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TABLE OF CONTENTS

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Many of the most difficult issues in law involve the choice between rules and rulelessness in cases where both seem unacceptable. The principal goal of this Article is to point the way toward a more refined understanding of the ideal of the rule of law, one that sees a degree of particularity, and a degree of law-making at the point of application, as important parts of that ideal. The Article defends a form of casuistry and describes the potentially democratic foundations of the casuistical enterprise in law. It begins by describing the distinctive advantages of rules and law via rules, especially as a means for providing a consensus on what the law is from people who disagree on much else. It also discusses three attacks on decisions according to rules: the view that rules are excessively conservative; the view that controversial political and moral claims always play a role in the interpretation of rules, and thus that rules are not what they appear to be; and the view that rules are obtuse because they are too crude to cover diverse human affairs, and because judges should not decide cases without closely inspecting the details of disputes. The Article suggests several ways to avoid the dilemmas posed by rules and rulelessness: (a) a presumption in favor of privately adaptable rules, that is, rules that allocate entitlements without specifying outcomes, in an effort to promote goals associated with free markets; (b) a recognition of legitimate rule revision, in which public officials and private citizens are allowed to soften the hard edges of rules; and (c) highly contextualized assessments of the virtues

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and pathologies of both options, in an effort to promote democratic goals of responsiveness and open participation.

> [T]he highest ethical life of the mind consists at all times in the breaking of rules which have grown too narrow for the actual case.
>
> —William James[1]

> [T]he establishment of broadly applicable general principles is an essential component of the judicial process . . . .
>
> —Justice Antonin Scalia[2]

> One other capital imperfection [of Common Law is] . . . the *unaccommodatingness* of its rules. . . . Hence the hardness of heart which is a sort of endemical disease of lawyers . . . . Mischief being almost their incessant occupation, and the greatest merits they can attain being the firmness with which they persevere in the task of doing partial evil for the sake of that universal good which consists in steady adherence to established rules, a judge thus circumstanced is obliged to divert himself of that anxious sensibility, which is one of the most useful as well as amiable qualities of the legislator.
>
> —Jeremy Bentham[3]

INTRODUCTION

There are two stylized conceptions of legal judgment. The first, associated with Jeremy Bentham[4] and more recently with Justices Hugo Black[5] and Antonin Scalia,[6] places a high premium on the creation and application of general rules. On this view, public authorities should avoid "balancing tests" or close attention to individual circumstances. They should attempt instead to give guidance to lower courts, future legislators, and citizens through *clear, abstract rules laid down in advance of actual applications.*

The second conception, associated with William Blackstone and more recently with Justices Felix Frankfurter[7] and John Marshall Harlan,[8] places a high premium on *law-making at the point of application* through case-by-case decisions, narrowly tailored to the particulars of individual circum-

1. GEORGE AINSLIE, PICOECONOMICS 218 (1992) (citing WILLIAM JAMES, PRINCIPLES OF PSYCHOLOGY 209 (1890)).

2. Justice Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. CHI. L. REV. 1175, 1185 (1989).

3. JEREMY BENTHAM, OF LAWS IN GENERAL, ch. XV, ¶ 12 n.1 (H.L.A. Hart ed., 1970).

4. See GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 403-13 (1986), which shows, however, that Bentham's views on rules are quite complex.

5. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952) (the "Steel Seizure Case").

6. *See generally* Scalia, *supra* note 2.

7. *See Youngstown,* 343 U.S. at 594 (Frankfurter, J., concurring).

8. *See* Poe v. Ullman, 367 U.S. 497, 525 (1961) (Harlan, J., dissenting).

stances. On this view, public authorities should stay close to the details of the controversy before them and avoid broader principles altogether. The problem with broad principles is that they tend to overreach; they may be erroneous or unreasonable as applied to cases not before the court.[9]

It would be hard to overstate the importance of the controversy between the two views. The controversy arises in every area of law;[10] it often involves fundamental liberties.[11] Of course, familiar understandings of the rule of law prize, as a safeguard of freedom, broad rules laid down in advance; but the American legal system also values close attention to the details of each case. In every area of regulation—the environment, occupational safety and health, energy policy, communications, control of monopoly power—it is necessary to choose between general rules and case-by-case decisions.

In its purest form, enthusiasm for genuinely case-specific decisions makes no sense. Few if any judgments about particular cases are entirely particular. Almost any judgment about a particular case depends on the use of principles or reasons. Any principles or reasons are, by their very nature, broader than the case for which they are designed. Case-by-case particularism is not a promising foundation for law.

In many circumstances, however, enthusiasm for rules seems senseless too. Sometimes public authorities cannot design general rules, because they lack relevant information. Sometimes general rules will fail, because the legal system seeks subtle judgments about a range of particulars. Often general rules will be poorly suited to the new circumstances that will be turned up by unanticipated developments; often rulemakers cannot foresee the circumstances to which their rules will be applied. Often rules will be too crude, since they run up against intransigent beliefs about how particular cases should be resolved.

One of my principal goals in this Article is to respond to a pervasive social phenomenon: extravagant enthusiasm for rules and an extravagantly rule-bound conception of the rule of law.[12] Case-by-case decisions are an important part of legal justice. We are familiar with a conception of procedural fairness based on rules. In this conception, people have a right to be told about prevailing requirements and a correlative right to test whether those requirements have been violated. But there is another, more particu-

9. The point is treated prominently in Board of Education v. Grumet, 114 S. Ct. 2481, 2498-99 (1994) (O'Connor, J., concurring in part).

10. *See infra* App. accompanying notes 284-323.

11. For example, see the attack on the undue burden standard as unacceptably open-ended in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2876-80 (1992) (Scalia, J., concurring in part and dissenting in part).

12. As examples of such enthusiasm, see F.A. HAYEK, THE CONSTITUTION OF LIBERTY 148-61 (1960); F.A. HAYEK, THE ROAD TO SERFDOM 72-87 (1944); Scalia, *supra* note 2. Justice Scalia's approach is not unqualified. *Id.* at 1177. For an attack on extravagant enthusiasm for rules, overlaping with what I suggest here, see generally KENNETH C. DAVIS ET AL., DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976).

laristic conception of procedural fairness, one that is also worthy of respect. Under that conception, people are entitled to argue that they are relevantly different from those that have come before, and that when their case is investigated in all its particularity, it will be shown that special treatment is warranted. On this view—with potentially democratic foundations—people who are affected by rules should be allowed to participate in the creation of the very rule to be applied to their case.[13]

I argue here that the disadvantages of rules and rule-bound justice are often insufficiently appreciated, and that legal systems sometimes do and should abandon rules in favor of a form of *casuistry.*[14] In the casuistic enterprise, judgments are based not on a preexisting rule, but on comparisons between the case at hand and other cases, especially those that are unambiguously within a generally accepted norm. Bounded rationality—in the form of ignorance about relevant facts, values, and future developments or circumstances—provides an important reason for proceeding in this way. When people lack sufficient information to design (satisfactory or sufficiently finely tuned) rules, they might resort to case analysis instead. But bounded rationality is not the only problem. The argument for case analysis depends as well on the diversity and plurality of values.[15] These ideas have an obvious bearing on law, and they have consequences for ethics, too, though I will not discuss ethical issues here.

I urge as well that both the old art of casuistry and the old domain of equity can be given democratic foundations. A legal system committed to casuistry might insist that every litigant is entitled to urge that he is distinctive, that he deserves distinctive treatment, and that his claims to this effect warrant a public response. Insofar as a legal system recognizes this claim, its form of casuistry embodies norms of participation and responsiveness. Such a system also seeks to ensure against premature judicial foreclosure of issues that should be subject to democratic deliberation.

I do not deny that quite serious risks are associated with any effort to proceed through case-by-case judgments. These risks include the abusive exercise of discretion, lack of predictability or of the capacity to form expectations, high costs of decisions, failure of political accountability, and much more. As a way of reducing those risks, we might evaluate solutions through both economic and democratic criteria. For this reason I argue against an ingenious solution proposed by Jeremy Bentham,[16] and suggest instead three principal alternatives. The first is founded principally in market rather than democratic norms. It involves a presumption in favor of

13. *See infra* notes 155-156 and accompanying text.

14. *See* ALBERT R. JONSEN & STEPHEN E. TOULMIN, THE ABUSE OF CASUISTRY 11-16 (1988).

15. *See infra* text accompanying notes 185-190. *See generally* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993) (discussing plural values); .

16. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,* 97 HARV. L. REV. 625 (1984).

what I will call *privately adaptable rules*—rules that allocate initial entitlements but do not specify end-states, and that harness private forces to determine outcomes. Such rules can help break through some of the dilemmas posed by the choice between rules and rulelessness; the crudeness of rules is alleviated by virtue of the power of private adaptation to particular circumstances. Allowing the remedy of "exit" rather than "voice,"[17] privately adaptable rules are typically invoked in support of economic markets. I argue here that they also deserve an honored place in a legal system committed to correcting the operation of economic markets.

