the court observed, it was not unusual that large financial incentives would be required to lure him to Disney.<sup>199</sup>

Reviewing the facts, Chandler concluded that, while Ovitz’s compensation was large, nothing about the board’s decision-making process suggested bad faith in connection with the approval of Ovitz’s employment agreement and no-fault termination. As such, Chandler found that the plaintiffs had failed to meet their burden to demonstrate that the directors had acted in a grossly negligent fashion.<sup>200</sup> Despite finding serious deficiencies in Disney’s compensation practices, Chandler held that the board’s conduct did not constitute a breach of their duty of good faith.<sup>201</sup> The directors had seemingly won a complete victory, frustrating the desire of shareholders for more extensive protection of their financial interests.

In the wake of the *Disney* litigation, scholars and shareholders alike despaired that the court had squandered an opportunity to develop and enforce a more robust definition of good faith.<sup>202</sup> While acknowledging that, given the facts, the court had likely issued the correct decision, critics nevertheless faulted Chandler for not taking more significant action.<sup>203</sup> Such criticism, however, failed to appreciate the powerfully remedial aspects of Chandler’s dicta.

The punitive intent behind Chandler’s opinion is evident from its opening pages. Chandler was short and to the point in explaining his refusal to dismiss the case on summary judgment grounds:

I concluded that the complaint, together with all reasonable inferences drawn from the well-plead allegations contained therein, could be held to state a non-exculpated breach of fiduciary duty claim, insofar as it alleged that Disney’s directors “*consciously and intentionally disregarded their responsibilities*, adopting a ‘we don’t care

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197. *Disney IV*, 907 A.2d 693, 755–57 (Del. Ch. 2005).

198. Janssen, *supra* note 188, at 1608.

199. Ukropina, *supra* note 193, at 146.

200. *Id.*

201. *Id.*

202. See Claire A. Hill & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833, 834 (2007).

203. See *id.* at 834–35; David Rosenberg, *Galactic Stupidity and the Business Judgment Rule*, 32 J. CORP. L. 301, 320–21 (2007).

about the risks' attitude concerning a material corporate decision."<sup>204</sup>

Chandler's remarks about the "devil may care attitude" of Disney's board were much noted—both by the media and the Delaware Supreme Court in the subsequent appeal.<sup>205</sup> But these striking remarks only hinted at the maelstrom of censure to come. Throughout the next 174 pages, Chandler availed himself of every conceivable form of dicta—as hypothetical, conjecture, editorial comment, and sarcastic aside—to illustrate and punish the many failures of Disney's upper management. Indeed, the *Disney* opinion, in its sheer ambition and rhetorical imagination, is a paradigmatic example of a practice first observed in *Beatty*: the creative use of dicta for bringing law into phase with ordinary moral expectations.

The equitable tension at the heart of the case frames Chandler's discussion. The central obstacle to finding liability in the case, as Chandler acknowledged, was that, as a matter of law, Delaware courts would not hold fiduciaries liable for a failure to comply with the "aspirational ideal of best practices."<sup>206</sup> This was no different, Chandler observed, than the common law prohibition against holding physicians liable for utilizing "merely competent or standard" medical treatment practices, lest the "average medical practitioner" be found inevitably derelict.<sup>207</sup> But as Chandler's "by the way" asides made clear, his appraisal of Disney's management was far from an endorsement. The conduct at issue, he noted, was not merely "average," but seriously deficient. "As I will explain in painful detail hereafter," Chandler wrote, "there are many aspects of defendants' conduct that fell significantly short of the best practices of ideal corporate governance."<sup>208</sup> The opinion more than delivers on this promise, narrating in grisly detail the various shortcomings of Disney's management and directors, while highlighting every significant and embarrassing aspect of the Ovitz debacle, including whether Ovitz's personal deficiencies stemming from his nature as a "pathological liar" might have triggered a legitimate excuse for terminating Ovitz's contract without paying his enormous severance package.<sup>209</sup>

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204. *Disney IV*, 907 A.2d 693, 754–55 (Del. Ch. 2005).

205. See, e.g., Hiestand, *supra* note 185, at 2; *In re Walt Disney Co. Derivative Litig. (Disney V)*, 906 A.2d 27, 63 (Del. 2006).

206. *Disney IV*, 907 A.2d at 697.

207. *Id.*

208. *Id.*

209. *Id.* at 719, 726–28.

Chandler reserved his harshest criticisms for Disney CEO Michael Eisner, specifically citing him as “the most culpable of the defendants,” an “imperial” CEO enthroned “as the omnipotent and infallible monarch of his personal Magic Kingdom,” whose “Machiavellian” nature was to a large extent “responsible for the failings in process that infected and handicapped the board’s decisionmaking abilities.”<sup>210</sup> Among his many misdeeds, Eisner was criticized for stacking the board with cronies and ignoring his responsibility to insure genuinely independent discretion on the part of Disney’s board of directors.<sup>211</sup> Likewise, Chandler scolded the CEO for unilaterally committing the company to hiring Ovitz with one of the richest pay packages in U.S. history, commenting sardonically that “Eisner’s actions in connection with Ovitz’s hiring should not serve as a model for fellow executives and fiduciaries to follow.”<sup>212</sup>

Neither did Disney’s board of directors escape their share of the blame. In his closing remarks, Chandler laid responsibility for the Ovitz debacle at their feet: “Are there many aspects of Ovitz’s hiring that reflect the absence of ideal corporate governance? Certainly, and I hope that this case will serve to inform stockholders, directors and officers of how the Company’s fiduciaries underperformed.”<sup>213</sup> For the defendants, this outcome was less a vindication than a Pyrrhic victory *par excellence*—a victory so costly it is doubtful it gave any gain to the winners.

But if Eisner and his fellow directors were the real losers in *Disney*, then a different question is presented: Who won? The likely answer is “shareholders.” As numerous commentators have observed, the Delaware corporate community is small, relatively homogenous, and highly interconnected.<sup>214</sup> Decisions of the Chancery courts are closely watched and generate extensive media coverage. In the immediate wake of the Chancery Court’s decision, law firms across America swamped their clients with written analyses of the opinion’s implications, and advised corporate boards of directors to significantly alter their compensation practices.<sup>215</sup> Boardrooms were forced to take no-

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210. *Id.* at 760, 763.

211. *Id.* at 760–61.

212. *Id.* at 762.

213. *Id.* at 772.

214. See, e.g., Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1013–14, 14 n.8 (1997).

215. See, e.g., AKIN, GUMP, STRAUSS, HAUER & FELD LLP, CORPORATE GOVERNANCE ALERT: THE DISNEY DECISION: DELAWARE CHANCERY COURT FINDS DIRECTORS DID NOT BREACH FIDUCIARY DUTIES IN CONNECTION WITH HIRING AND FIRING OF MICHAEL OVITZ

tice that the rules of the game had changed,<sup>216</sup> and the threat of copycat litigation prompted wholesale changes in the compensation practices at many Fortune 500 companies.<sup>217</sup> The nominal defeat of the shareholders in *Disney* made little difference. The court's dicta effectively reshaped the conduct of fiduciaries throughout corporate America.

The *Disney* case illustrates how courts go about setting (and raising) standards of conduct through the creative use of dicta. For example, while admitting that, "at least in the corporate fiduciary context, it is probably easier to define bad faith rather than good faith,"<sup>218</sup> Chandler nevertheless took it upon himself to provide the most substantive and authoritative discussion of good faith in the history of the court, effectively redefining its meaning within Delaware law.<sup>219</sup> In a maxim subsequently adopted by the Delaware Supreme Court,<sup>220</sup> Chandler observed that the failure to act in good faith could be demonstrated by any one of three primary failures: (1) "where a fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation"; (2) "where the fiduciary acts with the intent to violate applicable positive law"; or (3) "where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."<sup>221</sup> Of these duties, only the last was genuinely at issue in the *Disney* litigation, rendering much of this discussion dicta. But while dicta, this discussion was not anything like trivial or insignificant—it effectively announced a sea change in Delaware law. Not just the defendants, but corporate fiduciaries everywhere, were put on notice: a new sheriff was in town and his name was

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(2005), available at <http://www.akingump.com/docs/publication/795.pdf>; HUNTON & WILLIAMS LLP, CLIENT ALERT: DELAWARE CHANCERY ADDRESSES DIRECTORS' FIDUCIARY DUTIES IN WALT DISNEY CASE (2005), available at [http://www.martindale.com/members/Article\\_Atachment.aspx?od=304213&id=178114&filename=asr-178116.pdf](http://www.martindale.com/members/Article_Atachment.aspx?od=304213&id=178114&filename=asr-178116.pdf).

