

2007

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Saul Levmore, "A Theory of Deception and then of Common Law Categories," 85 Texas Law Review 1359 (2007).

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Texas Law Review

Volume 85, Number 6, May 2007

Articles

A Theory of Deception and then of Common Law Categories

Saul Levmore *

I. Introduction

Deception is a regular feature of matters that give rise to legal conflict, and yet we do not think of cases with deception or fraud as a common element as doctrinally related. I will suggest here that they can, in fact, usefully be thought of as a group. From that observation there follows the more abstract question of why judges have not thought of these cases as related. The common denominator of “deception” has not often motivated them to decide cases in ways that take into account decisions rendered in other deception cases. My aim here is to explain this sort of narrow judicial focus, or brand of “minimalism” as I will sometimes call it, and to argue that the reason for this selective minimalism is an important and unrecognized part of the common law process. Deception is hardly the only window to this observation about the common law process, but it is one such opening and, in any event, the one inspected here. Inasmuch as my larger goal is this exploration of common law decisionmaking, I avoid areas of law where legislative enactments dominate the landscape.

Some of the well-known deception cases, outside of statutory frameworks, include deception by police who bring criminals to a location where they can be arrested (courts normally find this police tactic acceptable)¹ or by police who physically or psychologically coerce a suspect

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1. *See, e.g.,* *People v. Charris*, 572 N.Y.S.2d 935 (App. Div. 1991) (finding no due process violation where the informant deceived and persuaded the defendant to make a drug sale in New York rather than Connecticut).

in order to encourage a confession (courts do not approve);² deception by investigative reporters who pose as employees in a supermarket's meat department (held to be unacceptable trespass, though courts have been wary of imposing too great a deterrent to such undercover work through damage awards)³ or as patients at eye clinics (*that* was found acceptable and is the weekly fare of popular television programs such as *60 Minutes* and *PrimeTime Live*)⁴ or in the living room of a quack who claims to heal through strange means (but that invasion was regarded as wrongful).⁵ There is deception by one who gains a sexual partner by hiding the fact that he is infected with a sexually transmitted disease (*that is* battery)⁶ and by one who uses a counterfeit \$100 bill to buy sex (but that is *not* battery).⁷ In employment law, deception by an employer who encourages early retirements by announcing layoffs that are in fact unintended is permissible,⁸ while even small deceptions on resumés empower employers to fire employees for cause.⁹ And then, quite recently, there is deception, or "pretexting," in the process of a public corporation seeking to discover the source of leaks from its board of director meetings.¹⁰

2. See, e.g., *Sims v. Georgia*, 389 U.S. 404, 407 (1967) ("It needs no extended citation of cases to show that a confession produced by violence or threats of violence is involuntary and cannot constitutionally be used against the person giving it.").

3. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (holding that a duty of loyalty was owed to the employer but only fining undercover reporters nominal amounts because of the countervailing factor of benefit from deception).

4. *Desnick v. ABC.*, 44 F.3d 1345 (7th Cir. 1995) (finding no liability with respect to a deceptive news team).

5. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (imposing a nominal penalty for invasion of privacy where a magazine visited a disturbed war veteran practicing a version of medicine in an unadvertised fashion in his home).

6. See *Hogan v. Tavzel*, 660 So. 2d 350, 353 (Fla. Dist. Ct. App. 1995) (allowing a battery claim by an ex-wife against her ex-husband for transmission of genital warts because of the "well established, majority view which permits lawsuits for sexually transmitted diseases").

7. RESTATEMENT (SECOND) OF TORTS § 892B cmt. g, illus. 9 (1977) (giving an example of payment for sex with a counterfeit bill, and offering a result of no battery even though it was intentional from the outset and even though nonconsensual intercourse is generally a battery).

8. *Stromberger v. 3M Co.*, 990 F.2d 974 (7th Cir. 1993).

9. Compare RESTATEMENT (SECOND) OF TORTS § 552(1) (1977) ("One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."), and *Sarvis v. Vt. State Colls.*, 772 A.2d 494 (Vt. 2001) (supporting an employer's right to dismiss where the plaintiff professor obtained a position through fraudulent claims on his resume), with *Hartman Bros. Heating & Air Conditioning v. NLRB*, 280 F.3d 1110, 1111-13 (7th Cir. 2002) (recognizing that a "salt," a union organizer inserted into a workplace to organize employees, may lie about being a salt to get a job because employers cannot fire employees for union activity).

10. Hewlett-Packard recently came under fire after the former HP chairman allegedly ordered an investigation of employees and directors who may have leaked confidential boardroom secrets to the media. *60 Minutes: Patricia Dunn: I Am Innocent* (CBS television broadcast Oct. 8, 2006), <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2069430.shtml>. HP has since settled

These ten quick examples begin to suggest the range of deception cases, and they are intended to encourage the conclusion already summarized: that “deception” can easily be regarded as an area of law, and one that can be reduced and mastered, even though the examples just offered produced evenly mixed results. Some readers might be pleased to see this demonstrated, as one is pleased to connect the dots in a coloring book or to clear an area of jungle. But some would be unsettled by a theory that is so predictive in style with no accompanying explanation as to how such judicial decisions come about, especially when judges do not explicitly describe the deception cases as related. In addition to this familiar objection to a theory attempting to explain (or rationalize) a set of cases, there is the deeper problem of circularity. Cases with the common element of deception might be unified, or revealed, with a single key, but the skeptic might say: “This is too circular. You have, in effect, connected a set of cases and thus made more manageable, or even more attractive, a portion of the jungle of judicial decisions. But when you clear an area of jungle and plant flowers, your claim that it was and is a flower bed is arbitrary because there is nothing natural about the boundaries of this plot. The flower bed’s boundaries may come to *seem* natural, but we will know that they were drawn either in an arbitrary fashion or to serve some other human purpose. Deception is not a natural flower bed, but by shoveling cases into it and highlighting a shared feature, we are too ready to see these cases as coherent and to believe that we have tied a pretty package, when these cases might just as well have been rationalized on different and disparate grounds.” Part of this skepticism is about the categorization in the first place and the well-known philosophical question of whether there are “natural kinds.”¹¹ “Things that fly” may or may not be less of an artificial grouping than “things weighing more than fifty pounds,” but in this regard the argument here should be understood in the skeptical tradition. Deception may be as important a grouping as, say, torts. The skepticism about deception should extend to torts. Skepticism about categorization might, however, soften where there is utility. Torts may be a useful category precisely *because* when new cases arise in that category, or in one of its subsets like trespass, judges try to fit them into the picture described by prior cases in the category. Thus, even if torts is not a natural kind, it is a useful grouping for people who care to predict legal decisions. In contrast, judges have made no attempt to rationalize dispersed cases with deception as the common denominator.

The argument advanced here does not seek to defeat the skeptical reaction to categorization. It advances the idea that precedent, like the scope

for \$14.5 million, *id.*, and criminal charges were filed but later dismissed, Matt Richtel, *Charges Dismissed in Hewlett-Packard Spying Case*, N.Y. TIMES, Mar. 15, 2007.

11. “Natural kinds” refers to groups of items all of which hold the same essential properties. The topic is a large one, and over time the theory has been applied to social groupings and has become a popular term of art in essentialism debates. See D.H. Mellor, *Natural Kinds*, 28 BRIT. J. PHIL. SCI. 299 (1977).

of doctrinal theories in law, is endogenous.¹² Indeed, it offers an explanation of why this is so. In the course of doing so, it makes some progress on the question of why common law judges are sometimes minimalist,¹³ moving in small steps, and sometimes aggressively theoretical or “maximalist.” They are attracted to general theories of torts or of the reasonable person, but not, or not yet, to a theory of deception. In the absence of such a general theory, we might say not only that deception is not a natural kind, but also that there is no particular benefit to grouping cases that simply happen to share the element of deception. But if in fact the seemingly disparate deception cases can be described or predicted with an elegant theory, then, natural kind or not, the grouping might simply be acknowledged to be useful, if only as a matter of predicting cases, much as even the natural kind skeptics might as well acknowledge torts, contracts, and patent cases as useful if not natural categories.