The second approach involves *legitimate rule revisions.* It recognizes that officials and citizens sometimes have the power to moderate rules, or applications of rules, that no longer make sense. Juries, police, and prosecutors all have some power to revise rules. Ordinary people sometimes exercise this power as well.

The third approach is pragmatic and more self-consciously casuistical; its major goal is to make space for the democratic goals of participation and responsiveness that I have just described. This last approach involves a highly contextualized inquiry into the levels and kinds of error and injustice via rules or via rulelessness, with special attention to the nature of the forum that will be making the crucial decisions. Rules cannot be favored or disfavored in the abstract; everything depends on whether, in context, rules are superior to the alternatives. It is therefore important to know something about the character of the institutions that will give rise to rules in the first instance or apply them after the fact.

I
SOURCES OF LAW

Law has a toolbox containing many devices. Lawyers have customarily compared standards ("do not drive unreasonably fast") to rules ("do not go over 60 miles per hour"), with rules seeming hard and fast, and standards seeming open-ended.[18] There are indeed differences between rules and standards. But the rules-versus-standards debate captures only a part of what is at stake, and it is important to have a fuller sense of the repertoire of available devices. In this section I outline a number of these devices; my goal is to clarify some terms that will come up throughout the discussion.

First, however, a cautionary note. Whether a legal provision is a rule, a presumption, a principle, a standard, a guideline, a set of factors—or something else—cannot be decided in the abstract. Everything depends on the understandings and practices of the people who interpret the provision. Interpretive practices can convert an apparently rule-like provision into

17. The terms come from ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 4 (1970).

18. *See infra* text accompanying notes 22-26 and 33-35.

something very unrule-like. The American Constitution, for example, says that "Congress shall make no law . . . abridging the freedom of speech."[19] This provision might operate as a rule if people take it as a flat ban on certain sorts of regulations. It could operate as a presumption if people see it as saying that Congress can regulate speech only if it makes a demonstration of harm of certain kinds and degrees. Or it could be understood as a set of factors: once we parse notions like "abridging" and "the freedom of speech," perhaps we will decide cases on the basis of an inquiry into two, three, or more relevant considerations.[20] The content and nature of a legal provision cannot be read off the provision. It is necessary to see what people take it to be.

For this reason we should distinguish among three kinds of actors. The first is the person or institution that *issues* the relevant legal provision. The second is the person or institution that is *subject to* the provision. The third is the person or institution charged with the power to *interpret* the provision. If we take a rule to be a provision that minimizes law-making power in particular cases,[21] a lawmaker may intend to issue a rule, but the interpretive practices of the interpreting institution may turn the provision into something very different. Whether a provision is a rule or not is a function of interpretive practices. The lawmaker has only limited power over those practices.

A. Untrammeled Discretion

By "untrammeled discretion," I mean the capacity to exercise official power as one chooses, by reference to such considerations as one wants to consider, weighted as one wants to weight them. A legal system cannot avoid some degree of discretion, in the form of power to choose according to one's moral or political convictions.[22] As we will see, the interpretation of seemingly rigid rules usually allows for discretion. But a legal system can certainly make choices about how much discretion it wants various people to have.

A system of untrammeled discretion exists when there are no limits on what officials may consider in reaching a decision and on how much weight various considerations deserve; hence there are no limits on the officials' power to decide what to do. Both inputs and outputs are unconstrained. In the real world, untrammeled discretion is quite rare. Even people with considerable discretion usually understand that some factors are irrelevant in light of their roles. In practice, however, some police officers may come very close to exercising untrammeled discretion in light of the practical unavailability of review.

19. U.S. CONST. amend. I.
20. *See* Dennis v. United States, 341 U.S. 494, 508 (1951).
21. *See infra* text accompanying notes 22-26.
22. *See* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 310, 334 (1994).

As we will soon see, it is too simple to oppose rules to discretion. Interpretation of rules necessarily involves discretion, and so-called discretion is rarely untrammeled in the legal context.

B. Rules

Often a system of rules is thought to be the polar opposite of a system of untrammeled discretion. As I have noted, there is no such polar opposition. Provisions that appear to be rules may not eliminate discretion. There is a continuum from rules to untrammeled discretion, with factors, guidelines, and standards falling in between.

The key characteristic of rules is that they attempt to specify outcomes before particular cases arise. Rules are largely defined by the *ex ante* character of law.[23] By the aspiration to a system of rules, I therefore mean to refer to something very simple: *approaches to law that try to make most or nearly all legal judgments under the governing legal provision in advance of actual cases.*[24] We have rules, or (better) "rule-ness," to the extent that the content of the law has been set down in advance of applications of the law. In the extreme case, all of the content of the law is given before cases arise. This is an ambitious goal—impossibly ambitious. As we will see, no approach to law is likely to avoid allowing at least *some* legal judgments to be made in the context of deciding actual cases.[25] Rules do not, and indeed cannot, contain all of the instructions necessary for their own interpretation. Nonetheless, it is possible to ensure that a wide range of judgments about particular cases will occur before the point of application.

On this view, we have a rule, or rule-ness, to the extent that decisions about cases have been made *ex ante* rather than *ex post.* If a key function of law is to assign entitlements, a rule can thus be defined as *the full or*

23. A qualification is necessary for rules whose content depends on *ex post* factors not within the control of the judge—as in "the outcome depends on what the Pope says" or "an amount not higher than Frank Thomas' batting average." These are rules, but their content is not supplied in advance. This point shows that an alternative definition of rules could look to the extent to which the relevant criteria are easy to ascertain for individual cases. *See* Stephen McG. Bundy & Einer R. Elhauge, *Knowledge About Legal Sanctions,* 92 MICH. L. REV. 261, 271 n.25 (1993). On this view, rules cannot exist where it is hard to know relevant criteria. One source of uncertainty would be discretion to make decisions *ex post,* but uncertainty could also arise if, for example, an adjudication under provisions specified *ex ante* would depend on certain facts that are hard to ascertain. Consider, for example, the ban on insider trading under Rule 10(b)(5) of the Securities and Exchange Act of 1933, which is well-specified *ex ante,* but which requires determinations of knowledge, materiality, and so forth that cannot be made easily and that will depend on educated, but error-prone, guesses. *See id., supra,* at 270-71. For some purposes, the "easy to ascertain criteria" conception of rules is preferable to the "*ex ante* specification" conception, especially if we are concerned with predictability. While the two conceptions overlap, the latter is a bit easier to describe and work with, and therefore I use it here.

24. This understanding is close to that in Louis Kaplow, *Rules Versus Standards: An Economic Analysis,* 42 DUKE L.J. 557, 559-60 (1992), and I am much indebted to Kaplow's illuminating treatment.

25. For a discussion of the open texture of law, see H.L.A. HART, THE CONCEPT OF LAW 124-29 (2d ed. 1994), *infra* at text accompanying notes 100-101.

nearly full ex ante *assignment of legal entitlements, or the complete or nearly complete* ex ante *specification of legal outcomes.*

When a rule is in play, the decision of cases does not depend on *ex post* assignments, as it likely does under a standard—understood to operate when, for example, a judge decides whether someone is liable for nuisance by determining whether his conduct was "unreasonable" (assuming this term has not been given precise content in advance) or when a judge decides whether a restriction on abortion imposes an "undue burden"[26] (making the same assumption). In the purest case, the responsibility of the decision-maker is to find only the facts; the law need not be found. When rules are operating, an assessment of facts, combined with an ordinary understanding of grammar, semantics, and diction—and of conventions and more substantive ideas on which there is no dispute—is usually sufficient to decide the case.

Rules may be *simple* or *complex.* A law could say, for example, that no one under eighteen may drive. It could be somewhat more complex, saying that people under eighteen may not drive unless they pass certain special tests. Or it could be quite complex, creating a *formula* for deciding who may drive. It might look, for example, to age, performance on a written examination, and performance on a driving test. Each of these three variables might be given a specified numerical weight.

Rules can also be *specific* or *abstract.* Specific rules apply to a narrow class of cases; abstract rules apply to a broad class of cases. An abstract rule might say, for example, that no one may drive over sixty miles per hour or that all cars must be equipped with catalytic converters. A specific rule might say that President Nixon's papers are public property; that the First Amendment allows government to ban advertisements for casino gambling when gambling has been unlawful in the recent past; or that sixth-grade students may be suspended without a hearing for a period of less than two weeks, if there has been a serious allegation of criminal activity. All rules are defined in terms of classes, but sometimes the rule is narrowly tailored so as to pick up only a few cases, or perhaps only one.