216. Steven J. Cleveland, *Process Innovation in the Production of Corporate Law*, 41 U.C. DAVIS L. REV. 1829, 1854 (2008) ("The court generally advised Compensation Committees and boards regarding the information component of the business judgment rule. Compliance with the advice may benefit shareholders via a more informed directorate and may benefit directors by enabling them to more easily attain dismissals of suits challenging their judgment.").

217. Hill & McDonnell, *supra* note 202, at 854.

218. *Disney IV*, 907 A.2d at 753.

219. See Hill & McDonnell, *supra* note 202, at 845.

220. *Disney V*, 906 A.2d 27, 66–67 (Del. 2006) (holding that that the "universe of fiduciary misconduct" cannot be limited to self-interested disloyalty or gross negligence: "This third category is what the Chancellor's definition of bad faith—intentional dereliction of duty, a conscious disregard for one's responsibilities—is intended to capture.").

221. *Id.* at 67.

“good faith.”<sup>222</sup> In less than a year’s time, the Delaware Supreme Court completed this process, alchemizing dicta into law with its adoption of Chandler’s good faith standard in *Disney V*.

Likewise, Chandler’s biting comments on the board’s many procedural failures effectively rewrote the book on standards of care for corporate boards. Post-*Disney*, for instance, boards no longer have license to approve massive compensation packages without detailed and lengthy appraisals of the potential downsides and consequences for the corporation. This conduct is now bad faith per se because, as Chandler emphasized, “[the] Court strongly encourages directors and officers to employ best practices as those practices are understood *at the time* a corporate decision is taken.”<sup>223</sup> In response, companies across the United States quickly revamped their compensation practices.<sup>224</sup> The result was a transformation of what had previously been best practices into ordinary standards of care.<sup>225</sup>

Scholars have seized on *Disney* as a paradigmatic example of the “illustrious history of cases that have had long-term impact for other than their ultimate legal holding.”<sup>226</sup> In particular, this case has been described as “a classic example, and a somewhat novel one, of how a court of law can make law without making law by relegating the final

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222. Joseph M. McLaughlin, *Good Faith: A New Sheriff in Town?*, DIRECTORS’ AND OFFICERS’ LIABILITY (Simpson Thacher & Bartlett LLP, New York, N.Y.), Feb. 9, 2006, available at <http://www.stblaw.com/content/publications/pub537.pdf>.

223. *Disney IV*, 907 A.2d at 697 (emphasis added).

224. Hill & McDonnell, *supra* note 202, at 854.

225. This process was aided substantially by the Delaware Supreme Court in their affirmation of Chandler’s decision. Their reasoning was largely, if not entirely, defined by the lower court’s dicta. Contrasting “what actually happened here” with “what would have occurred” had the compensation committee followed best practices, the Court found the *Disney* directors’ conduct had fallen short of current best practices and detailed practices future boards should adopt in similar circumstances. *Disney V*, 906 A.2d at 56. Specifically, the Court recommended that compensation committees should: (1) receive detailed financial spreadsheets illustrating all foreseeable compensation and termination scenarios; (2) in conjunction with explanations provided by the expert who prepared the report; (3) which the committee relies upon to form the basis for its deliberations and the decision of the committee. “Had that scenario been followed,” the Court commented, “there would be no dispute (and no basis for litigation) over what information was furnished to the committee members or when it was furnished.” *Id.*; JAMES F. REDA, STEWART REIFLER & LAURA G. THATCHER, *THE COMPENSATION COMMITTEE HANDBOOK* 99 (3d ed. 2008) (“Whether or not in a defensive position, the clear lesson from *Disney* (and now widely accepted best practice) is that, when considering employment, severance, or retirement agreements for management, the compensation committee should insist on reviewing numerical illustrations of the effect of the proposed benefits under various scenarios.”).

226. See, e.g., Tamar Frankel, *Court of Law and Court of Public Opinion: Symbiotic Regulation of the Corporate Management Duty of Care*, 3 N.Y.U. J.L. & Bus. 353, 354 (2007).

judgment to the Court of Public Opinion.”<sup>227</sup> As generally agreed, courts have an important role in the creation of social norms.<sup>228</sup> In fact, some have suggested the expressive function of courts is as significant as their adjudicative function.<sup>229</sup> Courts, on this theory, rather than simply being the arbiters of disputes between private parties, are the guardians of social morality, instructing members of society how to act through highly textured, fact-specific, and inherently normative accounts of corporate actors’ behavior.

Edward Rock, for instance, describes Delaware law as consisting of a set of informal mechanisms by which corporate norms are transmitted.<sup>230</sup> These include not just the narrative stories contained within the opinions of the Delaware courts, but speeches, articles, and out-of-court statements made by Delaware judges to the media. In this regard, Rock asserts “we come much closer to understanding the role of courts in corporate law if we think of judges more as preachers than as policemen.”<sup>231</sup>

At the heart of Rock’s analysis is the claim that standards in Delaware law work very differently than rules. Rock argues that standards are generated through a “distinctively narrative process, leading to a set of stories that is typically not reducible to a rule.”<sup>232</sup> Rather, Rock suggests Delaware judicial opinions “can be understood as providing a set of parables—instructive tales—of good managers and bad managers, of good lawyers and bad lawyers, that, in combination, fill out the normative job description of these critical players.”<sup>233</sup>

But this analysis, while enlightening, is not without its limitations. Describing Delaware courts solely in terms of their expressive function as “preachers” obscures equity’s role as a corrective mechanism within the law. The Chancery court’s decisions do more than simply set the stage on which Delaware’s morality tales are played out for a captive audience of well-heeled swells and their attorneys. Of equal impor-

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227. *Id.* at 355.

228. *See generally* MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 14–26 (1988).

229. *See, e.g.*, Robert Cooter, *Expressive Law and Economics*, 27 *J. LEGAL STUD.* 585, 586 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2021–22 (1996) (examining law’s role in articulating desirable norms rather than simply managing behavior).

230. *See generally* Rock, *supra* note 214 (arguing that Delaware corporate law is best understood as an attempt by Delaware courts to create social norms in the form of judicial “parables” for senior managers, directors, and the lawyers who advise them).

231. *Id.* at 1016.

232. *Id.*

233. *Id.*

tance is the power of the court to “correct” wrongs—that is, to restore injured plaintiffs to their rightful position. As we have seen, this is a power courts enjoy, even when no *legal* remedy presents itself. In *Disney*, the court’s public acknowledgement of wrongdoing on the part of company management was itself a symbolic remedy with deep ethical and political significance.

Even in victory, the defendants did not escape a measure of justice. Eisner lost his CEO position with Disney in the wake of the fallout.<sup>234</sup> Ovitz saw his once fearsome persona exposed as monomaniacal sham. And today, not a single defendant remains on the board of directors. If the reputations of all involved have not been completely destroyed, they are certainly in tatters, unlikely to be repaired or redeemed, even in a town that loves nothing more than a happy ending.

#### IV. Dicta and Its Discontents: The Criticism of Dicta as Equitable Remedy

Thus far, I have argued that a nuanced understanding of dicta requires that we grasp its utility as a form of equitable remedy. In this part, I consider three critiques of that view. The first, which I term the legitimacy critique, attacks the use of dicta as a form of unprincipled judicial lawmaking. The second, which is related, argues that however well or poorly courts are designed for lawmaking, their structural limitations ensure that the ill-considered nature of dicta inevitably results in bad law. The third critique urges that shaming otherwise innocent parties violates our standards of both fairness and due process. In considering and rejecting these critiques, I suggest that what their failure reveals is the paradox of dicta: that is, the essential *necessity* of what is otherwise regarded as “trivial,” “ill-advised,” “unnecessary,” and “besides the point.”

##### A. The Critique of Dicta as Illegitimate

Despite its ubiquity, the use of dicta as remedy strikes many as discretion’s evil twin.<sup>235</sup> Advocates of judicial restraint are understand-

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234. JAMES B. STEWART, *DISNEY WAR* 541 (2005).