II. A Theory of Deception

One way to build a positive theory of case law is to start with puzzling pairs or other subsets of cases, in the hope that some distinction or insight regarding these cases will illuminate a much larger group. Another strategy is to begin not with difficult and dueling cases but rather with single cases that seem to isolate one plausible component of a legal theory. For example, one might begin with instances where deception seems widely accepted in two-party transactions, as when one deceives another so as not to spoil a surprise, or in order to benefit third parties, as where one deceives a subject in order to carry out a reasonable scientific experiment. In both cases the deceiver is generally selfless. This strategy may be sound, but an inspection of the cases sampled at the outset of Part I suggests that this ground-up approach is not terribly—or at least not immediately—productive.

As for the puzzling pairs already encountered, it is unfortunate that neither the transactions for sex nor the dissembling of undercover investigators seems likely to represent an important proportion of deception cases. But an encouraging feature of both subsets is the absence of previous investigation in the academic literature. As already reported, he who knowingly uses a counterfeit bill to gain sex is not guilty of battery, but he who engages in the activity without disclosing a sexually transmitted disease is

12. See, e.g., Douglas Glen Whitman, *The Role of Panels in Enhancing Legal Predictability*, 25 INT'L REV. L. & ECON. 541, 553 (2005) (describing the endogenous preferences model, in which “previous decisions completely determine future decisions, because previous decisions endogenously determine judges’ opinions, and those opinions lead directly to future decisions”).

13. I adopt the term as used in CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999). Sunstein’s project deals mostly with personal rights and with constitutional and administrative law. The minimalism he advocates is said to be typical of common law judging, though I will suggest here that some redefinition of minimalism is required and that within certain domains, common law judges can be seen as maximalists.

guilty.¹⁴ Similarly perhaps, he who seduces with false promises of love does not commit rape, but intercourse under the pretense of rendering medical or psychiatric treatment is rape (at least in most states).¹⁵ There is no conventional wisdom to distinguish these cases.

As noted elsewhere, Richard Posner has offered up these cases in dictum (when dealing with our next topic, the undercover investigator) and has suggested that since it is obviously the case that there is fraud in all these cases, the distinction between guilt and no-guilt derives from the details of battery and trespass, which reflect the “inviolability” of the person and the person’s property, respectively.¹⁶ He says, in essence: The woman who is seduced with false claims of love, or she who is paid with the counterfeit bill, wants to have sex with her seducer, but the patient wants medical treatment—and not sex—with her doctor or with a medical impersonator.¹⁷ The argument might be characterized as intuitive rather than logical. After all, one who is paid with a counterfeit bill *wanted* to have sex provided the money was valuable; perhaps the patient similarly wanted to have sex if it would produce good medical treatment or if it were truly a means of resolving a medical or psychiatric problem. Of course it will not and it is not, but neither is the currency real. The suggested distinction has the feel of the time-honored claim about the difference between conditions precedent and subsequent, but that too is a distinction that modern sensibilities should find easier to deflate than to sustain.¹⁸

14. See *Hogan v. Travzel*, 660 So. 2d 350, 353 (Fla. Dist. Ct. App. 1995) (recognizing liability in Florida for battery for infecting a person with a sexually transmitted disease); *McPhearson v. McPhearson*, 712 A.2d 1043, 1046 (Me. 1998) (imposing a duty to warn or abstain where one knows or should know that he or she is infected with a sexually transmitted disease); *Lockhart v. Loosen*, 943 P.2d 1074, 1081–82 (Okla. 1997) (imposing a duty to warn where the plaintiff received herpes from her husband who in turn received the disease from the defendant during the course of an extra-marital affair).

15. Compare *People v. Borak*, 301 N.E.2d 1, 5 (Ill. App. Ct. 1973) (finding an inability to consent to sexual intercourse during a gynecological exam to indicate force amounting to rape), and *McNaire v. State*, 825 P.2d 571, 574 (Nev. 1992) (finding physician penetration of a patient without consent and with deceptive means to be sexual assault), with *Boro v. Superior Court*, 163 Cal. Rptr. 122, 124–26 (Ct. App. 1985) (distinguishing between fraud as to the fact (of intercourse) itself and fraud in inducement, and holding that a man claiming that sexual intercourse was medically necessary to cure a woman’s illness would be guilty of many things but not of rape as defined by the statute, since the woman was aware of and consented to the act of sexual intercourse). I recognize that the deception at issue in these cases pertains to a matter of statutory interest, while the argument in the text normally attempts to isolate the common law process.

16. *Desnick v. ABC*, 44 F.3d 1345, 1352 (7th Cir. 1995); see Saul Levmore, *Deceptive Judging*, 74 U. CHI. L. REV. (forthcoming 2007).

17. *Desnick*, 44 F.3d at 1352.

18. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981) (noting—in the Reporter’s Note—the criticism of the distinction between the terms “condition precedent” and “condition subsequent” in explaining the elimination of these terms in favor of the simple term “condition”); OLIVER W. HOLMES, THE COMMON LAW 316–17 (1881) (noting the confusion underlying the distinction between “conditions precedent” and “conditions subsequent,” and describing the manner in which all conditions may be seen both as precedent and subsequent).

If the key to the suggested distinction is not a notion of inviolability but one of reconstructing the complainant's likely wishes, then the distinction does seem to illuminate another likely pair: the restaurant critic who fails to reveal his true purpose in visiting a restaurant and the nosy tourist who loves to view the interior of houses and does so by claiming to be the local utility company's meter reader. We sense that there is a world of difference between the two cases of deception, and likely (or majoritarian) *ex ante* wishes may well be the most convenient source of difference. Each of these deceivers gains access with deceit, but the restaurant wants customers (and perhaps critics) while the typical homeowner does not anticipate intrusive visitors with any excitement. This distinction seems to "explain" or even justify the law's certain treatment of the meter-reader impersonator as a trespasser but the restaurant critic as something quite different and acceptable (perhaps like an old friend who deceives as to the purpose of a visit). The argument is essentially one about hypothetical *ex ante* bargains, an approach to which we return presently.

Deterrence, broadly understood, does better than inviolability. One who knowingly passes a counterfeit bill to gain sex will face civil and perhaps criminal sanctions for the counterfeit, not to mention the small possibility of prosecution for, or embarrassment regarding, soliciting a prostitute. The deceiver is thus deterred without any resort to trespass or battery claims. The law has no reason to find the use of counterfeit currency worse when used to buy sex than when used to acquire a milkshake, and so the wrongdoer faces the same remedies in the two cases. The seller of sex has the same remedy as the seller of milkshakes, and the state can prosecute as it likes. To be sure, the sale of sex case is easy to dismiss from any group. The victim of counterfeit may find it difficult to pursue a claim, especially where the sale is illegal; any remedy, or lack thereof, might be seen as reflecting a social or legal discomfort with the victim.¹⁹ Still, it is noteworthy that in the case of the doctor who takes advantage of the patient, there is no other remedy close at hand (setting aside the risk of delicensing). Similarly, where a partner fails to disclose a sexually transmitted disease, there is no other remedy or deterrent, especially where the case involves a spouse or normally agreeable partner. We might therefore understand the deployment of battery following both the nondisclosure of disease and the doctor's misbehavior as something of a remedy of last resort.

Remarkably enough, no commentator or judge explains any substantial subset of the deception cases with this familiar tool of deterrence²⁰ nor with

19. Cf. John W. Wade, *Benefits Obtained Under Illegal Transactions—Reasons For and Against Allowing Restitution*, 25 TEXAS L. REV. 31, 37–42 (1946) (discussing the law's reasoning behind refusing recovery for participants in illegal contracts as based upon principles related to maintaining the dignity of the legal system or as a requirement that the parties seeking relief must have committed no fault themselves).

20. There are certainly interesting and successful predictive theories of modest subsets, and some of these reflect efficiency principles of one sort or another. See, e.g., David A. Strauss,

that other familiar law-and-economics tool, hypothetical bargains.²¹ The failure to deploy a deterrence lens is plain in the investigative reporter cases, the basic plot of which is that a reporter seeks to expose something about a target such as a medical clinic or a store with cleanliness issues. Targets that are exposed in this way often try to fight back by seeking injunctions against the methods or products of deceptive investigators.²² It is very hard to do this prior to an investigation, and so a more successful strategy is to complain of the deception in an after-the-fact suit for damages, often filed before the broadcast, in the hope of discouraging the broadcast completely or at least encouraging some editing of the program.²³ We might have the intuition that bringing a suit against one who exposed our sins is a bad idea because it further publicizes unattractive facts, but apparently some targets take a long-run view or simply like revenge.²⁴ More interestingly, though never articulated in this manner, a target may reason that if it can establish the wrongdoing of the investigator, it will be better off in the event of future claims by injured customers whose cases are otherwise advanced by the misbehavior uncovered by the deceptive investigator.