C. Rules with Excuses: Necessity or Emergency Defenses

It is familiar to find rules that have explicit or implicit exceptions for cases of necessity or emergency. It is unfamiliar to find rules without any such exceptions. For example, a person may be banned from taking the life of another; this is a rule, but self-defense is a valid excuse. Many constitutions allow abridgements of individual rights in case of emergency. The American Constitution allows the suspension of the writ of habeas corpus in

26. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2821 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

time of war.[27] Other constitutions say that certain rights can be abridged under unusual circumstances.[28]

The consequences of making exceptions depend on the details. An exception could be *narrow but vague,* as in the idea that reasonable limits on free speech can be made only under conditions of war. The conditions are rare and the exception therefore narrow, but the meaning of the exception is vague (what are "reasonable limits?"). Or the exception could be *narrow and specific,* as in the idea that under conditions of war, members of the Communist party may not work for the military in any capacity. An exception might be broad and vague or broad and specific. A specific exception might well convert the rule with exceptions into a complex rule or a formula.

D. Presumptions

A legal system may contain presumptions or presumptive rules. The law may presume, for example, that when the government regulates speech on the basis of its content, the regulation is unconstitutional.[29] But the presumption might be rebutted by claims of a certain kind and strength, as when government can show a clear and present danger. The law might presume that an employer may not discriminate on the basis of race; but the presumption might be rebutted by a showing that, for example, a black actor is necessary to play the part of Othello.

The legal system is pervaded by rules that operate as presumptions and that can be countered by showings of a particular kind and degree. The line between presumptions and rules with emergency exceptions can be thin. A rule with necessity or emergency exceptions might be described, somewhat imprecisely, as a strong presumption. With presumptions, it is necessary to know what counts as a rebuttal, and whether the presumption and the rebuttal are specific or vague, broad or narrow.

E. Factors

We might contrast both untrammeled discretion and rule-bound procedures with approaches that allow particular judgments to emerge *through the decision-maker's assessment and weighing of a number of relevant factors, whose precise content has not been specified in advance.*[30] The key point is that several factors are pertinent to the decision, but there is no rule,

27. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.").

28. *See, e.g.,* CAN. CONST. pt. 1, § I (rights or freedoms are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"); S. AFR. CONST. art. 34, § 4 (constitutional rights may be suspended with a declaration of a state of emergency).

29. *See, e.g.,* Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2459 (1994) (requiring "exacting scrutiny" of content-based regulation of speech).

30. I refer to "factors" rather than "balancing tests," because the latter term is imprecise. *See infra* notes 157-190 and accompanying text (discussing judgments based on factors).

simple or complex, to apply. There is no rule because the factors are not described exhaustively and precisely in advance, and because their weight has not been fully specified. Hence the decision-maker cannot rely simply on "finding the facts" and "applying the law." The content of the law is not given; part of it must be found. There is a degree of *ex post* allocation of legal entitlements.

On this score, the difference between rules and factors is one of degree rather than kind. As we will see, those who interpret provisions that appear to be rules may be required to determine at least some of their content. In a system of factors, moreover, the decision-maker cannot do whatever she wants. But under a system of factors, the content of the law is created in large part by those who must apply it to particular cases, and not by people who laid it down in advance. To a considerable extent, we do not know what the law is until the particular cases arise.

Consider the Emergency Petroleum Allocation Act of 1973, which regulated pricing and allocation of petroleum products from 1973 to 1981. The statute required the agency to "provide for" nine factors, "to the maximum extent practicable."[31] These factors were (1) protection of public health, safety, and welfare; (2) maintenance of all public services; (3) maintenance of agricultural operations; (4) preservation of an economically sound and competitive petroleum industry; (5) operation of all refineries at full capacity; (6) equitable distribution of crude oil and petroleum products; (7) maintenance of exploration for and production of fuels; (8) economic efficiency; and (9) minimization of interference with market mechanisms.[32]

Congress added that each of the nine factors is equally important. There is much to be said about this quite bizarre list. What is important here is that an enumeration of factors may be possible.

In most contexts, however, any given list of relevant factors is not exhaustive. Life may turn up other relevant factors that are hard or impossible to identify in advance. In most areas of law governed by factors rather than rules, it is understood that the identified factors, if described at a level of specificity, are not complete—or that if they are intended to be complete, they are stated in a sufficiently general and abstract way, so as to allow unanticipated, additional considerations to apply.

F. Standards

Rules are often compared with standards.[33] A ban on "excessive" speeds on the highway is familiarly thought to involve a standard; so too

31. Act of Nov. 27, 1973, § 4(b)(1), Pub. L. No. 93-159, 87 Stat. 627, 629-30 (1973).

32. *Id.*

33. *See generally* Kaplow, *supra* note 24; Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22 (1992); Colin S. Diver, *The Optimal Precision of Administrative Rules,* 93 YALE L.J. 65 (1983).

with a requirement that pilots be "competent," or that behavior in the classroom be "reasonable." As standards, these might be compared with rules: a fifty-five miles per hour speed limit, a ban on pilots over the age of seventy, or a requirement that students sit in particular, assigned seats.

The contrast between rules and standards is quite useful. It identifies the fact that with some legal provisions, interpreters have to do a great deal of work in order to generate the necessary content for a legal provision. With a standard, it is not possible to know what we have in advance. This can be a decisive political advantage: Sometimes people can agree on a standard when they cannot agree on its specification. An *incompletely specified* provision may be the best the political (or judicial) system can do, as with many constitutional provisions and many standards governing administrative agencies.

The meaning of a standard depends on what happens with its applications. Standards share with factors a refusal to specify outcomes in advance. Standards depart from factors in refusing to enumerate considerations that are relevant in particular applications.[34] It would not be accurate, however, to say that standards offer more discretion than factors. The amount of discretion depends on the context and on the nature of the particular factors and standards.

Here too, moreover, the character of the provision cannot be read off its text, and everything will depend on interpretive practices. Once we define the term "excessive," we may well end up with a rule. Perhaps officials will decide that a speed is excessive when and only when it is over sixty miles per hour. If a standard is transparent, in the sense that there is a clear *ex ante* understanding of its meaning, it is a rule. We may instead end up with a set of factors or a presumption. Perhaps anyone who goes over sixty miles per hour will be presumed to have gone excessively fast, unless special circumstances are shown. Or perhaps the judgment about excessive speed will be based on need, weather conditions, traffic, time of day, and so forth. It is a familiar hope that standards will receive a degree of specification as they are interpreted, since officials may generate categories of cases that, under the standard, receive predictable treatment.[35]

G. Guidelines

Avoiding factors, rules, or standards, the law might establish ceilings and floors, or it might identify positions from which officials or citizens may deviate if they can demonstrate good cause. *Guidelines* of this sort may be mandatory or they may be merely suggestive. Mandatory guide-

34. *See* Kaplow, *supra* note 24, at 559-60.

35. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2821 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

lines[36] may be preferred to rules because they allow a degree of flexibility; they may be preferred to standards insofar as they can discipline behavior in a way that allows better monitoring of discretion. Thus guidelines may establish firm boundaries beyond which no one may go, and they may require reasons to be given publicly for any departure from the norm. On the other hand, the flexibility of guidelines may be a vice rather than a virtue.

H. Principles

Principles are not an alternative to rules, factors, guidelines, or standards. Their legal status is obscure, in part because the term "principles" refers to several different phenomena. In law, principles are often said to be both deeper and more general than rules.[37] We might say that rules are justified by principles, usually political or moral in character. The justification of the rule might be used to interpret its meaning; courts may resort to the principle in trying to understand the rule. For example, there is a (moral) principle to the effect that it is wrong to take human life without sufficient cause; the law implements this principle with a range of rules prohibiting homicide. Similarly, there is a (moral) principle to the effect that it is wrong not to keep your promises; the law contains a range of rules for enforcement of contractual obligations. Commonly, the term "principle" in law refers to the moral or political justifications behind rules.

There is another and quite different understanding of the notion of principle in law. Any legal system contains explicitly formulated (legal) principles as well as rules; these principles do not lie behind rules but instead are brought to bear on the resolution of cases.[38] Thus it is said that no person may profit from his own wrong; that he who seeks equity must do equity; that ambiguous statutes should be construed so as not to apply outside the territorial boundaries of the United States.[39] The status of legal principles is somewhat mysterious; they differ in weight, ranging from strong presumptions to tie-breakers when cases are otherwise in equipoise.[40] Sometimes they operate as factors. But principles are not rules. We might say that principles are more flexible than rules, in the sense that principles tend to bear on cases without disposing of them.[41] This distinc-

36. One example is the Federal Sentencing Guidelines. *See generally* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (West 1994).

37. *See* FREDERICK SCHAUER, PLAYING BY THE RULES 12-16 (1991).

38. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 4-7 (1977) (discussing the difference between laws and legal principles used by courts, for instance to invalidate laws).

39. Compare the discussion of the Rehnquist Court's canons of construction in the appendix to William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium,* 108 HARV. L. REV. 26, 97-98 (1994).

40. *See* HART, *supra* note 25, at 259-63 (discussing Dworkin's approach).

41. *See* DWORKIN, *supra* note 38, at 24-27.

tion should not be overstated.[42] Any given rule *X* is unlikely to resolve all cases that fall under the literal language of rule *X*,[43] and principles can be crucial to the disposition of cases.