235. See, e.g., Lebovits, Curtin & Solomon, *supra* note 15, at 255–56 (“Dicta—often added to placate, or even impress, the opinion’s audience—distracts the reader from the issues. Although some doctrines have arisen from dicta, it is not the way to develop legal precedent. A judicial opinion should resolve only the pertinent controversy and not discuss superfluous matters. Dicta should be limited because it has the potential to obscure holdings, make incorrect predictions, pressure officials in other branches of government, and

ably alarmed by the use of dicta to accomplish what otherwise lies outside the purview of the courts. They insist that, when judges can evade the enforcement of unpalatable laws, the result is hardly better than lawlessness itself—a state of arbitrary legal capriciousness masquerading as justice. Like a criminally exploited loophole, dicta is lamented by these critics as a form of judicial “self-abuse.”

The strongest of these criticisms inevitably bring to mind the counter-majoritarian difficulty inherent in judicial review.<sup>236</sup> The counter-majoritarian problem is well known: “[J]udicial review empowers unelected, largely unaccountable judges to invalidate the policy decisions of more majoritarian governmental institutions.”<sup>237</sup> Likewise, a problem arises for any form of democratic governance “if judges, appointed for life, exercise the power to make law simply by writing it into their decisions, regardless of whether the newly declared rule plays a role in the decision of the case.”<sup>238</sup>

As Michael Klarman has observed, virtually all modern constitutional theory consists of attempts to ameliorate this problem by locating the foundations of judicial review in something other than judges’ individual policy preferences.<sup>239</sup> These theories, of which originalism is perhaps the paradigmatic modern example, strive for an “objective” implementation. That is, they seek criteria of sufficient determinacy that judges of all political persuasions might derive consistent results in applying the theory to particular cases.<sup>240</sup> The use of dicta as a tool to rewrite unpopular laws or doctrines strikes many as the unprincipled substitution of an individual judge’s preferences for those of the majority.

This is a powerful critique. “Given that the court’s sole constitutional authority [under Article III] is to decide cases [or controversies],” Judge Leval asks, “what should we make of the constitutional legitimacy of lawmaking through proclamation by dicta?”<sup>241</sup> Such judicial fiat appears unjustified. Courts legitimately make law only as a

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‘over explain’ the case. Dicta is primarily a concern for appellate judges, whose opinions are binding legal precedent. But dicta can also lead trial judges to interpret appellate decisions erroneously.”).

236. The classic description of this problem is ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (2d ed. 1986).

237. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 768 (1991).

238. Leval, *supra* note 14, at 1260 n.26.

239. Klarman, *supra* note 237, at 768.

240. *See id.*

241. Leval, *supra* note 14, at 1259; *see also* *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (“[The case or controversy requirement defines the role] assigned to the judiciary in a tripartite

consequence of the performance of their constitutional duty to decide cases. They lack constitutional authority to issue rulings otherwise, just as many state courts are forbidden from rendering advisory judgments in the absence of a potential controversy.<sup>242</sup>

There is, however, a powerful response to the charge that dicta as remedy is unprincipled. Initially, we must observe dicta's peculiar essence: Dicta is not law. It is merely the *possibility* of law. As Bradley Shannon suggests, "The use of dicta is not illegitimate per se."<sup>243</sup> In particular, dicta plays an important role in the law by communicating courts' contemplation of legal change, while at the same time providing notice to potentially affected parties (including legislatures).<sup>244</sup> Indeed, without such a device, important reliance interests might otherwise be diminished.<sup>245</sup>

The abuse of dicta, as its critics all too frequently forget, lies not with its authors but with its audience. It is this audience—primarily judges, attorneys, legal academics, and professional commentators—who determine the ultimate truth-value of dicta. The author does no more than illuminate a new aspect of existing legal doctrine. In turn, whether dicta is ignored as a throwaway or seized upon as a radical alternative is not within the power of the authoring court to control. Ultimately, the test of any particular dictum's truth is measured by its use value for future courts—or future generations. In essence, dicta's legitimacy is fundamentally co-extensive with its insignificance. Its virtue is that it can correct the law without betraying the law.

Consider an example. In *DeShaney*, while refusing to endorse a constitutional remedy, the Supreme Court was not blind to the injustice suffered by the victim. Having concluded that the state of Wisconsin

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allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government.").

242. While Article III's case-or-controversy requirement applies only to federal courts, declaratory judgment statutes generally do not authorize state courts to give advisory opinions. See 26 C.J.S. *Declaratory Judgments* § 32 (2011) (setting forth relevant law in a fifty state survey). Furthermore, "[a] declaratory judgment proceeding is unavailable to secure judicial answers to questions that are theoretical, hypothetical, academic, or abstract." *Id.* § 31. *But see* Opinion of the Justices to the Senate, 436 N.E.2d 935, 947 (Mass. 1982) (noting that the Massachusetts Constitution gives the court the right to render advisory opinions).

243. Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 848 (2003) (arguing that dicta is often beneficial in communicating the possibility of future change in the law); see also ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 26–33 (1969) (describing the virtues of dicta).

244. Shannon, *supra* note 243, at 848–49.

245. RONALD DWORKIN, *LAW'S EMPIRE* 402 (1986) (discussing the propriety of warnings in judicial decisions of impending or proposed changes in the law).

sin “had no constitutional duty” to protect the injured child, Justice Rehnquist went on to explore alternative forms of remedy:

It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger. . . . The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process.<sup>246</sup>

For states wishing to afford their constituents the safeguards that federal courts were unable to provide, Rehnquist’s dicta suggested a constitutional alternative in the form of common-law liability schemes. This dicta shed light on potential remedies, without compounding the injustice of an already tragic situation. Subsequently, Rehnquist’s guidance to state courts and legislators, although nonbinding, was cited in hundreds of opinions grappling with the issues of state actors’ liability under common law tort schemes.<sup>247</sup> But it did so without compelling any particular response.

A second rejoinder to the critique that dicta is unprincipled arises from the notion of legitimacy itself. A common way of explaining why people obey the rule of law is the suggestion that courts enjoy some finite stock of a resource known as legitimacy, which can be cultivated but also depleted in a variety of ways.<sup>248</sup> “Legitimacy may be depleted, for example, by decisions that . . . smack of blatant partisanship or unprincipled vacillation, or otherwise blur the between legal decisionmaking and ordinary political decisionmaking upon which courts stake their claim to obedience.”<sup>249</sup> From this perspective, proclamation by dicta constitutes a substantial withdrawal from the bank of legitimacy, a withdrawal of the kind that a court cannot make on a regular basis without jeopardizing future compliance with its decisions. This view of legitimacy yields the prediction that every bit of dicta a court renders should weaken its capacity to secure compliance with future decisions.

But conceiving of dicta as an *equitable* form of remedy, however, leads to the opposite conclusion. When a law’s consequences are un-

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246. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201–03 (1989).

247. Kannan, *supra* note 160, at 587 (“[H]undreds of state and federal cases . . . have cited *DeShaney* and used its dicta as precedent.”).

248. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *Geo. L.J.* 723, 779 (2009).

249. *Id.*

just, one preserves the legitimacy of the law only by denying the ultimate authority of the law. Indeed, a court's legitimacy cannot long survive without the popular belief that the laws it enforces reflect the underlying values of society.<sup>250</sup>

Legal theorists since Max Weber have argued that the foundations of law do not lie in sovereign commands but rather in social practices involving the acceptance of authority.<sup>251</sup> Indeed, the crucial role of acceptance for the stability of legal systems becomes most obvious in times of revolution.<sup>252</sup> As Richard Fallon comments, "The commands of the Parliament did not cease to be law in the United States because Parliament commanded that its decrees should no longer be law here; [they] ceased to be law because they ceased to be accepted as such in the former American colonies."<sup>253</sup>

Alternatively, consider Herbert Wechsler's critique of *Brown v. Board of Education*. Wechsler charged that *Brown* failed to establish a neutral legal principle for invalidating segregation.<sup>254</sup> *Brown*'s absence of doctrinal justification, he argued, was not just wrongheaded but a betrayal of the institution of the court. But this criticism confuses the legitimacy of procedure with the legitimacy of the Court itself in American life. Indeed, Wechsler's critique is famously blind to the reality of the dilemma facing Justice Warren and his brethren.

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250. See, e.g., DAVID BEETHAM, *THE LEGITIMATION OF POWER* 15–17 (1991) (defining legitimacy along three dimensions, including rules that are justified "by reference to beliefs shared by both dominant and subordinate"); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 25 (2006) ("[L]egitimacy exists when the members of a society see adequate reason for feeling that they should voluntarily obey the commands of authorities."); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *ANN. REV. PSYCHOL.* 375, 378 (2006) (discussing ways in which legitimacy facilitates state exercise of power because individuals view authorities as morally or normatively appropriate).