When the investigators have entered the property of the exposed target, as is almost always the case, the subsequent claim by the exposed target is for trespass.²⁵ One example might be something like: “I let patients into my clinic for initial diagnoses because they need help and might return for

Persuasion, Autonomy, and Freedom of Expression, 91 COLUM. L. REV. 334, 358 (1991) (suggesting some reasons why the government may occasionally make false statements).

21. See, e.g., David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1824, 1840–44 (1991) (noting that law and economics theory supports enforcing contracts strictly on instrumental grounds and proceeding to justify the use of hypothetical bargains by those guided by such instrumental considerations).

22. See, e.g., *CBS v. Davis*, 510 U.S. 1315 (1994) (Blackmun, Circuit Justice) (staying a state-court injunction that would have prevented CBS from airing a hidden-camera exposé of a meatpacker based on the meatpacker’s allegations that CBS acquired the footage through deceptive practices); *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990) (ordering the district court to vacate a restraining order that enjoined *Inside Edition* from airing hidden-camera footage of a doctor allegedly committing medical malpractice, despite the doctor’s allegation that *Inside Edition* acquired the footage illegally). But see *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996) (granting a preliminary injunction against television reporters whose intrusive surveillance techniques arguably invaded a family’s privacy and inflicted emotional injury on family members).

23. See Geanne Rosenberg, *Tom Yannucci: On the Attack*, COLUM. JOURNALISM REV., Sept./Oct. 2000, at 49, 50 (discussing “preemptive strikes against the news media”).

24. See, e.g., *Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806 (9th Cir. 2002) (affirming summary judgment for the defendant, ABC, in a suit by a medical laboratory that had been the target of an undercover television news investigation); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (awarding Food Lion, a grocery store that had been the target of an undercover news investigation, a mere \$2.00 in damages).

25. See *Desnick v. ABC*, 44 F.3d 1345, 1352–53 (7th Cir. 1995) (citing a number of cases involving trespass claims where entry was gained by deceit, and discussing whether television investigators—with hidden cameras and posing as potential clients—committed the tort of trespass). When a target has been exposed, there is often an attempt to claim that the information was gathered by some form of trespass to justify an injunction preventing the reporter from sharing the information with others.

profitable surgery, but you came under false pretenses, you miserable reporter, and you know as well as I that, had you told the truth about your intentions or your identity, I would have denied you entry, as was my right. You have therefore trespassed.” Courts do sometimes award damages for such trespasses.²⁶ Often the damages are small; we might wonder whether they mean to follow doctrine and discourage the deception and trespass while throwing cold water on third-party lawsuits, or whether the real intention is to wink at the acceptability of deception in this context—without flouting too much doctrine or precedent at once. Either way, it is the fact that deception is sometimes acceptable and sometimes not that makes the subject interesting.²⁷

The hypothetical bargain idea is surely the source of the common intuition that a restaurant critic’s deceit and apparent trespass is to be entirely forgiven. In the aftermath of a stinging review, a disappointed restaurateur might well claim that the critic gained access through fraudulent means. But at the outset, the critic offers the restaurant the potential of a positive or even rave review, followed by the patronage of many new customers. It is therefore safe to say that the overwhelming majority of restaurants would agree in advance to an undercover visit by a critic masquerading as a mere patron. That the critic even pays for the meal, in the manner of the typical patron, makes the case yet easier. It would, of course, defeat the strategy of anonymity, itself useful in order to experience the restaurant as readers would, if the critic actually arranged for consent in advance.²⁸ We might label the critic’s strategy or intentions as nearly symmetrical, for the critic might impose a gain or a loss on the target. A restaurant that received a disparaging review might, *ex post*, wish that trespass applied and that liability for trespass had discouraged the reviewer. But the prospect of a favorable review, and the fact that the critic will then publish such free advertising, more than compensates. One suspects that most restaurants would in fact pay to be reviewed, if payments did not vitiate reviews, even knowing that some reviews are harsh.

26. In *Food Lion*, the court awarded total damages of \$2.00 on trespass claims against the defendant and declined to award publication damages, thus limiting the practical effect of damages on the media. 194 F.3d at 524.

27. And it is in this context that Judge Posner looked for inviolable interests and concluded that where the investigator invaded no specific interests that the law of trespass protects, all was well. *Desnick*, 44 F.3d at 1352–53.

28. Theater and film critics are often given free tickets because their presence does not alter the performance to be reviewed. But the fact that they are given free tickets might be taken as evidence (though applied to a different industry) that, if not for the likelihood of altering the restaurant’s “performance,” restaurant critics would also be welcomed in this manner. To be fair, a restaurant critic could preserve anonymity by obtaining advance consent for a visit sometime in the subsequent month or two. But the restaurant cannot normally deliver advance coupons for free dining, and then preserve anonymity and an unbiased dining experience, except with significant transaction costs and awkwardness.

But when the critic or investigator goes undercover as a patient in a medical clinic, as in *Desnick*,²⁹ a well-known and much cited case, or as an employee in a supermarket, as in *Food Lion*,³⁰ or as a customer in need of an auto repair,³¹ the problem is not quite so easy. The producers of the evening news and *60 Minutes* see nothing newsworthy or entertaining about a finding that a clinic treats patients as it should, or that a meat department meets sanitary standards. “Dog does not bite man” makes for dull broadcasting. Nor does the absence of a story convey much of a benefit on the target. The overwhelming majority of clinics and supermarkets surely go uninvestigated. Even the most dedicated television junkie would be unable to reason that the *absence* of a story about a supermarket demonstrates that it must have been investigated and found passingly clean, which is to say insufficiently entertaining for broadcast purposes. It is therefore quite plausible that while restaurants welcome deceit by investigators because they have much to gain from camouflaged reviewers, most medical clinics, auto repair shops, and supermarkets would not. They *might* welcome deceitful investigators who planned to sample several competing enterprises and then report on all the experiences, as is sometimes the case when reporters aim to compare service providers, perhaps most commonly where price variation is part of the story.³² But while there is apparently a market for columns and programs on individual restaurants, there is not much of one for news about competent medical clinics or sanitary supermarkets.³³

Moreover, the supermarket case differs markedly from the restaurant in hypothetical-bargain terms because the deceptive investigator imposes a net cost on the establishment. Even if the undercover reporter does a fair day’s work while masquerading as an employee, when this decidedly temporary employee quits—with or without a story in hand or in camera—the store suffers the cost of hiring and training a replacement. To be sure, any employee has the freedom to quit, leaving the employer with the need to search and train anew. But at least with other employees there is a distribution of ex-

29. *Desnick*, 44 F.3d at 1348.

30. *Food Lion*, 194 F.3d at 510.

31. *Am. Transmission, Inc. v. Channel 7*, 609 N.W.2d 607, 609 (Mich. Ct. App. 2000).

32. *E.g.*, Michael Barbaro, *The Toy War Begins; Retailers Gear Up for Competitive Holiday Season*, WASH. POST, Nov. 13, 2004, at E01 (highlighting the different prices for certain toys among retailers); Julia C. Mead, *Your Town Is Not the Worst Place on Earth To Buy Groceries*, N.Y. TIMES, Apr. 3, 2005, at 14L1 (comparing grocery and gas prices among several counties in New York).