What is the relationship between a principle and a standard? If we see a principle as the justification for a rule, the difference seems obvious: a standard is not a justification for an (already specified) rule, but instead a legal provision that needs a good deal of specification to be used to resolve individual cases. If, however, we understand a principle to be a relevant consideration in the decision of cases, the distinction between principles and standards is more complex. As I understand it here, a legal principle is different from a legal standard in the sense that the latter "covers" individual cases without specifying the content of the analysis in particular instances, whereas a principle is a background notion that does not by itself cover an individual case, but is instead brought to bear on it as a relevant consideration. This is a lamentably vague formulation, but the distinction should make intuitive sense. Compare a standard banning unreasonable risks with a principle that statutes should be construed to avoid constitutional doubts.[44]

One final complication. A decision in a case sometimes seems to turn on a "principle," as in the idea that speech may not be restricted unless there is a clear and present danger, or that discrimination on the basis of race is presumed invalid, or that no contract is valid without consideration. In this usage, a principle is not distinguishable from a standard or a presumption, and at some points below, I will use the terms interchangeably.

I. Analogies

The last category is not a simple alternative to the others, but it is quite an important tool that helps provide a clue to how law often operates. Sometimes a legal system proceeds by comparing the case at hand to a case (or to cases) that have come before.[45] The prior case is inspected to see whether it "controls," or should be extended to, the case at hand. The prior case will be accompanied by an opinion, which may *contain* a rule, a standard, a set of factors, or something else. The court deciding the present case will inspect relevant similarities and differences. That court, not bound by the previous opinion, may *produce* a rule, a standard, a set of factors, or something else. With analogy, we do not have a decision by rule, because the rule is not specified in advance of the process of analogical thinking.

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42. *See* HART, *supra* note 25, at 262-63.

43. *See infra* notes 104-112 and accompanying text.

44. *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 129-30 (1958); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 465-66 (1989) (holding that the Court should construe statutes to avoid constitutional questions).

45. *See generally* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (discussing the role of analogical reasoning in law).

When courts proceed with analogies, then, the nature of the legal provision—its content and even its character as a rule, a standard, a set of faetors, or a guideline—is not known before the analogical process takes place. The nature of the provision is specified in the case at hand by grappling with the precedent; we do not know what we have before the grappling occurs. It is unusual, however, for analogical thinking to yield rules. Most of the time, an analogy will produce a standard, one that makes sense of the outcomes in the case at hand and the case that came before.[46]

II
RULES AND THE RULE OF LAW

A system of rules is often thought to be the signal virtue of a system of law. Indeed, the rule of law might seem to require a system of rules.[47] The idea has a constitutional source. The due process clause of the American Constitution is sometimes interpreted so as to require rules, or rule-like provisions, and to forbid a system based on analogies, standards, or factors.[48] This is particularly important in the areas of criminal justice and freedom of speech, where the "void for vagueness" doctrine requires the state to set forth clear guidance before it may punish private conduct.[49]

Vagueness exemplifies a failure of the rule of law. But what specifically does the concept of the rule of law entail? It is possible to identify several characteristics.[50] A system committed to the rule of law seems to require (1) clear, general, publicly accessible rules laid down in advance; (2) prospectivity and a ban on retroactivity; (3) a measure of conformity between law in the books and law in the world;[51] (4) hearing rights and availability of review by independent adjudicative officials; (5) separation between law-making and law-implementation; (6) no rapid changes in the content of law; and (7) no contradictions or inconsistency in the law. These are the customary characteristics of a system committed to the rule of law. Of course, no legal system is likely to comply with these seven goals; failures of the rule of law, understood in such terms, are commonplace.

46. *See, e.g.*, Goss. v. Lopez, 419 U.S. 565, 577-84 (1975) (applying the Due Process Clause to the temporary suspension of students from public school).

47. *See* Scalia, *supra* note 2, at 1179; HAYEK, ROAD TO SERFDOM, *supra* note 12, at 72-87; LON L. FULLER, THE MORALITY OF LAW 106 (1969); JOSEPH RAZ, THE AUTHORITY OF LAW 210 (1979). Justice Scalia's essay is especially notable insofar as it defends general, judge-made rules as a way of reducing costs and arbitrariness, giving clear signals to citizens, and reducing judicial discretion. Scalia, *supra* note 2, at 1178-79.

48. *See, e.g.*, Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972) (the rule of law requires both that citizens receive fair notice of legal provisions and that those provisions do not encourage arbitrary or erratic enforcement).

49. *Id.*; Gooding v. Wilson, 405 U.S. 518, 520-21 (1972); Baggett v. Bullitt, 377 U.S. 360, 367-70 (1964); Smith v. Goguen, 415 U.S. 566, 572-73 (1974).

50. *See generally* FULLER, *supra* note 47; RAZ, *supra* note 47.

51. For qualifications to this principle, see *infra* notes 219-229 and accompanying text.

A particular advantage of a system of rules is that people who disagree on much else may nonetheless agree about the meaning of a rule. A rule that forbids people from going over fifty-five miles per hour has the same meaning to Republicans and Democrats, libertarians and socialists, anarchists and members of the Ku Klux Klan. When a rule of law is in place, people can know what the rules are without adverting to basic principles. Indeed, adverting to basic principles is generally illegitimate, short of civil disobedience.

This is an oversimplification, as we will see.[52] Disagreements about basic principles may break out in disputes over the meaning of rules. But the oversimplification contains fundamental truth. And in this oversimplification also lies some of the enduring truth of legal positivism, the law-politics distinction, and the view that ours is a government of law, not human beings.

III
THE CASE FOR RULES

A great virtue of rules is that they circumscribe permissible grounds for both action and argument; by doing so, they reduce costs of many diverse kinds. In a heterogeneous society containing people of limited time and capacities, this is an enormous advantage. I am suggesting that rules can help people cope with pluralism (even though the existence of pluralism can make it difficult to generate rules.)[53] Once generated, rules save a great deal of effort, time, and expense. By truncating the sorts of value disputes that can arise in law, rules also ensure that disagreements will occur along a narrowly restricted range.

A. Different Kinds of Rules

I now discuss some of the characteristic virtues of decisions according to rules. First, however, it is important to note that rules fall in several different categories. Here is a nonexhaustive account, tied to my special concerns.

1. Often rules are a summary of wise decisions; they are defended on the grounds that they are a good summary, and that they are desirable as rules, rather than mere advice or rules of thumb, so as to save the costs of making individualized decisions. These costs involve time, labor, and risk of error. Of course, a rule that counts as a summary of wise decisions may operate, for good pragmatic reasons, not as a rule of thumb but as a truly mandatory rule—one that cannot be revisited during particular applications. If people over the age of sixty are banned from being commercial pilots, it is because this is probably a pretty accurate summary of good individual

52. *See infra* notes 98-118 and accompanying text.

53. *See infra* notes 233-251 and accompanying text.

decisions, and far less costly to administer than any alternative. (Consider the expenditures that would be required to assess competence in every case.) If we say that people with SAT scores below 500 will not be admitted to a certain college, it is for a similar reason.

2. Often rules establish *conventions,* or otherwise enable people to coordinate their behavior so as to overcome collective action problems. This is true, for example, with respect to rules of the road. The rule that people must drive on the right-hand side of the road is valuable because it tells people where to drive, not because it is any better than its opposite. We do not think that people must drive on the right because it is a wise decision, in the individual case unaccompanied by rules, to drive on the right. So too, rules may solve prisoner's dilemmas, in which a series of individually rational decisions can lead to social irrationality or even disaster. The rules governing emission of pollutants are an example. If each polluter felt free to revisit the justification for the rules, the prisoner's dilemma might not be solved. The best solution is probably to fix a rule and to require everyone to adhere to it.

3. Some rules have an *expressive function.*[54] The rules governing who may marry whom, for example, say something about the institution of marriage and about social convictions about who is entitled to public recognition of a relational commitment. Three people cannot be married, nor can people of the same sex. These rules do not summarize individually wise decisions, but instead express a social judgment about relations and valuations. We might say that the expressive function of law includes the effects of law on social attitudes about relationships, events, and prospects, and also the "statement" that law makes independently of such effects.[55] Of course, some such statements and expressions might be challenged.

4. Some rules amount to *precommitment strategies,* designed to overcome the problems of myopia, lack of information, weakness of will, or time inconsistency. Suppose that in order to succeed in your plans, you need to engage in consistent behavior over time. Perhaps an exercise program requires you to work out for one hour, and just one hour, every day; or perhaps a good diet requires you to eat the same things, more or less, at the same time for a given period. In these circumstances, a rule that is enforceable through some mechanism—perhaps social sanctions—may be the best way to proceed.

Societies face similar problems. Perhaps good monetary policy for a certain period requires the Federal Reserve Board to do the same thing each month; suppose that without a rule, and with particularized consideration of what to do each month, the Board would do inconsistent things. Adoption

54. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law,* 92 MICH. L. REV. 779, 820-24 (1994).