251. Richard H. Fallon, *How to Choose a Constitutional Theory*, 87 *CALIF. L. REV.* 535, 547 n.56 (1999) ("Even if the sovereign's commands are the law, they are not the law because the sovereign has commanded that the sovereign's commands should be law, but because relevant parts of the population accept the sovereign's commands as authoritative."); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 *OHIO ST. J. CRIM. L.* 231, 239 (2008) ("[L]egitimacy develops from the manner in which authority is exercised.").

252. Fallon, *supra* note 251, at 547.

253. *Id.*

254. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 19 (1959) ("The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law.").

*Brown's* major accomplishment was neither the announcement of a new principle, nor the reversal of an old one. Rather, the Warren Court's achievement was in speaking the great unacknowledged truth of its day: separate but equal was *never* equal. The impact of this statement in American life was the equivalent of announcing the emperor had no clothes. The great dissonance in American society was finally acknowledged outright by its highest court. Like the bloody defeat at Gettysburg, *Brown* marked the beginning of the South's long retreat from American apartheid.

As others have observed, the use of dicta as a form of prophylactic remedy is sometimes the only available option for a court committed to society's demand for justice.<sup>255</sup> For example, Kent Greenawalt comments:

When the Court decides to accept or reject cases, to decide them on this ground or that, to issue warning dicta which are then not made the basis for decision, it is necessarily performing a function far more complex than Professor Wechsler's call for candor in meeting *every* issue in *every* case on the basis of neutral principles of adequate generality.<sup>256</sup>

Had the Court in fact followed Wechsler's advice, Greenawalt concludes, "it would have disappeared long ago from [its central place in] American life."<sup>257</sup>

The public's faith in the legitimacy of the judicial system remains strong only so long as its courts administer just results.<sup>258</sup> As Neal Feigenson observes, "in a world of increasing privatization and decreasing faith in elected government, legal cases and especially jury trials bear an ever-growing and perhaps ultimately unbearable burden of providing the sense of justice that is otherwise absent from the public sphere."<sup>259</sup> Writing for the Court in *Vasquez v. Hillery*, it was Justice Marshall who explained that "detours from the straight path of stare decisis"<sup>260</sup> have occurred most often when the Court has felt obliged "to bring its opinions into agreement with experience and with facts

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255. Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1008 (1978).

256. *Id.* (quoting EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 34 (1962)).

257. *Id.*

258. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003) (arguing that citizen's compliance with the law is powerfully effected by their subjective belief in the fairness of the courts); see also *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.").

259. Neal R. Feigenson, *Accidents as Melodrama*, 43 N.Y.L. SCH. L. REV. 741, 788 (2000).

260. 474 U.S. 254, 266 (1986).

newly ascertained.”<sup>261</sup> The creative use of dicta allows courts to honor this responsibility without betraying their obligation to the rule of law. By utilizing dicta as a vehicle for announcing the direction of legal doctrine, courts are able to evolve legal standards to meet changing social need, without violating traditional reliance interests.

“Conversely,” David Law insists, “a court jeopardizes its [legitimacy] by allowing people to observe that it is not obeyed,” even when it is right.<sup>262</sup> The Marshall Court refused to assist William Marbury secure his rightful judicial commission and acquiesced to a “constitutionally dubious” purge of Federalist judges rather than risk political backlash.<sup>263</sup> But today, we do not remember *Marbury v. Madison* as a defeat for the sovereignty of the law. Instead, as Law notes, “We remember it . . . as the cornerstone of judicial power in this country because the Court had the strategic sense to assert itself in a ruling that was at no risk of being disobeyed in any obvious way.”<sup>264</sup> *Marbury*, like *Beatty* and *Brown*, was the assertion of a principle that could only be realized in the fullness of history. If the equitable power of the those courts was an illusion, with the passage of time, this illusion has become reality.<sup>265</sup>

## B. The Critique of Dicta as Ill-Considered

Even someone who believes that dicta can serve useful purposes may still object that courts are poorly equipped to articulate legal doctrine by way of off-the-cuff remarks. According to this critique, courts, by their manner and operation, risk promulgating ill-considered precedent by launching their craft into the waters of hypothetical speculation.<sup>266</sup> As Judge Pierre Leval complains, “This is never true when law is made by dictum, which is always—by definition—superfluous to the court’s performance of its job.”<sup>267</sup> Because courts rely primarily on the briefing of adverse parties, lack research staff, rarely employ neutral experts, and are generally under pressure to enter judgment promptly, critics argue that lawmaking by courts is best limited to circumstances where that lawmaking inescapably follows from the court’s

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261. *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)) (internal quotation marks omitted).

262. Law, *supra* note 248, at 782.

263. *Id.* at 785 (footnote omitted).

264. *Id.*

265. *Id.* (describing *Marbury* as an opportunistic assertion of judicial power: “With the passage of time, the illusion of power has become the reality.”).

266. Leval, *supra* note 14, at 1260–61.

267. *Id.* at 1261.

performance of its duty to decide cases rather than hypothetical questions.<sup>268</sup>

This critique is based in part on considerations underlying the adversarial system of law.<sup>269</sup> Under this model, a judge should avoid ruling on issues not directly before the court because she lacks the benefit of “confronting conflicting arguments powerfully advanced by both sides.”<sup>270</sup> When the court issues rulings outside the scope of its immediate jurisdiction, this salutary benefit is absent. Indeed, in most such cases the court will be forced to rely entirely upon its own limited devices “because the parties usually have no interest in [briefing] a question whose resolution will not affect the result of their case.”<sup>271</sup>

But consider one response to this critique: the advocate’s prime loyalty is to his client, not to truth as such.<sup>272</sup> Generally speaking, “truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time.”<sup>273</sup> The assumption that truth will emerge from partisan presentations by parties with diametrically opposed interests is an act of faith not borne out by many civil and criminal proceedings.<sup>274</sup> Indeed, counsel bent exclusively on winning and judges bent on pursuing the truth are not even playing the same game.

As Marvin Frankel observes, “many of the rules and devices of adversarial litigation” as conducted in the American system are not only inappropriate for, “but are often aptly suited to defeat, the devel-

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268. *Id.* at 1261–62.

269. See generally Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 385–86 (1978) (arguing that judges work best as neutral arbiters, considering the arguments presented by the parties or their representatives, avoiding policy-making or other abstract considerations); Chrysanthi S. Leon, *Should Courts Solve Problems? Connecting Theory and Practice*, 43 CRIM. L. BULL. 879, 882 (2007).

270. Leval, *supra* note 14, at 1261.

271. *Id.* at 1261–62.

272. See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) (“[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve.”).

273. *Id.* at 1037.

274. See LOIS G. FORER, *THE DEATH OF THE LAW* 132 (1975) (“The fairness of this sport known as litigation is seldom questioned even though the average civil litigant and the average indigent defendant have about as much chance as the unarmed Christians had in the gladiatorial combats with the lions in the Coliseum of ancient Rome.”); R. J. Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3, 4 (1987) (“Seven years on the trial bench yield the conviction that our adversary method . . . is at times a cumbersome giant that, to some, may exalt trickery and victory over ethics and truth.”); Felicity Nagorcka et al., *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 462 (2005).

opment of truth.”<sup>275</sup> Too often, this process achieves truth only as a lucky accident. Unsurprisingly, those schooled in the Continental system insist that a court is far more “likely to make true pronouncements when it acts on its own initiative, rather than when it addresses issues that have been framed solely by the interested parties before it.”<sup>276</sup>

Still, one can recognize the limits of the adversary system but remain uncomfortable with the idea of judges as quasi-legislators or philosopher kings. No less a committed pragmatist than Judge Posner recognizes the limits of discretion: “The idea of [unbridled] judicial discretion . . . is, no matter how fancied up, a source of unease to the legal profession.”<sup>277</sup> We have no good reason to believe that judges are in a better position to evaluate policy than democratically elected legislatures. Neither do we have reason to believe that courts would function better freed from the normal requirements of *stare decisis*.<sup>278</sup> If judges were free to ignore precedent or the law, then the law would be nothing more than the will of judges.