33. This is not the place to develop a general theory of investigative reporting and consumer preferences, but it is interesting to look for differences among restaurants, films, theater performances, books, new cars, and other matters that attract regular reviews, and then shoe stores, hotels, and hair salons, which do not. Broad participation on the World Wide Web, and before that in consumer magazines, has softened this difference, inasmuch as there are now consumer reviews of virtually everything. *See, e.g.*, Bob Tedeschi, *Help for the Merchant in Navigating a Sea of Shopper Opinions*, N.Y. TIMES, Sept. 4, 2006, at C5 (reporting the trend of allowing consumers to post product reviews on shopping websites). If there remains a puzzle, it is to understand when professional reviewers find a market.

pected length of employment; the supermarket would be most unlikely to hire and train applicants for its meat department if the applicants revealed at the outset that for personal reasons they would be unable to remain at the job for more than two or three weeks. It is therefore noteworthy, or even gratifying, that it is precisely in the supermarket case (*Food Lion*) that trespass was found and damages, albeit nominal ones, imposed (though the dissent in that case supports this argument even more than the majority's decision).³⁴ But the reporter who goes to an eye clinic and finds fraud and extreme malpractice when posing as a patient is essentially absolved (though the *Desnick* court insists on saying that this is because no inviolable interest was invaded),³⁵ as of course is the restaurant critic who is also welcome *ex ante* by the well-behaved target. In the latter two cases the deceived target enjoys net revenues, or at least no extra costs, and the absence of a trespass charge seems to follow.³⁶

The argument advanced thus far, which understands a set of deception cases through the lens of hypothetical bargaining or implied consent, raises the obvious question of explicit dissent. A restaurant might post a sign that says to critics, in effect, "If you enter our property in order to write a review, then you are a trespasser." We might predict that courts would respect the property owner's wishes, but such cases will be rare. Opting out of the pro-deception regime, so to speak, by posting such a sign would scare off too many customers. Few of us would patronize a physician's office that warned off patients who planned on telling others about their experiences or impressions. And if the sign put up by an inhospitable firm is directed at testers sent by a government agency to check on housing discrimination, for example, we would expect courts (or a statute itself) to allow the unauthorized visits despite the property owner's exclusionary expressions. We could imagine or even prefer a legal system that required a warrant before any such unwanted intrusion,³⁷ but the warrant would need to be kept secret from the property owner until after the investigation. We have, however, come to expect that administrative investigations carried out by the government's tax

34. See *Food Lion*, 194 F.3d at 512–14 (reversing a finding of fraud because the reporters did not say how long they planned to work); *id.* at 525–26 (Niemeyer, J., concurring in part and dissenting in part) (finding that the reporters impliedly misrepresented themselves because they "never intended to work as loyal employees for Food Lion").

35. *Desnick v. ABC*, 44 F.3d 1345, 1353 (7th Cir. 1995).

36. The analysis raises the question of what would happen if the supermarket employee-investigator required no training or had been hired as a short-term employee. If the investigator is exonerated, the theory in the text will look especially good because of the absence of training costs. If the investigator is a trespasser, we might say that here, as is often the case, a category or "rule" can be overinclusive and underinclusive, for no rule need respond to every change in facts. The question is whether, on average, supermarkets and eye clinics present different cost-benefit calculations.

37. *E.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 309–25 (1978) (holding the section of the Occupational Safety and Health Act authorizing warrantless searches to be unconstitutional); *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967) (holding that the Fourth Amendment required a warrant for the city housing authorities to conduct a search of the appellant's apartment).

investigators, health inspectors, and housing discrimination testers need not be cleared through search warrants, and can be accomplished with deceit.³⁸ Thus, government employees may pretend to be in the rental market for housing in order to test a defendant's compliance with nondiscrimination law.³⁹ And even police (who obtain consent) may sometimes enter private property, with deceit and without warrant, though probably not when we think of the police as undertaking a "search."⁴⁰ These government invasions resemble that of the undercover reporter who works in a supermarket, except that we have more confidence in the government's ability to go where inspections are most needed, or more fear that the property owner would otherwise exclude the government's investigators in order to hide wrongdoing.

It is by now fairly clear what one obvious theory of deception would look like. Courts might be described as weighing the social costs and benefits of deception and then fashioning trespass doctrine and judicial rhetoric accordingly, bearing in mind the deterrence provided by other available remedies (as in the counterfeit-currency-for-sex case). Much the same could be said about deception in contract law, where there is a good argument, both positive and normative in character, for "optimal dishonesty," but inasmuch as this is a subject with its own extant literature, there is no need for extensive discussion of the similarity between the two areas of (sometimes) acceptable deception.⁴¹ But note that in the contracts case, the claim about deception's acceptability in the interest of efficiency most closely resembles the situation where the target of an undercover investigator

38. See, e.g., *State v. Dolce*, 428 A.2d 947, 951 (N.J. Super. Ct. App. Div. 1981) (holding that activities within an industry "subject to pervasive or long-standing governmental regulation" are exempt from the warrant requirement for administrative searches). The police are also permitted to conduct warrantless searches when prior received information is the basis for the search and the illegal search itself does not produce new information previously unknown to the officers; essentially, the search operates as an evidence preservation mechanism. See *Segura v. United States*, 468 U.S. 796, 798 (1984) (holding that "where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures").

39. See *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979) (finding there is no Fourth Amendment violation when government "testers" pose as potential customers when they are in fact collecting evidence of Fair Housing Act violations).

40. Where a warrant would be required, the police cannot avoid the requirement with deception, as in *State v. Donahue*, 762 P.2d 1022, 1025 (Or. Ct. App. 1998), where a detective claimed to be a meter reader and the court said that implied permission did not constitute an open-ended waiver of the defendant's privacy. But the line between searches and other police activity is sometimes difficult to maintain. See, e.g., *State v. Brown*, 461 P.2d 836 (Or. Ct. App. 1969) (en banc) (upholding a search warrant obtained based on what a police officer saw when he entered onto private property for a non-search purpose and without the owner's permission).

41. E.g., Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 137-42 (1982) (introducing "optimal dishonesty").

prefers to opt out of the regime suggested by the normal hypothetical bargain. In the contracts cases, one powerful idea is that disclosure is required the more there is a net social loss from silence. If I am the seller of a home and I fail to reveal its flaws to a potential buyer, then the buyer may pay more for the property than would a well-informed buyer. When the buyer later learns of the property's flaws and brings suit for damages or rescission, the law supports the buyer in some cases but not in others. If the seller withholds information about a termite infestation, the law favors the buyer.⁴² A reasonable way to think of this result is that the law tolerates mere transfers of wealth between seller and buyer but willingly intervenes where the seller's silence means that the termites will eat away at the property and reduce its value in a manner that produces a net social loss.⁴³ We can be confident that if the first owner were to keep his property, he would quickly call in an exterminator in order to halt any damage from termites. In contrast, where the seller quietly deceives the buyer about unusual and erratic local water pressure, the law allows the seller the benefit of the bargain.⁴⁴ In that case buyer and seller would suffer in similar fashion, so from a social cost point of view, it is a wash. Disclosure is encouraged where a social benefit is created. In the case of the investigative reporter, then, deception is acceptable where a hypothetical bargain suggests a social benefit; in the contracts cases, a form of deception is acceptable only where there is no reason to think that a net social loss is thereby generated.

With this suggestion—that the law of deception might be understood in cost-benefit terms—I do not claim to have demonstrated that no other elegant theory of deception is possible. But none has yet materialized. Thus, a corrective justice theory of deception shows little promise, for it is hard to see how it will distinguish among deceptive investigators, only some of whom are found to be trespassers or otherwise wrongful. In any event, my present aim is not to construct a winning theory of deception. It will be sufficient for present purposes to see just one plausible theory of deception, for

42. See, e.g., *Smith v. Renaut*, 564 A.2d 188, 192 (Pa. Super. Ct. 1989) (stating that “[u]nder Pennsylvania law, a seller has an affirmative duty to disclose a known termite infestation”).

43. See *Levmore*, *supra* note 41, at 135 (explaining that a net social loss occurs because if sellers are permitted to withhold such information, termites will continue to destroy the property while buyers may, at the very least, have to pay for a second termite inspection).

44. See *Hilton v. Traficanti*, No. 04WAD006, 2005 WL 351256, at *5 (Mass. App. Div. Feb. 9, 2005) (holding the seller's representation that the home provided water “adequate for normal household use” was a matter of opinion that did not constitute misrepresentation to the buyer). Note that a case involving contaminated or leaking water threatens a net social loss because an unsuspecting buyer will not know to take precautions. See, e.g., *Janida v. Lanning*, 390 P.2d 826 (Idaho 1964) (affirming a judgment cancelling a contract for the sale of a house after the seller concealed from the buyer the material fact that the well was contaminated); *Posner v. Davis*, 395 N.E.2d 133 (Ill. App. Ct. 1979) (affirming a judgment of fraud against a seller who concealed leakage problems from the buyer). Efficiency-based disclosure rules, which are motivated by the need to encourage production of information in some cases and by the societal loss that would result from withholding information in other cases, do seem to explain the differences in these rulings. See *Levmore*, *supra* note 41, at 133–37.

the larger question considered here is why judges avoid such a theory, or indeed the very fact that deception is an element common to many cases.