55. *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State,* 62 U. CHI. L. REV. 1, 66-71 (1995).

of a rule may ensure the requisite consistency. In this way, a rule may be a precommitment strategy that overcomes predictable problems with ruleless decisions.[56]

B. *Defending Rules as Rules*

Rules might produce *incompletely theorized agreements*—agreements among people who disagree on questions of theory or on fundamental values.[57] Rules might do this in three different ways. First, people can sometimes agree that a rule is binding, or authoritative, without agreeing on a high theory of why it is binding, and without agreeing that the rule is good. Theories of legitimate authority are highly pluralistic, and acceptance of rules can proceed from diverse foundations.[58]

Second, people can sometimes converge on a particular rule without taking a stand on large issues of the right or the good. The rule of *stare decisis*—acceptance of precedents —is a familiar example; we can accept that rule from diverse theoretical perspectives. So too, people can urge a sixty miles per hour speed limit, a prohibition on bringing elephants into restaurants, a ten-year minimum sentence for homicide, and much more without taking a stand on debates between Kantians and utilitarians, and indeed without offering much in the way of general theory at all.[59] Of course acceptance of any legal provision requires a reason or a principle; my point is only that a wide range of starting points can sometimes yield the same rule and even the same reason or principle, so long as these are described at a low or intermediate level of generality. When legislatures and bureaucracies issue rules, they often do so without getting into high-level theory.[60]

Third, people may agree on the meaning of a rule despite their disagreement on much else. Rules also sharply diminish the level of disagreement among people who are subject to them, and among people who must interpret and apply them. Once a rule is in place, large-scale theories need not be invoked in order for us to know what the rule means, and whether it is binding. This generalization is a bit crude;[61] but it is fundamentally right. In the following section, I am concerned principally with the advantages of

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56. *See* JON ELSTER, ULYSSES AND THE SIRENS 86-111 (1979); *see also* Stephen Holmes, *Precommitment and the Paradox of Democracy, in* CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988).

57. *See* Cass R. Sunstein, *Political Conflict and Legal Agreement,* 17 The Tanner Lectures on Human Values (Grethe B. Peterson ed., forthcoming); Cass R. Sunstein, *Incompletely Theorized Agreements,* 108 HARV. L. REV. 1733 (1995).

58. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 58 (1986) ("More importantly, the practice [of proceeding through rules] allows the creation of a pluralistic culture. For it enables people to unite in support of some 'low or medium level' generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or in Liberalism, etc.").

59. *See id.*

60. *See* Sunstein, *Incompletely Theorized Agreements, supra* note 57.

61. *See infra* notes 98-118 and accompanying text.

rules for those who must enforce and interpret the law, as well as for those of us who must follow it.

1. *Rules Minimize the Informational and Political Costs of Reaching Decisions in Particular Cases*

If we understand rules to be complete or nearly complete *ex ante* specifications of outcomes in particular cases, we can readily see that rules have extraordinary virtues. Because of their simplifying effects, rules produce enormous gains where decisions would otherwise be extremely expensive. Every day, people operate as they do because of rules, legal and nonlegal. Often the rules are so internalized that they become second-nature, greatly reducing the costs of decisions and making it possible for people to devote their attention to other matters.[62]

Because they resolve cases in advance, rules are disabling, but they are enabling, too. Like the rules of grammar, they help make social life possible. If a rule says that there will be one and only one President, we do not have to decide how many presidents there will be. If a rule says that a will must have two witnesses, we do not have to decide, in each case, how many witnesses a valid will requires. Rules facilitate private and public decisions by establishing the frameworks within which they can be made, freeing up time for other matters. For example, the justification of a speed limit is to promote safety; that justification is hardly a rule. This is because the purpose of a rule is not itself a rule; it is a justification that, in all likelihood, does not settle all cases before the fact.

By adopting rules, people can also overcome their own myopia, weakness of will, confusion, venality, or bias in individual cases. Rules make it unnecessary for each of us to examine fundamental issues in every instance; in this way rules create a convergence on particular outcomes by people who disagree on basic matters. Rules can, in short, be the most efficient way to proceed, by saving time and effort, and by reducing the risk of error in particular cases. This holds true for individuals and societies alike. Societies and their representatives may also be subject to myopia, weakness of will, confusion, venality, or bias, and rules safeguard against all of these problems.

These ideas justify the general idea that rules should be entrenched in the sense that they apply even if their rationale does not.[63] A rule is not really a rule if decision-makers feel free to disregard it when its application is not supported by its justification; if decision-makers investigate the purpose for a rule before applying it, they convert the rule into something very close to a standard or set of factors.

62. *Cf.* HART, *supra* note 25, at 9-11, 54-59 (distinguishing between rules and habits). Both rules and habits can be internalized.

63. See SCHAUER, *supra* note 37, at 12-16, 47-52.

There is much to be said on behalf of refusing to inquire into the purposes of rules.[64] If we substitute for each rule an investigation of whether its application is justified in each instance, we are engaging in a form of case-by-case decision-making, and it is easy to underestimate the often-substantial costs of that way of proceeding. Officials may be pressed by the exigencies of a particular case to seek individualized justice, without seeing the enormous expense and risk of unfairness in systematically pursuing that approach.

Some of the costs of rulelessness are simply a matter of compiling information. To know whether a particular pilot is able to fly competently (a standard), it is necessary to know a lot of details. But some costs are of a different character. Suppose that we are deciding on emissions levels for substances that contribute to destruction of the ozone layer, or that we are thinking about when to go forward with projects that threaten endangered species. Information is important here, but it is also necessary for multiple people to reach closure on hard and even tragic matters. For this reason, there may be great difficulty in producing a rule; proceeding through standards or factors may involve lower political costs *ex ante*. But once a rule is set forth, individual officials can bracket those matters and take the decision as a given.[65] One advantage of having rules is that those who must interpret rules need not make difficult judgments about first principles.

The high costs—informational and political—of ruleless decisions are often not invisible to those who are deciding whether to lay down rules in the first instance. The Supreme Court, for example, can see that rules will bind its members, perhaps unfortunately, in subsequent cases, and therefore might avoid rule-making in the interest of maintaining flexibility for the future. The Court might so decide without easily seeing that the absence of rules will force litigants and lower courts to guess, possibly for a generation or more, about what will turn out to be the real content of the law.[66] In this way the Court can internalize the benefits of flexibility while "exporting" to others the costs of rulelessness. So too, legislatures can see that rules may contain major mistakes, or that they cannot be compiled without large informational and political costs—without, perhaps, fully understanding that the absence of rules will force administrative agencies and private citizens to devote enormous effort to giving the law some concrete content.

Thus far I have emphasized the benefits of rules to legal institutions. But a particular advantage of rules, connected with the informational cost of rulelessness, is that they enable people to make plans without fear of sanc-

64. *See, e.g., id.* at 229-33.

65. This argument supports the result in Tennessee Valley Auth. v. Hill, 437 U.S. 153, 172-75 (1978) (protecting snail darters without regard to costs).

66. *See* Scalia, *supra* note 2, at 1178-80, 1186 (discussing negative effects of balancing tests and other non-prospective standards).

tions.[67] Rules can therefore provide strong incentives for people to bring their behavior into compliance. While many of the various costs of rulelessness must be borne by public officials, high costs can be borne by citizens and corporations as well. People will have to invest large amounts of resources in trying to predict outcomes.

Legal rules can also overcome social myopia. Myopia may take the form of decisions whose short-term net benefits are high but whose long-term costs dwarf their long-term benefits. Consider, as possible examples of rules overcoming myopia, the social security disability grid[68] and mandatory retirement rules. For instance, an airline may derive great short-term benefit from retaining an experienced pilot beyond a predetermined retirement age; but such a decision may lead to high long-term costs from monitoring every pilot individually and from risking mistaken decisions. Of course, the various costs of rulelessness may be lower than those produced by certain rules, and thus it cannot be said, in the abstract, whether rules are better than rulelessness from the standpoint of private citizens or society as a whole. A company would probably prefer a law calling for an assessment of five factors before any pollutant may be banned to a law saying that all pollutants are banned. A homosexual rights group would prefer a law saying that discrimination against homosexuals will be prohibited where a three-part test so suggests to a law saying that discrimination against homosexuals is always acceptable. We can still say, however, that factors will produce costs of certain kinds, and that these costs may be very high. Note in this regard that mechanical formulas often perform better than clinical discretion in the areas of medical diagnosis and academic performance.[69]

2. *Rules Are Impersonal and Blind; They Promote Equal Treatment and Reduce the Likelihood of Bias and Arbitrariness*

We have seen that rules may reduce human error caused by confusion or ignorance. They can also counteract something worse: bias, favoritism, or discrimination in the minds of people who decide particular cases. In this way, rules are associated with impartiality, a notion which is captured in the idea that Justice, the goddess, is "blindfolded."[70] Rules are blind to many features of a case that might otherwise be relevant, and that are relevant in some social contexts, or to many things on whose relevance people have great difficulty in agreeing—religion, social class, good or bad looks, height, and so forth.

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67. *See* Kaplow, *supra* note 24, at 568-86.