Nonetheless, the view of dicta as remedy espoused in this Article does not require the conclusion that every use of dicta is unprincipled. A judge’s counter-majoritarian power is always checked by significant bulwarks present in judicial and legal culture.<sup>279</sup> As Judge Posner observes, “The belief that judges are constrained by law, that there is more to law than the will to power, is a deeply ingrained feature of the legal culture.”<sup>280</sup> Any judge who violates this expectation is likely to attract professional criticism from his most important audience—other judges.<sup>281</sup>

Central to judicial culture is the belief that any decision must be justified by neutral analysis and the giving of reasons.<sup>282</sup> “For the judiciary,” as Michael Dorf observes, “giving reasons justifies the exercise of governmental authority, much as elections justify its exercise by the political branches.”<sup>283</sup> Figuratively speaking, such reasons are the cur-

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275. Frankel, *supra* note 272, at 1036.

276. Dorf, *supra* note 17, at 2002.

277. POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 56, at 21.

278. Dorf, *supra* note 17, at 2004.

279. *Id.* at 2029.

280. POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 56, at 194.

281. *Id.*

282. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (“A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary’s exercise of power.”).

283. Dorf, *supra* note 17, at 2029.

rency by which opinions pay their way in the marketplace of legitimacy. “A justice who refuses to explain her decisions might not thereby commit an impeachable offense,” Dorf concludes, “but she would lose the respect of the legal community, which, in the long run, would undermine her ability to translate her views into law.”<sup>284</sup>

We can now take up what I consider the most troubling question for any theory of dicta that takes the limits of judicial discretion seriously: When we permit a judge to introduce significant dicta into an opinion in the form of observations beyond the case, counterfactual hypotheticals, and other nondispositive determinations, do we not illegitimately cede authority over the most important of our contemporary legal problems? And moreover, because this dicta has no consequences for the holding, do we not risk that such pronouncements will be glib, ill-considered, uttered without careful scrutiny, and therefore often mistaken?<sup>285</sup>

Initially, we should note that this criticism is the product of the intuition that dicta is trivial, contingent, superfluous—in a word, unnecessary. And if unnecessary, then avoidable. But the model of equitable dissonance suggests just the opposite conclusion. As we have seen, dicta is not merely a convenient judicial tool; dicta in fact plays a crucial role in legal reasoning.

Dicta’s function in legal reasoning is illustrated by analogy to the well-known distinction between rules and standards.<sup>286</sup> A law requiring drivers to stop at a stop sign is a rule. A law requiring drivers to proceed “cautiously” when passing through a construction zone is a standard. When determining guilt or innocence, the application of a rule depends solely on the existence of specific facts. For example, did the car stop at the sign?<sup>287</sup> But the application of a standard involves a consideration of the facts in light of complex underlying values. For example, how fast was the car going? What were the road and visibility conditions? How much risk does the law allow an individual driver to

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284. *Id.*

285. Leval, *supra* note 14, at 1268 (arguing that the dangers of dictum uttered without “paying the price” of considered review outweigh any of its possible benefits in the vast run of cases).

286. Many scholars have observed this fundamental distinction between rules and standards. *See generally* Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000) (“Rules establish legal boundaries based on the presence or absence of well-specified triggering facts.”); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (“Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere.”).

287. *See, e.g.*, POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 56, at 42–45.

take when driving through a construction zone? Where is the line between carelessness and negligence?<sup>288</sup>

Many legal questions can be answered by the application of clear and uncontested rules to determinate facts: Is it illegal to drive fifty miles an hour in a twenty mile per hour zone? Is Illinois' Governor entitled to take bribes? Is marriage to one's sister valid?<sup>289</sup> As Judge Posner comments, the reason these questions do not much figure in legal debate is that "they are too simple to be a likely subject of litigation or even to require legal counseling."<sup>290</sup> Their boundaries can be immediately intuited.<sup>291</sup> By contrast, standards are characterized by a lesser or greater degree of indeterminacy.<sup>292</sup> The meaning of a common law standard such as negligence or an equitable standard such as unconscionability cannot be defined by reference to itself. Why? Because to understand what a legal concept like "negligence" or "unconscionability" looks like, you have to know what its opposite—"prudence" or "fairness"—looks like. The extension of one is demarcated by the limits of the other. This is particularly the case when a court is addressing a relatively complex equitable concept such as the duty of good faith in the context of fiduciary duties. But how does this description of "the opposite" emerge? How does one distinguish good faith from bad faith? In a case involving the miscarriage of justice, the demarcation of that *difference* is the province of dicta.

Consider two recent Supreme Court opinions. In *Lawrence v. Texas*, while striking down Texas sodomy laws as an unconstitutional violation of the Equal Protection Clause, the Court was careful to distinguish all the potential "liberties" that this decision did not protect:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether

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288. See Sullivan, *supra* note 286, at 58 ("A legal directive is a 'standard'—like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.").

289. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 56, at 42–43.

290. *Id.* at 43.

291. Another way of expressing this thought would be to say that rules are like analytic truths: they contain their own premises. Thus, speeding is going faster than the speed limit; theft is taking what is not yours. If you understand the premise, then you understand the truth of the proposition, and vice versa.

292. One must be cautioned that even this quick sketch of rules and standards is deceptive. As one commentator points out, the distinction between rules and standards marks a continuum, not a divide: "Just as a pure rule can become standard-like through unpredictable exceptions, a pure standard can become rule-like through the judicial reliance on precedent." Korobkin, *supra* note 286, at 29.

the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.<sup>293</sup>

Justice O'Connor was even more explicit in her concurrence, noting that the fact "this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review."<sup>294</sup> Justice O'Connor went on to cite national security and preserving the traditional institution of marriage as two legitimate state interests not implicated by *Lawrence's* holding.<sup>295</sup>

Similarly, in *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Roberts was careful to observe that the Court's decision striking down the use of racial classifications in school district assignment plans did not imply such "cataclysmic" concerns as the invalidation of the No Child Left Behind Act.<sup>296</sup> These are paradigmatic examples of dicta. Their authors might have asserted contrary positions (or eliminated this dicta altogether), and the holdings of these cases would still come out the same. Yet, it is difficult to characterize either of these pronouncements as judicial overreaching. In both, the significant dictum in question functions to clarify, rather than confuse, the scope of the holding.

The Chancellor's dicta in *Disney* is only a more sophisticated example of this phenomenon. Characterizing *Disney's* dicta as a series of ill-considered pronouncements is an error that follows from regarding dicta as purely contingent, rather than a necessary stage in the resolution of equitable dissonance. Yet, as we have seen, in a critical sense, the opinion's legal reasoning relied upon dicta to arrive at the ultimate holding. That is because it was only through the demarcation of bad faith—in this case the egregious conduct of Eisner, Ovitz, and the Disney board members—that the evolving picture of good faith could come into view.<sup>297</sup> Likewise, on appeal, the Delaware Supreme Court announced that "[i]n our view, a helpful approach is to compare what actually happened here to what would have occurred had the commit-

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293. 539 U.S. 558, 578 (2003).

294. *Id.* at 585 (O'Connor, J., concurring).

295. *Id.*

296. 551 U.S. 701, 745 (2007) ("[T]he [cataclysmic] examples the dissent mentions—for example, a provision of the No Child Left Behind Act of 2001 that requires states to set measurable objectives to track the achievement of students from major racial and ethnic groups—have nothing to do with the pertinent issues in these cases." (citation omitted)).

297. *See Disney V*, 906 A.2d 27, 63–67 (Del. 2006).

tee followed a ‘best practices’ (or ‘best case’) scenario, from a process standpoint.”<sup>298</sup> The court’s subsequent discussion in dicta of idealized “best practices” clarified the “ordinary” standards of care by which boards would be judged in the future.<sup>299</sup>

*Disney* thus illustrates how dicta functions as a source of illumination in complex legal reasoning. The court’s use of hypotheticals and other thought experiments was not blind speculation, but rather a necessary element of the critical thinking at work in the resolution of the controversy. In each case, dicta is the hinge upon which the underlying logic of the opinion swings into view. But consequently, the holding cannot be thought of as a distinctly separate element within these opinions—dicta and holding must be understood as an implicit unity.