Deception is just one example of an “area” of law, or perhaps I should say potential area of law, that is under-theorized or avoided in judicial decisions. I choose deception because the obvious theory sketched here is (not only fairly obvious but) comparable, in terms of precision and substance, to Posner’s famous Theory of Negligence.⁴⁵ The theory offered here is (also) a large-scale theory loosely based on efficiency principles, and it may well be the best available theory of the disparate cases with deception in common. That may be enough to proceed with the much larger idea about why and where such theories take hold—or go undeveloped—in our courts.

To be sure, any leap from a theory of deception to a theory of common law judging will seem hasty. A careful theorist would want more data, and might first unfold not just a theory of deception but also several other examples of fairly obvious connections among cases that judges, nevertheless, do not draw. But I save other examples, and therefore perhaps a more comprehensive and convincing claim, for another effort. We should be uneasy about a theory of common law judging or a grouping of judicial decisions that builds on one putative area of law. But it is also difficult to consider several areas at once without the reader wondering whether the data have been randomly selected. My strategy here is to tie the theorizing about the development and importance of categories to the deception cases, while noting other areas that would seem to contribute to the argument. As we will see, there will be no shortage of such areas; in virtually every field of law, there are common elements that judges and lawyers stress—and others that they avoid. The argument that deception could be an area of law will thus find many counterparts. In some cases the described area will seem useful, in the sense that it is easy (as it is for the deception cases) to construct a theory that ties the cases together, and in others the connection will seem arbitrary or, perhaps, merely a set of markers on a path not taken by the law.

Given the emphasis I put on the deception cases as one example of a simple theory that could easily have been found in judicial decisions but is not, it will be useful to firm up this example by noting other judicial decisions that would have been easy to decide with the theory of deception suggested here. Consider in this regard the law of criminal procedure and policing. The police have been allowed to use deception in a variety of circumstances, with the courts paying some attention to aims, methods, and alternatives.⁴⁶ In one representative case, evidence against a rogue officer

45. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (explaining the “social function of the negligence concept and of the fault system of accident liability that is built upon it”).

46. See, e.g., *State v. Patton*, 826 A.2d 783, 793 (N.J. Super. Ct. App. Div. 2003) (“New Jersey courts have . . . permitted the use of trickery in interrogations.”); *State v. Vallejos*, 945 P.2d 957, 962–63 (N.M. 1997) (“While police may engage in some degree of deception in their efforts to detect certain sorts of crime that are difficult to detect otherwise, police may not employ

was gathered by pressuring an informant to deliver sexual favors to the target.⁴⁷ I pick this illustration from dozens where police deception is (and then sometimes is not) permitted by the courts because it shows the police or their agent crossing the line into inviolable interests. If the rules applicable to undercover reporters carry over, we should have expected that deception would be disallowed. It is difficult to see why interests should be inviolable in one setting and not in another, unless the underlying reality is that inviolability is a term of precedential convenience or somehow only important when it is investigative reporters who do the violating. In the area of law enforcement, deception is apparently too important and valuable a police practice to be discouraged with § 1983 or other suits.⁴⁸ This result seems like a straightforward application of the idea that deception is permitted when social benefits exceed private costs. The inviolable interest idea may have looked like a trump that would beat cost-benefit analysis, but it does not.

Employment law offers many nice examples, though it is surely evident by now that we might think of these cases as all drawn from deception law, rather than as dispersed examples found in employment law, torts, criminal procedure, or even “investigative reporter law.” *Stromberger v. 3M* arose out of a plan by the 3M Corporation to reduce a sales force by some 200 employees.⁴⁹ The company announced new sales quotas and a plan to terminate employees who did not meet the new, higher goals, as was its legal right.⁵⁰ Salespersons were given the option of resigning and receiving economic benefits greater than those available to salespeople who remained but were then terminated.⁵¹ Mr. Stromberger resigned, but when he later observed that 3M did not in fact terminate all who failed to meet the new quotas, he regretted his earlier resignation and claimed fraud.⁵² The Seventh Circuit dismissed the claim because the at-will employee had no right to continued employment and thus could not show that he would have been better off if the alleged fraud had not occurred.⁵³ In fact, I think most

unconscionable methods in their attempts to ferret out crime.”); *State v. Davis*, 542 S.E.2d 236, 240 (N.C. Ct. App. 2001) (“Our Supreme Court has held that although deceptive methods and false statements made by police officers are not commendable practices, standing alone they do not render a confession inadmissible.” citing *State v. Jackson*, 304 S.E.2d 134, 148 (N.C. 1983)); *Creager v. State*, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997) (“Trickery or deception does not make a statement involuntary unless the method was calculated to produce an untruthful confession or was offensive to due process.” (citation omitted)).

47. See *Alexander v. DeAngelo*, 329 F.3d 912, 917 (7th Cir. 2003) (permitting police to trick the suspect, a fellow officer, through sexual favors performed by an informant).

48. See 42 U.S.C. § 1983 (2000) (providing a cause of action when officials acting under color of state law deprive individuals of rights, privileges, or immunities secured by the Constitution and federal laws).

49. 990 F.2d 974 (7th Cir. 1993).

50. *Id.* at 976.

51. *Id.*

52. *Id.*

53. *Id.* at 976–78.

factfinders would think there was a more-likely-than-not chance that the alleged fraud made the employee worse off, but we need not dwell on that here. I mention it only to suggest that the opinion is a bit forced; it is as if the author—Posner again—gathers in a majority, not to mention future adherents among the judiciary, by limiting the opinion to (a strained conception of) causation and avoiding the more controversial idea that deception may simply be acceptable where it is (weakly) efficient or where most employers and employees would, *ex ante*, have bargained to permit it.

A plausible story of the case is that 3M sought to downsize and needed to decide which employees should be separated from the firm. Rather than severing the 200 most recently hired employees, or randomly chosen salespeople, or even those who produced the lowest sales revenues in a recent time period, 3M hoped to have its employees self-assess their own likelihood of future, improved (or poor) performance. Toward this end, we might imagine that by announcing new and higher sales quotas and indicating that it would fire, on worse terms, those who failed to meet the new goals, 3M hoped that only those who were confident of their future success would stay aboard. If too few of the employees had accepted the offer associated with immediate separation, 3M would likely have terminated a good number, and an inability to meet quotas would surely have figured prominently in the selection process. But if many employees identified themselves as unlikely to meet the new quotas, perhaps because they were risk averse (itself something 3M might have judged to be a proxy for poor performance) or perhaps because they preferred to work less rather than more in the future, then 3M would not need to terminate any who remained. It is also likely that resignations would cause the remaining salespeople to produce higher sales figures, if only because customers and locales would now be spread among fewer salespeople. Moreover, by giving the volunteers some positive incentive to resign on their own, 3M gained a good reputation and avoided the demoralization of its remaining work force that would surely have accompanied the involuntary separation of many co-workers.⁵⁴ But the plan required deception. All in all, 3M's deceptive strategy might well have been the most efficient alternative, with the better or hungrier salespeople remaining on the job. The plan looks better the more we think that the employees themselves, rather than the employer, had superior information about likely future performance. In the absence of the deception—false promise of ungenerous termination in the event that quotas were unmet—employees would have had no reason to self-identify because of a kind of collective action problem in which all employees remain, hoping that others will depart.

54. Cf. Terry Fiedler, *Lean, Not Mean: 3M Co. Spinoff of Imation Corp. "Could Be a Model" for Restructuring*, STAR TRIB. (Minneapolis), Nov. 19, 1996, at 1D (praising 3M's practice of offering employees voluntary separation plans and minimizing its reliance on involuntary separation as a means of restoring profitability).