68. *See* Heckler v. Campbell, 461 U.S. 458, 461-62 (1983).

69. *See* JON ELSTER, LOCAL JUSTICE 169 (1992).

70. *See generally* Dennis E. Curtis & Judith Resnick, *Images of Justice,* 96 YALE L.J. 1727 (1987) (discussing anthropomorphic depictions of "blind Justice").

The claim that rules promote generality and in that sense equal treatment requires an important qualification. Of course rules suppress many differences among cases; they single out a particular feature common to a range of cases and subsume all such cases under a single umbrella. In this sense, rules make irrelevant features of cases that might turn out, on reflection by people making particular judgments, to be relevant indeed.[71] Should everyone who has exceeded sixty miles per hour be treated the same way? Should everyone falling in a particular unfortunate spot in a social security grid be denied benefits? If equality requires the similarly situated to be treated similarly, the question is whether people are similarly situated, and rules do not permit a particularized inquiry on that score. In this way, rules may actually frustrate equal treatment; rulelessness may promote it.

3. *Rules Serve Appropriately Both to Embolden and to Constrain Decision-Makers in Particular Cases*[72]

A special advantage of rules is that judges (and others) can be emboldened to enforce them even when the particular stakes and the particular political costs are high.[73] Because rules resolve all cases before the fact, rules can make it easier for officials to stick with certain unpopular judgments when they should do so, but might be tempted to back down.

Suppose, for example, that the Supreme Court has set out the *Miranda* rules,[74] and that everyone knows that they will be applied mechanically to every criminal defendant. If so, judges can refer to those rules, and in a sense hide behind them, in cases in which the defendant is especially despised, and in which it is tempting to say that the *Miranda* rules should yield before a multifactor test to be resolved against the defendant. Similarly, the implementing doctrines for free speech can provide judges with an acceptable way to make correct but unpopular decisions. For example, if a rule banning viewpoint discrimination is entrenched in the law of free speech, judges can defer to that rule in protecting flag-burning, even in the face of severe and otherwise irresistible public pressure.[75]

The key advantage here (one that can be a disadvantage too) stems from the fact that rules decide cases before they arise. By settling cases in advance, rules also make it unnecessary and even illegitimate to return to first principles. If judges are allowed to decide the content of law without a firm rule, and if they have to go back to first principles each time, they

71. *See* SCHAUER, *supra* note 37, at 136-37.

72. *See* Scalia, *supra* note 2, at 1185 (discussing his greater willingness to decide cases arising under a "clear congressional command").

73. *Cf. id.* at 1186 (criticizing lack of guidance for future decision-makers when balancing of interests is used).

74. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

75. *See, e.g.*, United States v. Eichman, 496 U.S. 310, 318-19 (1990) (holding prosecution under a federal ban on flag burning violated defendant's First Amendment rights).

might not adhere to those principles at all when the stakes become high at the (politically charged) point of application.

In one sense rules reduce the responsibility of the official for particular cases, by allowing her to claim that it is not her choice, but the choice of others who have laid down the rule.[76] Officials can claim that the previous choice is not being made, but simply followed. When the rule is ambiguous, this claim is fraudulent. But it is true when the rule is clear. In a system in which rules are binding, and are seen to be binding, the law can usefully stiffen the judicial spine, and this may be necessary to safeguard individual liberty against public attack.

At the same time, rules reduce the risk that illegitimate or irrelevant factors will enter into the decision, at least compared with standards or factors. When a judge has the discretion to apply standards or factors to a case, unarticulated considerations may weigh in the balance. A judge's sympathetic or unsympathetic reaction to a particular party (or lawyer) may tip the balance in a case based on factors. This is less likely when rules are operative. Here, too, rules have large virtues in a system that aspires to consistent decisions amidst heterogeneity.

4. Rules Promote Predictability and Planning for Private Actors and for the Government

In modern regulation, a pervasive problem is that members of regulated classes face ambiguous and conflicting guidelines, so that they do not know how to plan. For people who are subject to public force, it becomes especially important to know what the law is before the actual case arises. Indeed, it may be more important to know what the law is than to have a law of any particular kind. Consider, for instance, the *Miranda* rules. A special virtue of those rules is that they tell the police specifically what must be done, eliminating the guessing games that can be so destructive to *ex ante* planning. So, too, in the environmental area, where prospectively clear rules, even if strict, are often far better than the "reasonableness" inquiry characteristic of the common law. Under a multifactor test, by contrast, neither government officials nor affected citizens may reliably know their obligations in advance.

5. Rules Increase Visibility and Accountability

When rules are at work, it is clear who is responsible and who is to be blamed if things go wrong. This is most obviously valuable when the rulemaker has a high degree of accountability and legitimacy: consider the President and Congress. One problem with a system based on standards or factors—environmental law, for example—is that no one knows whom to

76. *See* ROBERT M. COVER, JUSTICE ACCUSED 147-48 (1975); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 388 (1973).

hold ultimately responsible if the air stays dirty or is cleaned up at excessive cost. By contrast, if the *Miranda* rules create a law enforcement or civil liberties problem, the Court is obviously to blame. If a different due process calculus based on factors were to produce serious problems, it is possible that the Court itself would escape the scrutiny it deserved. People might blame the lower-court judges assessing the factors, rather than the Court in instituting them.

There is a related point. Without rules, the exercise of discretion can be invisible, or at least less visible to the public and affected parties. At the same time, rules allow the public to monitor compliance much more easily than a system of factors would. For instance, the public can easily ascertain if the police are following a correct procedure or if officers are failing to give *Miranda* warnings to all arrestees. Compliance with a ban on "involuntary" confessions is harder to supervise.

6. *Rules Avoid the Humiliation of Subjecting People to Exercises of Official Discretion in Their Particular Case*

A special advantage of rules is that because of their fixity, *ex ante* quality, and generality, they make it unnecessary for citizens to ask an official for permission to engage in certain conduct. Rules turn citizens into right-holders, able to expect certain treatment as a matter of right. Standards, guidelines, or factors are more likely to make citizens into supplicants, requesting official help. Importantly, factors and standards allow mercy, in the form of relief from the consequences of rigid rules. But rules have the comparative advantage of forbidding officials from being unmoved by, or punitive toward, a particular applicant's request.

Compare, for example, a rule of mandatory retirement for people over the age of seventy (a rule) with a law that would permit employers to discharge employees who, because of their age, are no longer able to perform their job "adequately" (a standard). One advantage of the former over the latter is that if you are an employee, it may be especially humiliating and stigmatizing to have employers decide that age has rendered you incompetent. A rule avoids this inquiry altogether, and it might be favored for this reason even if it is both over- and under-inclusive.

7. *Rules Promote Equal Application of the Law*

It is also plausible to think that case-by-case judgments systematically favor the well-to-do. Litigation is extremely expensive, and for litigants to seek fine-grained, individualized judgments, they need resources. In an ideal world, case-by-case particularization might allow for more equitable judgments tailored to particular facts. But in this world, it may result in a pervasive form of inequality, in which people without resources stand on the sidelines, or are unable to persuade officials that their case warrants favorable treatment.

IV
AGAINST RULES

A. *Introductory Note*

I now identify three arguments against rules. The first challenge is that rules embody "formal equality" and are for this reason too conservative or too closely associated with excessively free markets; in this way, rules are said to be sectarian after all. The second challenge, making the way for casuistry, is that rules cannot do what is claimed of them, since a degree of case-by-case judgment will indeed break out at the moment of application. On this view, casuistry is inevitable or nearly so. The third challenge is that the generality of rules, and their blindness to particulars, is a political vice, because a just system would allow equity through adaptation to the particulars of individual cases. This third challenge points toward casuistry as a substitute for rule-making and rule-application. I conclude that there is nothing in the first challenge, some important truth in the second, and some enduring wisdom in the third.

B. *The Rule of Law as a Check on Legislation*

Before exploring these arguments, it is important to examine a common but misleading claim about rules. Some people think that the requirements of the rule of law provide an important check on partisanship or selectivity in decision-making.[77] On this view, the rule of law is a requirement of generality, and this requirement forbids law from imposing selective benefits or selective burdens. In this notion lies much of the debate over the ideas of impartiality and neutrality in law. There is some truth in this claim, but it also contains an important confusion.

An influential discussion appears in Justice Robert Jackson's concurring opinion in the *Railway Express* case.[78] New York City prohibited anyone from operating an "advertising vehicle" on the streets, that is, a vehicle that sells its exterior for advertising purposes. The New York law exempted from the general prohibition advertising of the owner's business placed on vehicles engaged in the ordinary business of the owner, and not used mainly or only for advertising.

Railway Express, a company operating nearly 2000 trucks for advertising purposes, challenged the New York law under the due process and equal protection clauses. The Supreme Court upheld the law, emphasizing that judges should defer to legislatures, and noting that the local authorities might have believed that people who advertise their own wares on trucks do not present the same traffic problems.[79] The Court added that "the fact that New York City sees fit to eliminate from traffic this kind of distraction but

77. *See* HAYEK, CONSTITUTION OF LIBERTY, *supra* note 12, at 226-27.
78. Railway Express Agency v. New York, 336 U.S. 106, 111-17 (1949) (Jackson, J., concurring).
79. *Id.* at 110.

does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[80] In this way the Court rejected the idea that the principle of generality imposed serious limits on legislative classifications.