What does it mean to characterize dicta as one with an opinion’s holding? Again, it helps to consider the dialectical nature of legal reasoning. “Doctrinal categorizations . . . tend to be built on conceptual oppositions.”<sup>300</sup> For example, interdependent legal concepts such as good faith and bad faith are best described as what Jack Balkin terms “nested” oppositions: opposed concepts that have a “relation of dependence, similarity, or containment.”<sup>301</sup> Typically, these conceptual oppositions emerge from the opposition of concepts in a particular context.<sup>302</sup> The context of opposition is important because the two ideas may not even be logically related—and therefore not contradictory—except in a specific context.<sup>303</sup>

Similarly, legal concepts like good faith and bad faith, even justice and injustice, exhibit conceptual dependence on each other. Indeed, their relation is so intimate that as signifiers they can almost be said to refer to the same signified—two sides of the same coin, rather than distinct entities. This theory implies, of course, that the appearance of dicta within opinions analyzing legally sanctioned injustice is inevitable. The limitations of a problematic legal doctrine cannot be expressed without reference to its opposite. To say what the law is, we must be able to say what it is not.

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298. *Id.* at 56.

299. *Id.* (“In a ‘best case’ scenario, all committee members would have received, before or at the committee’s first meeting on September 25, 1995, a spreadsheet or similar document prepared by (or with the assistance of) a compensation expert . . .”).

300. Griffith, *supra* note 186, at 36.

301. J.M. Balkin, *Nested Oppositions*, 99 *YALE L.J.* 1669, 1671 (1990) (reviewing JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989)).

302. *Id.* at 1674.

303. *Id.* at 1674–75.

The failure to acknowledge the necessity of conceptual interdependence in legal reasoning accounts for many of the flaws in the criticism directed at the use of dicta as remedy. This is particularly true of critics who disparage dicta as “unnecessary.” Fundamentally, this criticism is characterized by a blindness to the binary opposition at the heart of the debate—the opposition between holding and dicta itself. Just as “good” cannot be thought without reference to “evil,” and “justice” cannot be limned without reference to “injustice,” the holding of a case is inevitably demarcated by its dicta. Even when dicta is suppressed within a written opinion, it is never simply “absent.”

The idea that words or concepts stand in a one-to-one correspondence with things is a form of naive realism long abandoned by the human sciences.<sup>304</sup> Whether written or spoken, no element within a logical system can function without relating itself to another element. Consider, for example, Saussure’s famous pronouncement that the structure of language is *purely* differential: “Whether we take the signified or the signifier, language has neither ideas nor sounds that existed *before* the linguistic system, but only conceptual and phonic differences that have issued *from* the system.”<sup>305</sup> On this theory, “[e]very concept is necessarily and essentially inscribed in a chain or a system, within which it refers to another and to other concepts, by the systematic play of differences.”<sup>306</sup> As Jacques Derrida observes, “Nothing, neither among the elements nor within the system, is anywhere ever simply present or absent.”<sup>307</sup> Rather, each element is constituted on the basis of the traces within it of all the other elements in the system.

The consequence to be drawn is that the holding cannot be thought without reference to dicta. The authority of the holding is defined by what it is supposedly not: “trivial,” “superfluous,” “contingent.” But accordingly the holding depends on dicta for its meaning—these two concepts are intimately bound in the logic of legal reasoning.

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304. DANIEL CHANDLER, SEMIOTICS: THE BASICS 59 (2d ed. 2007) (“No semiotician or philosopher would be so naive as to treat signs such as words as if they were the things for which they stand but . . . this occurs at least sometimes in the psychological phenomenology of everyday life and in the uncritical framework of casual discourse.”).

305. JACQUES DERRIDA, SPEECH AND PHENOMENA: AND OTHER ESSAYS ON HUSSERL’S THEORY OF SIGNS 140 (David B. Allison trans., Nw. Univ. Press 1973) (1967) (emphasis added) (quoting FERDINAND DE SAUSSURE, A COURSE IN GENERAL LINGUISTICS 120 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., Philosophical Library 1959)).

306. *Id.*

307. JACQUES DERRIDA, POSITIONS 26 (Alan Bass trans., Univ. of Chi. Press 1981) (1972).

What this discussion reveals is that the criticism of dicta as ill-considered is itself ill-considered. For example, the criticism of judges' employment of hypotheticals and other thought experiments as an illegitimate technique is simply blind to the essential function of dicta in legal reasoning. Like negative space in paintings, dicta allows the holding of an opinion to stand out in relief.<sup>308</sup> Indeed, dicta, particularly in the form of hypotheticals, functions as the canvas upon which holdings are painted. This operation is visible whenever a court makes its thinking explicit.

Even as dicta allows the holding to emerge into light, the shadow it casts across the page remains conspicuous. The contours of good faith in *Disney*, for example, emerge most clearly not through abstract passages of doctrine, but from the Chancellor's scathing commentary on the ethical and professional failures of CEO Michael Eisner and his fellow board members. Thus, a central claim regarding the necessity of dicta emerges into view: dicta appears in hard cases not in spite of the holding, but *because* of the holding. Dicta is literally the holding's dark twin.

### C. The Critique of Dicta as Unfair

A problem remains: there is an obvious contradiction between declaring a defendant innocent of legal fault one moment, but then punishing that same defendant in the next breath for the identical conduct. Indeed, critics of dicta argue that this is one more example of the abuse of judicial discretion—a tool of injustice in the hands of a tyrannical legal establishment.

They are mistaken. Certainly, the suggestion that dicta operates as a remedial device, creating liability for defendants where none otherwise exists, opens courts to charges of unprincipled decision-making. There, the judge takes a losing claim under established principles like loyalty and due care, mixes the magic dust of dicta, and suddenly a plaintiff can snatch victory from the jaws of defeat. In *Disney*, for instance, Chandler's extravagant discussion of bad faith acted as punitive deterrent and prophylactic remedy in a case where the defendants, in theory, prevailed. This struck some as judicial overreaching. Yet, the use of dicta as remedy appears unprincipled only when viewed

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308. In paintings, negative space is literally the space on the canvas between objects. A simple two-tone image, for instance, depicts the subject in black and leaves the space surrounding it blank (or white), thereby forming a silhouette. RENE PAROLA, *OPTICAL ART: THEORY AND PRACTICE* 18 (Dover Publ'ns 1996) (1969).

from the myopic perspective that splits the purposes of adjudication into isolated and often conflicting elements.

Private litigation is never genuinely private: “It is in the nature of adjudication for courts to gather and report information about the behavior of the parties that come before them.”<sup>309</sup> This mission carries with it the power to shape the ethical and commercial practices of the greater community. Social scientists have suggested that “merely by collecting and distributing information about how actors behave, courts can induce people to refrain from bad behavior.”<sup>310</sup> Consider, for example, the *lex mercatoria*, a private legal code developed by European merchants during the emergence of commercial law in the early Middle Ages.<sup>311</sup> This code was administered by judges who were themselves drawn from the merchant ranks. These merchants had little power to enforce judgments against those who violated the code and could not call upon the state for assistance. But what they could do was make information public regarding those who violated these codes and refused to honor judgments. The prospect of being black-listed by other merchants ensured a healthy degree of compliance with both the *lex mercatoria* and the decisions of private judges.<sup>312</sup>

Likewise, the role of judges in collecting and transmitting information about the behavior of private individuals plays an important function in popular democratic rule. First, courts that engage in judicial review solve a critical information problem by broadcasting their investigations in the form of opinions. Only if people are aware of the bad behavior of their fellow citizens (or their government for that matter) can they respond appropriately.<sup>313</sup> Second, private litigation plays an important role in shaping the norms and behaviors of the community.<sup>314</sup> Courts do not merely settle controversies between pri-

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309. Law, *supra* note 248, at 745.

310. *Id.*

311. *Id.*

312. See AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 315–49 (2006) (concluding that trade relations in medieval Europe reflected the operation of a “community responsibility system” sustained in part by the “imperfect monitoring” that courts performed with respect to traders); Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 2–5 (1990) (arguing that the role of private judges in transmitting information about past behavior gave traders an incentive to obey their judgments).

313. See Law, *supra* note 248, at 786–89 (likening judicial review to a fire alarm mechanism that alerts the public when those with public power have acted unconstitutionally).

314. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1303–1315 (2004) (arguing that tribunals perform signaling and coordination functions that help explain how

vate parties; written judgments take on a life of their own outside the courthouse. The very act of deciding cases is simultaneously a transmission of norms and a shaping of expectations.<sup>315</sup> In fact, the primary function of the dicta in *Disney*, *Beatty*, and *Mary M.* was to provide a quasi-prophylactic remedy, insuring *ex ante* that the harms addressed in those cases would not continue to repeat themselves ad infinitum.