I like to think that the decision went in 3M's favor because its plan seemed reasonable, or even efficient. But that thought is, of course, not found in the rhetoric of the case. If judges came around to a theory of deception and were prepared to announce that they would favor 3M, or a similarly situated employer, because of the good use to which it put deception, then litigants in future cases would labor to show why deception was or was not justified. An employer might, for example, see that it could deceive employees about the likelihood of layoffs if it does so not just to save itself money but rather to trim the workforce in a reasonable manner and to save the jobs of other employees. Note that I am making a weak-form efficiency claim here; it is one that we might also describe as aggregating likely third-party effects, rather than following hypothetical two-party bargains. An employer and many employees might be better off in a world where deceit is permitted in order to encourage self-selection rather than a blunt layoff policy, but I cannot guarantee that an individual employee such as Stromberger would have (ex ante) acceded to the deceit. He might be like the restaurant that posts a sign warning off deceivers who plan on writing reviews. Stromberger and some other employees who are risk averse or who expect to be poor performers in the future might say, "Please do not deceive us for our benefit because we know that information you obtain through deception will harm us even though your subsequent plan benefits most other employees."

III. Common Law Minimalism and Areas of Law

I think we have enough material to support a useful, positive theory of deception. The theory, again, is that deception is tolerated where the social benefits of deception exceed the costs, taking into account alternative remedies that can deter deception and reduce its costs. As is typical of such theories, particular, concrete arguments do not follow mechanically from this general theory, but the theory, which is of the cost-benefit or weak-efficiency sort, guides the user who searches for arguments that are likely to indicate whether a given deception, such as that undertaken by 3M in the *Stromberger* case,⁵⁵ will be tolerated. And yet the simple and familiar quality of this theory, however subtle or even challenging it is to apply, makes the fact that it is unknown or unrecognized quite puzzling. The same Richard Posner who famously asserted many years ago that "A Theory of Negligence" could explain something like half the common law, seems reticent or even unwilling—for he surely can not have been unable—to recharacterize the common law in order to suggest a theory of deception, even though such a theory would rather neatly have incorporated the

55. See *Stromberger*, 990 F.2d at 978 (concluding that the misrepresentation by 3M did not support a claim of fraud).

available and intended decisions, not to mention the ones brought to him on appeal.⁵⁶

The puzzle, or slighting of theory, is explained in one sense if we see judges as common law minimalists. By this I mean that a common law judge compares new cases to inherited ones and seeks to fit each new situation into a picture or flower bed, as I called it earlier,⁵⁷ that was drawn or recognized by earlier judges. No judge takes on the responsibility of reconceptualizing an area. Each case is first put into a previously defined group, and then the matter is decided with reference to other cases in the group.⁵⁸ Much as the constitutional law adjudicator is encouraged by some to move “one step at a time,”⁵⁹ which is to say in small steps, so too the common law judge learns to gain approval and avoid reversal by deciding cases narrowly and by situating decisions within a precedential framework that incorporates many influences and rejects none, or at least none unnecessarily. The pattern is reinforced at the appellate level by the convention of specifying the matter up for appeal—the “questions presented”—so that cases that might have encouraged judges to cross boundaries are often limited by convention to a particular, recognized area of law.

In some cases advocates contribute to the process I describe here, with judges following their lead rather than drawing the boundaries themselves and then forcing or encouraging lawyers to work within them. The lawyer-driven story is strongest where judges are in the habit of deciding on the basis of arguments that counsel have raised and resisting the urge to supply their own arguments—and thus sometimes cross-boundary questions—that the lawyers had not adduced or even imagined. This interaction between lawyers and judges is another feature of the present argument that deserves further inquiry.

For present purposes, however, I prefer to think of judges as the key players, on occasion ambitious within a previously defined area of law but generally modest and minimalist about defining new areas or crossing boundaries. Each judge can be thought of as a voter who joins other voters over time in deciding on the path of the law. In this view a maximalist or more aggressive judge has difficulty counting on support while a minimalist can modestly build coalitions with predecessors. Judges are subtly encouraged to be minimalists, deciding one case at a time with most of their attention directed to consistency with (or, occasionally, careful and very slight departure from) past decisions. Only a modest amount of attention is paid to the question of how today’s decision will affect matters likely to arise in the future. In public law, where it is often the Constitution or a statute that is interpreted, as well as in private common law, the minimalist can be de-

56. See Posner, *supra* note 45.

57. See *supra* text accompanying note 11.

58. See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006).

59. SUNSTEIN, *supra* note 13, at 4–5.

scribed or glorified as fearing unintended consequences. But minimalism can also be derided as producing, almost inevitably, unattractive path dependence. Minimalism can also be faulted for failing to capture the potential of law to inform parties about future rules. Aggressive theorizing gives stronger signals about the outcome of future cases, and this is of value to parties who might prefer to order their affairs without waiting for the results of litigation about every detail visited by the minimalists. I think it is fair to say that the best arguments for minimalism in constitutional law are absent when it comes to nonconstitutional common law, but this is not the place for that extension of the argument. My claim here is about the reality of common law minimalism; it is not, or certainly not yet, an argument about some optimal degree of theorizing in common law or other cases.

Academics, of course, are rewarded for their maximalist tendencies. The broader the reach the better. Richard Posner, the academic super-maximalist who produced a general theory of negligence, is seen here in the deception cases as a conventional minimalist. There are cases where he is ambitious and maximalist,⁶⁰ but here he merely nods toward the possibility that the investigative reporter at the eye clinic might be related to the defendant who uses a counterfeit bill to gain sex, and he completely avoids the idea that either of these deceivers might be connected to the deceptive employer or police officer.⁶¹ He, like other judges who have decided cases involving deception, willingly accepts a previously announced category (trespass) and then uses a doctrinal tool (inviolability) to rationalize the deception cases only within that category.⁶² The deployment of “inviolability” as a critical distinction or doctrinal shortcut is remarkable both because it does so little work and because it attaches to the language and categories of inherited trespass law. And yet this judicial minimalism is plainly rewarded by fellow judges. The decision in *Desnick*, the investigative reporter-as-patient case, has been extremely well received. It is found in an important casebook,⁶³ and it has been frequently cited and followed.⁶⁴ It is fair to say

60. See, e.g., *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 358 (7th Cir. 1998) (using a “charming miniature of a case” as occasion to develop an economic analysis of the law of probabilistic evidence).

61. See *Desnick v. ABC*, 44 F.3d 1345, 1352 (7th Cir. 1995) (acknowledging the similarity of the case at hand with the hypothetical of the counterfeit bill).

62. *Id.*

63. WARD FARNSWORTH & MARK F. GRADY, *TORTS: CASES AND QUESTIONS* 28–31 (2004).

64. The decision has been cited by the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits, as well as state courts in California, Illinois, Maine, Michigan, New York, and North Carolina. See *LaSalle Bank Nat’l Ass’n v. Noniura Asset Capital Corp.*, 424 F.3d 195, 199 (2d Cir. 2005); *Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 817 (9th Cir. 2002); *Lucas v. Fox News Network, LLC*, No. 99-02638-CV-CAM-1, 2001 WL 35836256, at *2 (11th Cir. Jan. 16, 2001); *Veilleux v. NBC*, 206 F.3d 92, 122 (1st Cir. 2000); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517–18 (4th Cir. 1999); *Leleux v. United States*, 178 F.3d 750, 755 (5th Cir. 1999); *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 942 (7th Cir. 1997); *Sanders v. ABC*, 978 P.2d 67, 76 (Cal. 1999); *Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 702 (Ill. App. Ct. 2002); *Hawkes v. Private Investigation Serv.*, No. CV-98-270, 2000 WL 33721625, at *4 (Me. Super. Ct.

that it is now the leading authority on (the very narrow subject of) deception by investigative reporters. In other words, by sticking to the inherited groupings, this common law judge was able to write an opinion that would be followed. The very cause of success makes it likely that the opinion becomes a leader in a very narrowly defined field. We should not criticize a judge for failing to link a decision dealing with an investigative reporter to cases of deception in contracts or deception by employers. Minimalism is likely critical to the decision's success. Had the decision tried to develop a theory of deception, claiming to explain many cases including the one decided by that appellate panel but also extending to many others past and present, other judges would almost surely have distanced themselves from such a wide ranging, imperial, and unnecessarily ambitious decision. By working in existing categories or groupings, and moving in small minimalist steps, judges attract followers from the ranks of fellow judges.⁶⁵ Minimalism might be less popular in the judiciary if it included many more individuals whose professional experience had been in the academy, but I can hardly claim that the world would be much better were that the case. The convention or practice of *stare decisis* can thus be associated with judicial modesty and caution. The larger point emphasized here is that the process discourages arguments that move from one previously defined area of law to another. It is also the case that each opinion writer is constrained by preceding decisions, so that the overall process is remarkably path dependent, but that is a feature, with significant implications, left for future work.