Justice Jackson took this seemingly mundane case as an occasion for celebrating the use of the equal protection clause as a guarantor of the rule of law, understood as a ban on selectivity. Justice Jackson began by contrasting the due process clause with the equal protection clause. The due process clause does not require equality; instead it imposes a flat barrier to legislative enactments. In this way it "leaves ungoverned and ungovernable conduct which many people find objectionable."[81] But the equal protection clause is not similarly disabling: "It merely means that the prohibition or regulation must have a broader impact."[82] The requirement of breadth in turn serves a democratic function.

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[83]

In Justice Jackson's view, a requirement of generality helps to flush out illegitimate reasons for legislation. If the law is imposed on some but not all, it may be based on prejudice. Perhaps the law is a means of oppressing a particular group; if it cannot be passed unless it is partial, we may suppose that it is undergirded by something other than the articulated justification. Perhaps it is a form of rent-seeking or supported solely by private pressure.

There is much good sense here. A system of law should require general justifications for the denial of benefits or the imposition of burdens. Moreover, the requirement of generality can produce political checks where opposition would otherwise be too weak to prevent oppressive legislation from going forward. For example, the public might willingly accept a law forbidding Nazis from wearing swastikas in public where they would reject a more generalized rule against the display of political insignia.

But how are we to know when a seemingly narrow enactment should be applied generally? Is it illegitimate, for example, to exempt labor unions

80. *Id.*
81. *Id.* at 112 (Jackson, J., concurring).
82. *Id.*
83. *Id.* at 112-13.

from the antitrust laws, electric cars from the Clean Air Act, insane people from the ordinary operation of the homicide laws, or small businesses from occupational safety and health regulation? Is it illegitimate to say that blind people cannot receive drivers' licenses, or that felons cannot vote? These are all examples of rules that might be thought to have escaped from the requirement of generality.

To determine whether generality is required, it is necessary to ascertain whether there are relevant similarities and relevant differences between those burdened and those not burdened by legislation. No one thinks that "generality" should be required when relevant differences exist. No one supposes that the speed limit laws are unacceptable because they do not apply to police officers and ambulance drivers operating within the course of their official duties. Indeed, Justice Jackson did not even vote to invalidate the New York law: "[T]he hireling may be put in a class by himself and may be dealt with differently than those who act on their own."[84]

We should conclude that any requirement of equal treatment depends on a substantive account establishing whether there are relevant differences between the cases to which a law applies and the cases to which it does not. If a law says that in order to receive federal employment, everyone who is not white must take certain tests, we can easily see that the grounds for the distinction are illegitimate. In such a case, Justice Jackson's analysis seems sufficient and unimpeachable. But sometimes the plea for generality is based on more controversial grounds. In such cases, the requirement of generality hides a range of substantive judgments, and those judgments cannot be supplied by the requirement itself.

With all this, we have come far from rules and the rule of law. In deciding whether a plausible ground for discrimination and hence selectivity is a permissible one, courts are not merely requiring generality but are second-guessing legislative judgments about who is similar to whom. The rule of law, by itself, does not have the resources to resolve the resulting debates. The requirement of rule-bound decisions has numerous virtues, but we should be careful not to overstate what it requires.[85]

V

AGAINST RULES, I: IS THE RULE OF LAW TOO CONSERVATIVE OR TOO CLOSELY ASSOCIATED WITH FREE MARKETS?

These points provide reason to doubt Friedrich Hayek's influential discussion of rules and the rule of law.[86] Hayek identifies the rule of law with a norm of "impartiality." Its antonym is a system of "planning," in which the state picks winners and losers. Hayek claims that general rules lead to impartial decisions among different groups. Because the rule of law does

84. *Id.* at 115.

85. *See also* RAZ, *supra* note 47, at 219-23 (describing values in the rule of law).

86. *See* HAYEK, CONSTITUTION OF LIBERTY, *supra* note 12, at 220-33.

not pick out particular winners and losers, it does not play favorites, and in this sense it is impartial. Hayek concludes that there is a close association between the rule of law and free markets, both of which require generality.

But what is the partiality that the requirement of generality forbids? Hayek does not disapprove of much that is done in the name of the regulatory state. On his view, government provision of many public services is unobjectionable.[87] Nor does he disapprove of "general rules specifying conditions which everybody who engages in a certain activity must satisfy."[88] This category includes regulation of production, maximum hour laws, laws banning dangerous products, and laws protecting conditions in the workplace.

What, then, is prohibited? Hayek is concerned about those measures that "involve arbitrary discrimination between persons."[89] This category includes most importantly "decisions as to who is to be allowed to provide different services or commodities, at what prices or in what quantities—in other words, measures designed to control the access to different trades and occupations, the terms of sale, and the amounts to be produced or sold."[90]

Here Hayek appears to be speaking of the related requirements of generality, impartiality, and equality; his argument is very much like that of Justice Jackson. Certain measures violate these requirements because they make arbitrary distinctions. But how do we know whether a distinction is arbitrary? How do we know whether the state can "control the access to different trades and occupations"? It is not thought impermissible for the state to require taxi drivers to show that they have good eyesight, or to ban people from practicing medicine without meeting certain requirements of medical competence. Hayek himself emphasizes that in some circumstances the state may impose occupational qualifications.[91] It therefore emerges that the state is banned from imposing qualifications only when they are truly arbitrary. To decide this question, it is necessary to develop a theory of appropriate qualifications. The rule of law, standing by itself, could not possibly supply that theory.

What about price controls? Hayek is concerned that any prices must be constantly adjusted; he also thinks that since they abandon the relationship between supply and demand, governmentally-fixed prices "will not be the same for all sellers" and that they will "discriminate between persons on essentially arbitrary grounds."[92] His conclusion is that all controls of prices and quantities "must" be arbitrary.[93]

87. *Id.* at 223 (finding government services acceptable when private enterprise is unable to provide them, or when a government acts analogously to a private market participant).

88. *Id.* at 224.

89. *Id.* at 227.

90. *Id.*

91. *Id.*

92. *Id.* at 228.

93. *Id.*

Of course government controls of prices and quantities are usually harmful or even disastrous, and much of what can be said against them relates to their rejection of the forces of supply and demand. But insofar as he is invoking the rule of law, Hayek's claim is unconvincing. Price controls can satisfy all of the rule-of-law requirements described above:[94] if price controls were stable, public, general, and so forth, they would be consistent with the rule of law. The judgment that they are arbitrary stems not from the notion of the rule of law, but from an independent theory, grounded in ideas about efficiency and liberty, to the effect that the appropriate prices and quantities of goods and services are those set by the market. That is a reasonable judgment, but it is not part of the rule of law. It is an independent point requiring an independent defense.

It might be tempting at this point to suggest that much of Hayek's discussion is simply confused, and that the rule of law has nothing to do with markets at all. What can be said on behalf of markets, or against price controls, is different from what can be said against rule-free government. But this conclusion would be too simple. There are at least three common features in the operation of markets and a system of rules. First, rules do not aspire to make *ex post* adjustments. Rules operate prospectively; they take the *ex ante* perspective. Enthusiasts for markets aspire to do the same thing. In markets, outcomes are not specified in advance, for the winners and losers will emerge from a complex process of bargaining.[95] Second, there is a sense in which both rules and markets are "no respecter of persons." For advocates of the rule of law, government, like justice, should be "blind." Markets are similarly blind. Third, both rules and markets can ensure against measures that impose inappropriate informational demands on government. Government price-fixing is especially objectionable because it requires government to do something that it lacks information to do well; when markets set prices, they take advantage of a wide range of information unavailable to official price-fixers. The same argument can be invoked on behalf of many rules. By setting out rules of the road, or requirements for the transfer of land, government can appropriately allocate informational burdens between itself and others.

On the other hand, all of the government actions that Hayek finds compatible with the rule of law do, in a sense, pick winners and losers. Certainly this is true for maximum hour laws; it is also true for the provision of governmental services. And though the common law may not pick winners and losers, it is often quite predictable who will be favored and who will be disfavored under the ordinary rules of property, tort, and contract. Severely disabled people, for example, are unlikely to do well in a market system run under the common law. Moreover, there is a theoretical

94. *See supra* text accompanying notes 50-51.

95. Of course, the laws that underlie markets may be standards rather than rules; consider the law of torts, which is pervaded by standards.

possibility that a system of planning could be made consistent with the rule of law, at least if the "plans" were announced in advance and if expectations were firmly protected.[96] Probably most real-world systems of planning are unable to conform to such requirements. But in his opposition to "planned" systems, Hayek seems to have something else in mind, concerning the way in which plans play favorites. The notion that plans play favorites is parasitic on the unarticulated understanding of fair processes and distributions. That understanding has nothing to do with the rule of law.