To be sure, overruling a prior decision directly compelling an opposite result would often lead to substantial unfairness to the losing party. Notice to litigants is an important aspect of due process. Without proper notice, the law regards punishing wrongdoers as itself unlawful. Yet, once substantive injustice has been observed, once innocents have been harmed, the system cannot permit a cycle of iniquity to continue. Consider the SEC's current civil suit against Fabrice Tourre.<sup>316</sup> That defrauding clients through a form of selective nondisclosure was legal yesterday does not mean that the courts must endorse such behavior until the end of time. Stare decisis is not a suicide pact. Rather, the court must, in each instance, weigh the value of predictability and stability against the likelihood of continuing harm.

As Dorf observes, "When a litigant later presents to the court its earlier ruling and asks for an unjust or even absurd result, stare decisis does not require that the court oblige."<sup>317</sup> If precedent thwarts justice in a truly egregious manner, the appropriate response is an exercise of the court's equitable powers, either by directly overruling a past case or by charting an evolution in the court's doctrine through candidly worded dicta. And, while litigants should not have to guess today what they may be liable for tomorrow, neither is precedent a license for the clever to get away with frauds that less imaginative criminals have neglected.

*Beatty*, for instance, exemplifies the limits of what a court can properly do in the face of injustice following from ossified legal doctrine. Obviously, there is something profoundly amiss in a legal system where judges say to each other, "The law requires outcome A, but B

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courts command obedience in part by shaping the self-fulfilling expectations on the part of litigants).

315. See generally Rock, *supra* note 214, at 1063–72 (arguing that the judiciary's sermon-like pronouncements are passed along by counsel and press to a wider audience); Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1119–24 (2009) (arguing that studies reveal that corporate counsel play a critical role in transmitting information of fiduciary duties to a wider corporate audience).

316. SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147 (S.D.N.Y. 2011).

317. Dorf, *supra* note 17, at 2057.

makes better policy sense so we'll go with B."<sup>318</sup> But, at some point, the outcome that leads to genuinely appalling results is—by that very consequence—no longer the correct outcome, from either an equitable or a legal standpoint.<sup>319</sup> In such cases, dicta is often a court's only vehicle for lawfully resolving the controversy before it.

Likewise, describing the dicta in *Disney* or *Mary M.* as unwarranted punishment obscures the fundamental equitable principles at stake. The acknowledgement of injustice, even when the law provides no legal remedy, is as critical to sustaining the integrity of the courts as their reliance upon precedent.<sup>320</sup> Legal scholars refer to this kind of public acknowledgement of a past injustice as a "symbolic remedy."<sup>321</sup> A lack of compensatory money damages does not by itself render this remedy insignificant. For the victims of legally sanctioned injustice this acknowledgement carries deep psychological resonance. This is because the failure to acknowledge injustice is itself a form of further injury visited upon the victims of unjust laws. Such widespread social amnesia, that mode of forgetting by which a whole society separates itself from a discreditable past, erases not only collective guilt, but the very identities of past victims by denying the reality of their experience.<sup>322</sup>

Symbolic remedies, even those issued in pure dicta, provide a measure of rectification for the dissonance otherwise experienced by innocent victims. These remedies are themselves manifestations of equity, a form of struggle against injustice, insisting that far worse than the crime is the cultural blindness or amnesia which denies that a crime ever took place.<sup>323</sup> The courts' employment of dicta to acknowledge and criticize legal injustice is thus always more than simply pun-

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318. See, e.g., POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 56, at 145 (discussing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

319. *Id.*

320. JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 35 (1990) ("[N]o democratic political theory can ignore the sense of injustice that smolders in the psyche of the victim of injustice. If democracy means anything morally, it signifies that the lives of all citizens matter, and that their sense of their rights must prevail. Everyone deserves a hearing at the very least.").

321. See, e.g., Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, in *JUSTICE, ETHICS, AND NEW ZEALAND SOCIETY* 139–45 (Graham Oddie & Roy W. Perrett eds., 1992) (arguing that apologies and acknowledgments are properly demanded, and at least symbolic compensation may be due to aboriginal descendants of those who were originally treated unjustly).

322. Spaulding, *supra* note 110, at 1998–2001.

323. See generally Waldron, *supra* note 321, at 141–44. While Waldron does not support the idea of massive monetary remedies for the victims of past historical injustices, he does, however, support efforts at redress that he deems symbolic rather than compensatory. The

ishment or parable. It is also countermemory, the remembrance of an inconvenient truth that would otherwise be repressed.<sup>324</sup>

It should not be forgotten that many of the Supreme Court's most important pronouncements in the area of civil rights were first born in dicta. Justice Stone's suggestion that discrimination against "discrete and insular minorities" might require "a correspondingly more searching judicial inquiry" into the supposedly undemocratic aspects of the political process in *Carolene Products*, an opinion holding constitutional legislative discrimination against unpopular commercial manufacturers, is one such case.<sup>325</sup> Justice Powell's observation that racial diversity might be a compelling interest in college admissions in *Bakke*, an opinion striking down the U.C. Davis medical school's affirmative action program, is another.<sup>326</sup> And the Court's admonishment that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people," in *Hirabayashi v. United States*, an opinion holding constitutional the curfew and relocation of all citizens of Japanese ancestry from the West Coast during World War II, is a third.<sup>327</sup> Similar instances of momentous dicta abound in the history of the Supreme Court's equal protection jurisprudence.<sup>328</sup>

Dicta functions as a principle of resistance in such cases. It expresses legal conclusions clearly at odds with the rationales justifying

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federal government's token redress payments of \$20,000 to surviving Japanese American internees is an example of the sort of symbolic reparations that Waldron supports. *Id.*

324. See Spaulding, *supra* note 110, at 2006 (arguing that the significance of the Civil War and Reconstruction Amendments for federalism principles can only be recovered through the method of countermemory—a form of historical consciousness that seeks to reveal both perverse desire animating the self-aggrandizing tendencies of national "history" and the inconvenient facts it is so prone to forget).

325. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). This pronouncement is widely regarded as perhaps the most influential footnote in American legal history. See, e.g., J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 275 (1989); Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 926 (2001); Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 168–69 (2004); Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 277 (1995).

326. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–18 (1978).

327. 320 U.S. 81, 100 (1943).

328. For example, school systems relied for over thirty years upon dicta in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), regarding the use of the broad discretionary power of school boards to combat de facto segregation through racial balancing within districts. Jonathan Fischbach, Will Rhee & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 505 (2008).

their outcomes. It reveals the Court struggling with itself to map the boundaries of doctrine. When read against the purported holdings, the dicta in cases like *Carolene Products* and *Hirabayashi* creates significant tensions, begging an as yet unrealized redemption, and opening doors that subsequent courts walk through.

Moral leadership will inevitably be thrust on certain judges—a role they may play well (as by the Chancellor in *Disney*) or badly.<sup>329</sup> As Judge Posner observes of his colleagues on the bench: “Much of the law applied by judges, not to mention the ‘law’ that tells us whether the rules or for that matter the judges themselves are lawful, consists of moral and political considerations.”<sup>330</sup> How could this be otherwise, when, “as Holmes himself emphasized, the law is—and should be—shaped by social needs and interests?”<sup>331</sup>

Traditionally English judges performed two primary functions: (1) resolving private disputes and (2) imposing criminal justice.<sup>332</sup> A third, and also traditional, function of courts is the exercise of equity power to prevent injustice when the law dictates otherwise, either through error, ignorance, or human fallibility. During periods of our own recent legal history, the legitimacy of this function has been denied. Indeed, since its merger with our courts of law in 1938, equity has literally become the ghost in the machine. Yet, judges have exercised broad equity powers since the dawn of the court system. The demands of equity upon judges in the modern American legal system are no less real. Even in an age of legislation, every statute has gaps to fill, ambiguities to decipher, and inadequacies to overcome.

Equity demands that courts uphold not just the letter of the law but also the spirit of the law.<sup>333</sup> The challenge for judges confronting unjust laws is how to correct the law without betraying it. Dicta is the magic wand by which courts perform this miracle of justice.

## Conclusion

Despite its critics, dicta persists. The question is, “Why?” The explanation for the failure of conventional theories of the holding/dictum distinction to answer this question is now clear. They assume what they claim to prove (i.e., the insignificance of dicta). These conven-

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329. POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 56, at 193.

330. *Id.* at 243.