I have been careful to note that deception is just one example of something that might have precipitated a new and useful grouping. It could have joined "self-defense" and "trespass," and thus been something of an area (smaller than torts or criminal law to be sure) in which judges would strive for consistency and litigants would feel empowered to look for precedents. Instead, deception is not a recognized area, and it is simply a feature common to many cases in (what we are told are) diverse areas. The common denominator is not enough to require judges to wrestle with a desire for consistency with respect to deception, any more than they feel compelled to explain how cases involving facts that took place on cold days need to be linked and rationalized with one another. But deception is of course different from cold days. We have trouble imagining a legal system built around areas of law such as "cold-day facts," "defendants named Smith," and "red-colored property." We doubt that theories could connect these cases; if they did so we would be disappointed in our legal system; and if they had, we might ex-

Apr. 4, 2000); *Am. Transmission, Inc., v. Channel 7*, 609 N.W.2d 607, 613 (Mich. Ct. App. 2000); *Lee v. City of Rochester*, 663 N.Y.S.2d 738, 749 (Sup. Ct. 1997); *Keyzer v. Amerlink, Ltd.*, 618 S.E.2d 768, 772-73 (N.C. Ct. App. 2005).

65. This claim is more of a conjecture than a conclusion at present, inasmuch as I offer for now but one example, though it is a striking one. Additional examples could show that minimalism attracts followers, and a yet more extensive argument would surely be needed to convince skeptics that minimalism is brought about by the desire (or unstated aim) to attract other judges.

pect some evolution away from these “areas” of law. These are arbitrary as opposed to useful groupings. Deception is less like these and more like “windfalls,” and it is surely closely related to “cases with asymmetric information.” A legal system could well be built up with these flower beds, and with such better known subjects as “self-defense,” “trespass,” and “least cost avoider” hanging on the sidelines as notable features of many cases that cut across other, recognized areas of law. In this alternative universe, a judge facing a case with an evident self-defense or trespass feature would modestly decline to distinguish or adhere to other cases with such a feature, but would instead seek to fit the case with others from a recognized area of law, such as those with unlabored-for windfalls or deception. I do not go so far as to claim that our flower beds, or areas of law, are all arbitrarily drawn—self-defense and windfalls, for instance, are much better shapes than red-colored properties or cold-day facts to hoe. But many familiar areas of law owe their shape to history or strange fortune, and many undrawn connections, or areas, could have done just as well or better than many familiar areas. Moreover, some of these plausible but unrecognized areas, like deception itself, may well emerge as flower beds in their own right. Whether this is because of a higher level connection, such as “efficiency,” is not something that needs to be resolved, or insisted upon, at present.

Returning to judicial practice, I can not possibly claim that common law judges are invariably minimalist, or even that minimalism is a necessary condition for popularity. For one thing, minimalism is relative. I have described a judge who decides a “trespass” case involving an investigative reporter at a medical clinic with reference to another case involving an investigative reporter with eyes on a supermarket’s meat department as minimalist, for avoiding the connection to a deceptive employer or police department. But of course a more serious minimalist might have limited the relevant universe to cases involving investigators of medical clinics. And even if we could avoid disputes about the definition of an area of law, or about minimalism, there is the observation that judges do sometimes range across reasonably large areas. Fairly general theories and moderately maximalist strategies are sometimes accepted in the common law, as for example in the case of “negligence,” generally seen as an area within “torts,” such that judges try to decide cases in this sub-area in a manner that will allow them to coexist with earlier cases in the same flower bed. Reasonable-person decisions in auto accident cases willingly cite the reasonable person standard in medical malpractice cases.⁶⁶ But they assuredly do not cite cases where a

66. See, e.g., *Schwartz v. United States*, 70 F.3d 1274, 1995 WL 703712, at *2 (7th Cir. Nov. 27, 1995) (unpublished table decision) (supporting descriptions of Wisconsin negligence law by citing to medical malpractice cases: *Johnson v. Misericordia Cmty. Hosp.*, 294 N.W.2d 501 (Wis. Ct. App. 1980), *aff'd*, 301 N.W.2d 156 (Wis. 1981) (“The test of cause-in-fact in Wisconsin is whether the defendant’s negligence was a substantial factor in contributing to the harm from which damages are claimed.”) and *Young v. Prof’ls Ins. Co.*, 454 N.W.2d 24 (Wis. Ct. App. 1980) (noting that in Wisconsin “[t]here may be more than one substantial factor contributing to the same result”).

defendant was negligent in breaching a contract. Judges and lawyers would be puzzled if certain economic or emotional losses were included in tort damages in medical malpractice cases but then not in auto accident cases, but no one is unnerved if these damages are recognized in tort cases but then completely excluded in landlord–tenant cases.⁶⁷ (Again, I do not speak of statutes or statutory decisions here.) When judges say that tort damages are more extensive than contract damages, with the latter limited to expectancy, no explanation is given,⁶⁸ except perhaps by very modern commentators. In contrast, a judge would feel compelled to justify a decision to award thin-skull damages in a landlord–tenant dispute or in a franchise–franchisee case, when expectancy damages were normally awarded in contract cases. Somewhat similarly, even before the Securities Acts preempted the “field” of securities,⁶⁹ we did not find any insider-trading cases drawing on bailment law in order to establish a case for disgorgement.

I think these cross-boundary examples make clear that there are recognized fields, of which torts is one, that are carved out of the jungle of case law and human interaction. Each of these fields contains or describes a set of cases and claims regarding which lawyers and judges think that con-

67. Even academic commentators were taken aback when products liability cases threatened to erase the boundary between torts and contracts, and to constitute the new area of “contorts.” See Kerry L. Macintosh, *Gilmore Spoke Too Soon: Contract Rises from the Ashes of the Bad Faith Tort*, 27 LOY. L.A. L. REV. 483 (1994) (describing the development of the bad faith “contort” and the eventual abandonment of it in favor of traditional contracts remedies). That movement has, of course, lost steam as courts have secured the old boundary. On the other hand, the fact that some contracts (like that for the purchase of an automobile) bring about liability for the manufacturer in a manner that neither purchaser nor intermediary can likely avoid through contractual waivers reminds us not only of cross-border judicial lawmaking but also of the possibility that “waivers” could have emerged as an area of law, with judges explaining why waivers were effective in some settings and not others.

68. See, e.g., *Hale v. Stoughton Hosp.*, 376 N.W.2d 89, 95 (Wis. Ct. App. 1985) (“Like damages in tort actions, contract damages compensate the wronged party for damages that arise naturally from the wrong. Unlike tort damages, contract damages are also limited by the concept of foreseeability. Recovery is limited to damages reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach.” (citations omitted)). Academic commentators, as we might have guessed, do sometimes cross the boundary and suggest, for example, that tort damages are appropriate in contract cases, and that traditional fears are overblown. See Barry Perlstein, *Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract*, 58 BROOK. L. REV. 877, 878–79 (1992) (“The spread of the imposition of tort damages has alarmed courts and commentators; they see it as a threat to the historical (and justifiable) explanation of the difference between tort and contract damages. . . . When tort damages are awarded in contract cases, it seems the law imposes duties that go beyond what the parties to the contract may have intended.” (footnote omitted)).

69. See Securities Act of 1933, 15 U.S.C. § 77r to r-1 (2000) (exempting covered securities from state regulation of securities offerings and preempting state law); 2 THOMAS LEE HAZEN, TREATISE ON THE LAWS OF SECURITIES REGULATION 252–53 (5th ed. 2005) (summarizing federal preemption of state securities law as follows: after 1996, “[m]ost publicly offered securities which are registered federally cannot be regulated by the states beyond notice and/or coordinated filings”; and, after 1998, “[t]he preemption of state court actions includes state common law and securities fraud-based claims involving covered securities, which are defined to include most publicly traded securities registered with the SEC”).

sistency is to be expected, or at least inconsistencies explained. One can therefore cite one tort case in deciding another. The same is probably true of the subfield of negligence standards in tort law. Patent law is another such recognized area, and contracts another. It is, perhaps, too simple to say that academics try to be broad⁷⁰ and judges narrow, but if we think of the terms as relative, there is some descriptive value to the comparison.