331. *Id.*

332. Michael Boudin, *The Real Roles of Judges*, 86 B.U. L. REV. 1097, 1097 (2006).

333. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1047–48 (2001).

tional theories have sought to distinguish the difference between holding and dicta through a variety of formal definitions of what counts as precedent.<sup>334</sup> Some theorists have attempted to define holdings in terms of facts and outcomes, while others have defined holdings in more abstract terms as the rationales underlying opinions.<sup>335</sup> What all these theories share in common, however, is the conviction that dicta is essentially a *lack*—something deficient, derivative, and contingent. But their unquestioned faith in the assumption that dicta is secondary and corrupt has led them to ignore more fundamental questions. Indeed, they have ignored what might be called the ultimate question: Why is there *something*, rather than nothing? This question leads us back to place from which we started: the hard case, the case where what is “just” diverges entirely from what is “legal.”

Holmes famously observed that hard cases make for bad law.<sup>336</sup> Holmes thought most judges opt for the good result and made bad law as a result, because in reaching their decision they must distort the law to get what they consider to be the correct outcome.<sup>337</sup> “While this process may result in justice for the immediate parties,” comments William Hawkland, “it makes bad law in a jural system that relies on stare decisis, because it leaves in its wake a ‘twisted law,’” a distortion that “haunt[s] the counselor and confuse[s] the judge in subsequent situations not having the same [peculiar] equities.”<sup>338</sup> But as we have seen, there is an alternative open to the judge confronted with the hard case: the use of dicta as equitable remedy.

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334. Dorf, *supra* note 17, at 1998–99 (arguing that traditional theories of the holding/dicta distinction defines holdings along a continuum that runs from the concrete (i.e., holdings defined in terms of facts and outcomes) to the abstract (i.e., holdings defined in terms of rationales from prior cases)).

335. See Abramowicz & Stearns, *supra* note 23, at 1045–52 (tracing the history of the holding/dicta distinction).

336. *N. Sec. Co. v. United States*, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting) (“Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.”).

337. William D. Hawkland, *The Uniform Commercial Code and the Civil Codes*, 56 LA. L. REV. 231, 241 (1995); see Michael Halley, *Breaking the Law in America*, 19 LAW & LITERATURE 471, 477 (2007) (“While a person seeking justice as a final destination might hope that the great case is a triumph of sober and reliable objective discernment over the unfounded ‘conjectures of imagination,’ for Holmes, the great case is bad because ‘it distorts the judgment.’” (footnote omitted)).

338. Hawkland, *supra* note 337, at 241.

Here, we must observe again dicta's peculiar nature. Dicta is not law; it is merely the possibility of law. The test of any particular dictum's validity is not defined by its immediate audience but by its efficacy for future courts. Dicta's virtue is precisely this: It corrects the law without betraying the law. Its very triviality explains dicta's utility as a source of equity within the modern legal regime.

Confronted with the contradiction that results from a flawed law, a judge has only two choices. One is silence—a silence that risks the mistake being repeated ad infinitum through precedent, like an avalanche rolling down hill, sweeping everything in its path.<sup>339</sup> The other choice is protest. But this choice *requires* dicta; the demarcation of the “correct” standard—whether that is good faith, or fairness, or prudence—can only be articulated through an explication of the “incorrect” standard. The consequences of the defendant's conduct must be put on display for the entire world to see, or the insight is lost. This is the internal logic of equitable dissonance made visible.

This logic reveals itself most clearly in hard cases. Like our experience of music, the mediation between past, future, and present in the act of adjudicating hard cases is a gathering-together in which the whole cannot be separated from its parts without destroying the essence of the legal composition. Dicta is simply the most nuanced and sophisticated example of this compositional technique.

Dicta, of course, is always potentially destabilizing. Analogous to Wittgenstein's method of “solving” philosophic problems, dicta dissolves conflicts between “this is unjust” and “but this is how it *must* be” by revealing the existence of other possibilities for justice, other aspects of law previously undisclosed. But this also creates the dilemma of knowledge in its audience. The ambiguous tension that dicta creates—what I have termed “equitable dissonance”—cannot be ignored or forgotten. Once dicta reveals some new aspect of legal doctrine, you cannot *unsee* it. Indeed, it's the inability of the audience to forget that is the real magic. Once introduced into legal discourse, dissonance carries an implicit demand for its own redemption. As Foucault observes, discourses mutate and evolve—an evolution that exceeds and is independent of any “author.”<sup>340</sup> The power—indeed, the dan-

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339. This choice is anathema to many, triggering Holmes' famous “puke” test in pragmatic judges. See Richard A. Posner, *Pragmatic Adjudication*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 235–36 (Mortis Dickstein ed., 1998) (defining the Holmes' famous test as follows: “A statute or other act of government violates the Constitution if and only if it makes you want to throw up.”).

340. See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 189–92 (A. M. Sheridan Smith trans., Pantheon Books 1972) (1969); see also MICHEL FOUCAULT, *POWER/KNOWL-*

ger—of dicta is that these philosophic ruptures may take on a life of their own.

Dicta is something trivial and significant; superfluous and necessary; neither this nor that, but both at the same time. This contradiction is pregnant with meaning. The appearance of dicta in a significant opinion typically signals a breakdown in the legal system. It suggests that the law is not complete in itself. There is this *something else*—this aporia—which the law can neither explain nor comprehend.

But if the law can be reduced to the facts, the holding, the *rationes decidendi*, then what is this *excess* that is left over? The answer is simple but not obvious. When you strip away all the trappings of law—the holding, the facts, the black letter rules—what is left over is that which is prior to and greater than the system of laws. The referent to which this *excess* refers is justice. Speaking in the language of equity, dicta is a mnemonic device *par excellence*. It remembers precisely that which the law as a totalizing system seeks to veil and forget: the priority of justice to the law.

Like dicta, justice is simultaneously immanent within yet external to the system of laws it corrects in the exercise of equity. Without justice as an organizing heuristic, law would have no meaning for us. We would perceive only a series of arbitrary decisions, generated more or less at random, a play of conflicting interests from which only one conclusion might be drawn: Law is the power of the sovereign to enforce his will—and *nothing* more.<sup>341</sup> But this insight forces us to recognize the limits and boundaries of the law; the *law's* contradictions can only be resolved by reference to a greater consonance. Dicta retains its power to shock because it reminds us of the equitable dialectic at play between justice and law—a dialectic the legal system obscures and elides.

To restate the essential premise, the paradox of the law is that following the “rules” will sooner or later lead to lawful injustice. When this transpires, the predictable outcome is the blare of dicta. Dicta follows from a critical thinking about the contradiction of a defendant who is both guilty and not guilty at the same time. And dicta as equita-

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EDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977, at 244–45 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980); ALEC McHOUL & WENDY GRACE, A FOUCAULT PRIMER: DISCOURSE, POWER AND THE SUBJECT 3–4 (N.Y. Univ. Press 1997) (1993).

341. This was Holmes' famously cynical view of the law. See OLIVER WENDELL HOLMES, JR., JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 21, 22 (Harry C. Shriver ed., 1936) (“[S]overeignty is a form of power, and the will of the sovereign is law, because he has power to compel obedience or to punish disobedience, and for no other reason.”).

ble remedy is the movement of this critical thinking as it attempts to demarcate the boundaries between good faith and bad faith; prudence and negligence; fairness and unconscionability. Indeed, the ultimate task of dicta is to mark the boundary between injustice and justice itself.

In the hard case, the authorship of dicta is the necessary method through which legal contradiction is both acknowledged and transcended. This is not a form of judicial lawlessness, but a creative act predicated on respect for the rule of law. Dicta allows a court to address injustice, without *doing* injustice. Indeed, dicta's greatest virtue as remedy is its very *in-significance*, its lack of binding authority. Like other forms of sublation, dicta preserves even as it transforms. Dicta is thus a manifestation of equity in its most originary task: the correction or supplementation of civil law.

Even in our experience of the most beautiful music, we hear dissonance as conflict. The dissonant note begs resolution. It plagues the ear like a guilty conscience. Our experience of the law is no different. Where there is injustice, equitable dissonance cries out that our rules are in conflict with our basic intuitions of what is fair and right; it is the siren song of justice, calling us back to a forgotten home. Always and again, the frisson of dicta shatters the illusion that our man-made law is the final word. But in so doing, dicta reminds us of what is all too often forgotten. Justice is our end; the law is only a means.