Whether or not we regard judges as narrow, it is plain that deception by an employer who seeks to encourage some self-assessment and voluntary retirement, as in the *3M* case,⁷¹ is not thought of as in the same area of law as that occupied by deception on the part of an investigative reporter, nor is it in the same box as deception by police who seek a confession from one suspected of a crime. The *3M* case is in a separated, small box either because deception is somehow not a recognized field or because the case seems to belong to more than one recognized field. This case of employer deception will be cited in other cases of deception by an employer, or perhaps, yet more narrowly, only in those where the employer dissembles in order to encourage early retirements. And so minimalism is not really a fixed thing, and precedent is not quite what it seems either. When the subject matter is narrowed because of the absence of a conventionally defined field, judges will naturally seem more minimalist, as they think of themselves as looking to cases involving very similar transactions, and then deciding in a way that will influence only such cases in the future. In contrast, a judge who decides, say, that recovery in a medical malpractice case should be limited to incremental damages (in other words, only those which exceed the damages that would have occurred had the defendant been non-negligent), would probably expect the decision to be used in other torts cases, and not only in medical malpractice tort cases. It is plausible that it is this very expectation of nonminimalist consequences that causes judges to shy away from innovation with regard to an incremental damage limitation.⁷² Alternatively, a judge who sought to push forward the idea that damages be limited in this manner might labor to explain why for *this* purpose medical malpractice was unlike other torts, perhaps because evidence from mortality tables and studies of alternative medical procedures and their outcomes was especially well developed and thus suited to calculating incremental damages. In short, we need to start with the idea that there are subject areas of law and then say that within those areas judges are reasonably ambitious, or more often maximalist, attempting to make the entire area coherent but only so far as conventional wisdom or practice defines the area. I recognize that this claim—that judges are more

70. For one famous example of academic maximalism (and flattery), see Guido Calabresi, *Remarks: The Simple Virtues of The Cathedral*, 106 YALE L.J. 2201, 2203 (1997).

71. *Stromberger v. 3M Co.*, 990 F.2d 974, 975–77 (7th Cir. 1993).

72. See, e.g., John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 991–92 (1984) (arguing that the second-guessing created by incremental damages as to liability would result in under-compliance in most legal regimes).

ambitious within an area or sub-area of law than they are across the boundaries that define these areas—leaves too much to the definition of sub-area (like negligence) or area (such as torts), but I mean only to describe degrees of minimalism. In deciding cases involving incremental damages, for instance, judges will surely connect medical malpractice cases more closely than they will negligence cases and much more closely than they will tort cases at large. And we would think it positively startling if in deciding such a medical malpractice case a judge drew on the calculation of damages in a trade secrets or admiralty case.

Judicial ambitions aside, real consequences flow from legal groupings. The idea advanced here suggests something of a collision between consistency and minimalism. In the case of deception, I have suggested that even though judges do not think of this as an area of law, the cases, though found in disparate recognized areas, can be rationalized with a single theory, in this case the cost–benefit or hypothetical bargain theory. At the margins, the law might have developed differently had judges signaled their openness to thinking of the deception cases as a group. But in other potential areas there is likely more of a cost, if that is the right word, to the groupings. For example, I have suggested in passing that we do not think of waivers as a single area of law; if we did, we could imagine that cases involving waivers would be more consistent, as judges would have developed doctrinal rules and distinctions with this grouping in mind. Waiver cases might well have been as useful a grouping as trespass. In sum, I am suggesting that law avoids purely arbitrary groupings, like redheaded defendants, in favor of more useful groupings, like contracts or trespass. These groupings become more useful as judges work within them to make cases delineated in this manner yet more consistent.

Where do these well worn groupings, subject areas, or flower beds, come from? In some part, I think, from law schools. We teach courses called torts and contracts, and so lawyers come to believe that within each of those domains there should be consistency. We do not teach waivers as a subject, and we come therefore to accept, or not to see, the mystery of the uneven treatment afforded to waivers in contracts (itself a useful but hardly inevitable grouping) as well as in constitutional matters. We do not teach laches, so no one seems surprised to discover that the doctrine of laches seems to survive the appearance of statutes of limitations in patent law but not in tort law. And we do not teach a course in, or write books devoted to, deception, and that goes a long way toward explaining the fact that deceptions by the police, by undercover reporters, by customers, and by employers are treated almost as four distinct topics in law. I have suggested that these cases involving deception can be connected with a single theory, but I do not claim that this is so for other suggested groupings, and I recognize that some readers might resist the theory sketched earlier. Restitution, or perhaps Remedies, may occupy something of a middle ground, as law schools and judges sometimes treat this as an area of law, and certainly more so when

thinking in comparative law terms. On average, we should expect cases involving restitution claims to be less consistent than those concerned with damages in tort (a regularly recognized flower bed), and more consistent than those with deception as a common element. To the extent that this has come about because academics have perceived that cases with restitution as a common denominator can be linked with some theory of that remedy's purpose or impact, we can also see that deception and waivers may one day be treated as areas of law. In the case of deception we have something of a headstart, because, as we have seen, deception is much more than a mere common denominator. It may already be a useful grouping, though not one that judges massage. But it is surely more like restitution and less like "defendants named Smith." If it comes to be recognized, then judges can be expected to be more ambitious in searching for ways to connect, or at least not be inconsistent with, cases with a deception component in common. Over time, it appears, academics in maximalist fashion define new flower beds, and occasionally judges, aided by academic specialists and their writings, further this process by working ambitiously within the boundaries of the newly defined area.

IV. Conclusion

It would be unlikely that the theory of deception sketched here could smoothly incorporate all, or nearly all, the known cases in which deception plays some role. But it does appear that this weak-efficiency sort of theory does gather in a number of cases not previously connected and not intentionally made consistent with one another. The judicial disinclination to connect these cases is especially interesting because deception is more than a common denominator that could easily have gone unnoticed. Deception is like self-defense, an element found in many cases and familiar to us as humans with moral aspirations. The easy thing to say about the judicial conventions that bring about these decisions and overlook the moral and economic connections is that they reflect minimalism, or case-by-case decisionmaking, of an unambitious and untheoretical sort. Such minimalism is driven by the fact that the deception cases (or at least those explored here) were "found" in areas of law already defined by earlier judges. The common law process is as much about inherited conventional categories as it is about minimalism. When encountering these deception cases within defined areas of law, judges treated the deception element as nothing more than a common characteristic. Judges labor to bring about consistency within a defined area, but common characteristics across these areas are easily overlooked. As a result, academic law affects law at least as much by grouping cases together as by arguing for particular results. In this manner, new areas of law are created—and then within those areas lawyers and judges do feel encouraged to be less than minimalist, as everything within the newly defined area is in play.

Privacy is perhaps the best known example of such an area that is said to have emerged from a law review article.⁷³ Deception's future may be like privacy's past. That area, or collection of cases, emerged and evolved, so that one can now cite a right of privacy in one area in order to gain purchase in another.⁷⁴ In this manner, there may be a developing law of collective action problems, as there may be for deception or windfalls. The common law is a reasonable name for this process, so long as we understand that the phrase refers to the importance of subject-matter boundaries and to the fact that it is through concerted attention to common denominators that these boundaries, and thus the scope of precedent and theory, expand.

73. See Samuel W. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (articulating a right to privacy based on extant common law); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 849 (5th ed. 1984) (“The recognition and development of the so-called ‘right of privacy,’ is perhaps the outstanding illustration of the influence of legal periodicals upon the courts. Prior to the year 1890, no English or American court ever had granted relief expressly based upon the invasion of such a right.”).

74. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003) (extending married couples’ right to privacy, upheld in *Griswold v. Connecticut*, 381 U.S. 479 (1965), to homosexual sodomy); *Eisenstadt v. Baird*, 405 U.S. 438, 443–46 (1972) (using *Griswold*’s privacy rationale to invalidate a law banning the distribution of contraceptives to unmarried persons).

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