These points cast doubt not only on Hayek's view but also and for the same reasons on Marxist-inspired attacks on the rule of law. Consider Morton Horwitz' suggestion:

> Unless we are prepared to succumb to Hobbesian pessimism 'in this dangerous century,' I do not see how a Man of the Left can describe the rule of law as 'an unqualified human good'! It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.[97]

There is much to be said about this passage. For present purposes the key point is that the passage takes the rule of law to require much more than in fact it does. Does the rule of law forbid the pursuit of substantive equality through, for example, progressive income taxes, welfare and employment programs, antidiscrimination laws, and much more? Like Hayek, Horwitz appears to identify the rule of law with (a particular conception of) market ordering. The identification is unwarranted.

I conclude that the rule of law does not have the features that Hayek understands it to have. A familiar challenge to rules—that they promote merely formal equality—is therefore unconvincing. Rules could provide that no person may have more than one dollar more than anyone else, or that the average income of men and women must be the same, or that all racial groups must have the same proportional wealth. There is no necessary association between rules on the one hand and conservatism, free markets, or inequality on the other.

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96. *See generally* JOHN E. ROEMER, A FUTURE FOR SOCIALISM (1994) (defending market socialism).

97. Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (book review).

VI
AGAINST RULES, II: ARE RULES FEASIBLE?

A. Challenges

Calling themselves rule-skeptics, some people question the feasibility of rules and the rule of law.[98] Usually they focus on the internal point of view—on how lawyers and judges, operating within the legal system, figure out what rules mean. If rules are really understood as a full *ex ante* allocation of legal rights, it is said, rules are impossible or very close to it. Fixity in this *ex ante* sense is not possible. Encounters with particular cases will confound the view that things really have been fully settled in advance. In this view, the need for interpretation, and the likelihood of competing interpretations founded on disagreements about the good or the right, defeat the project of following rules.

A central point here is that because of the nature of language, legal rules will leave a variety of gaps and ambiguities; there will be no ordinary or literal meaning in many cases. Even when the meaning of a legal term is clear in ordinary parlance, in the abstract, or in the dictionary, uncertainty or *ex post* judgments may break out at the point of application.[99] In Hart's terms, rules have an "open texture,"[100] stemming from two factors: the rule-makers' ignorance of fact and the rule-makers' indeterminacy of aim. No law is issued with full knowledge of the factual situations to which it will be applied, and no law is enacted with full understanding of or agreement on its animating purposes. When the law confronts an unanticipated situation raising questions about its underlying goals, the problem of open texture will arise, and people interpreting the law will have discretion, in a sense, to make law on their own.[101] Thus, for example, a law banning dogs from a restaurant may have uncertain meaning and require *ex post* judgments as applied to a blind person with a seeing-eye dog, or a police officer using a german shepherd to search for bombs.

If we are fanatical about limiting interpretive discretion, we will be disturbed to find that laws apparently intended as *ex ante* rules call for judgments by interpreters at the point of application, especially if those judgments involve law-making or choices on issues of politics and morality. But perhaps this is not a decisive problem with a system of rules. Some laws that appear to be rules are really standards: their terms squarely invite

98. *See* HART, *supra* note 25, at 124-54, for a still-valuable discussion. *See generally* Kennedy, *supra* note 76.

99. *See* Note, *Looking It Up: Dictionaries and Statutory Interpretation,* 107 HARV. L. REV. 1437, 1445-53 (1994) (cautioning that dictionary definitions can also be indeterminate).

100. HART, *supra* note 25, at 128. Hart draws the term from F. Waismann, *Language Strata, in* LOGIC AND LANGUAGE 11 (Antony Flew ed., 1953).

101. The right description of legal judgment in the face of open texture is part of what divides positivists from Ronald Dworkin. *Compare* DWORKIN, *supra* note 41, at 350-54 (defending judges who interpret laws according to their "convictions about justice and fairness") *with* RAZ, *supra* note 22, at 206-10 (criticizing Dworkin).

moral or political judgments. Laws that use words like "equal" or "reasonable" or "carcinogen" are likely to fall in this category. To this extent, such provisions do not qualify as rules at all. They are incompletely specified, and most people understand this fact.

A more fundamental objection to the project of rule-following is that all or almost all decisions under a rule will involve *ex post* moral or political judgments, even where there is no invitation for such judgments from the text of the rule itself or from its drafters. Even laws that appear confining, and quite rule-like, may require interpreters to give them content at the point of application—not only the judgment to be bound by law itself, but also substantive understandings that go into the interpretation of legal terms. If this is so, a degree of law-making through encounter with particular cases is inevitable. Even apparently rigid rules do not fully allocate entitlements *ex ante*.

To outline the argument in advance: The very fact that a rule has at least one exception (as nearly all rules do), and the very fact that the finding of this exception is part of ordinary interpretation, means that in nearly every case a judge is presented with the question of whether the rule is reasonably interpreted to cover the circumstances at issue. Usually that question is easy—so easy that it does not even register. But any judgment whether to apply the rule to the particular case depends on a moral or political claim about relevant differences and relevant similarities between the acknowledged exception and the case at hand. Hence a degree of *ex post* judgment is inevitable.

In this way, substantive claims at the point of application lie behind most claims about what the law is. When the meaning of law seems to be a simple matter of fact,[102] it is not because there has been no resort to substantive argument, but because people agree on what substantive arguments are persuasive under the circumstances. This is so not merely in the sense that people agree that as a moral matter, they ought to apply the law. It is so in the more fundamental sense that their view about what the law means has an important moral or political dimension.[103] Of course, substantive judgments are malleable over time, and when prevailing views change, judgments of meaning, even of relatively plain meaning, may shift as well.

If this is true, *ex post* judgments are unavoidable. A form of the old art of casuistry therefore emerges as an important aspect of the law of rules.

102. *See* HART, *supra* note 25, at 246-48 (rejecting "plain fact" positivism).

103. A prominent positivist makes this very point. *See, e.g.*, RAZ, *supra* note 47, at 48-49 (describing role of both legal and moral reasoning); RAZ, *supra* note 22, at 310-24 (acknowledging the moral content of legal arguments).

B. *Substantive* Ex Post *Judgments Everywhere? The Problem of the Single Exception*

If contests over substance are unavoidable, the project of rule-following and (a certain understanding of) the rule of law may well seem threatened.[104] At least this is so if such contests involve moral and political issues in particular cases, for when they do, the meaning of the rule is determined by moral and political judgments at the point of application.

Let us turn to an example, designed to demonstrate the likely role of casuistry in a regime of rules, brought about by what might be called *the problem of the single exception.* Langnage will never, or almost never, be interpreted so as to apply in ways that would produce absurdity or gross injustice. There is an old maxim from Chief Justice Coke: *Cessante ratione, cessat ipsa lex.*[105] Suppose, for example, that a law forbids people from driving over fifty-five miles per hour on a certain street. Jones goes seventy-five miles per hour because he is driving an ambulance, with a comatose accident victim, to the hospital; Smith goes ninety because she is a police officer following a fleeing felon; Wilson goes eighty because he is being chased by a madman with a gun. In all these cases, the driver may well have a legally acceptable excuse, even if there is no law "on the books" explicitly allowing an exception in these circumstances. If rules have exceptions in cases of palpable absurdity or injustice,[106] the denial of an exception depends on a moral or political judgment to the effect that the particular result is not palpably absurd or unjust. Here is the central point: once it is decided that a single exception will be allowed, it is always open, in principle, to decide that another exception should be made too. The refusal to make a further exception is based on a form of casuistry, finding the proposed further exception to be distingnishable from the previous case in which an exception has been made. Hence the line between case-by-case judgments and rule-following becomes thin in principle.[107]

Consider a real case, that of *Church of the Holy Trinity v. United States.*[108] In that case the Court held that it was acceptable for a church to pay for the transportation to the United States of a rector, notwithstanding a

104. *See* HAYEK, ROAD TO SERFDOM, *supra* note 12, at 72 ("Stripped of all technicalities, [the Rule of Law] means that government in all its actions is bound by rules fixed and announced beforehand . . . .").

105. P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 89 (1987).

106. Presumptions against absurdity appear in virtually all legal systems. *See* Massimo La Torre et al., *Statutory Interpretation in Italy, in* INTERPRETING STATUTES 213, 222 (D. Neil MacCormick & Robert S. Summers eds., 1991); Zenon Bankowski & D. Neil MacCormick, *Statutory Interpretation in the United Kingdom, in* INTERPRETING STATUTES 359, 373 (D. Neil MacCormick & Robert S. Summers eds., 1991); Robert S. Summers & Michelle Taruffo, *Interpretation and Comparative Analysis, in* INTERPRETING STATUTES 461, 485 (D. Neil MacCormick & Robert S. Summers eds., 1991) (Germany); *id.* ("virtually every system in our study").

107. *See* HART, *supra* note 25, at 127.

108. 143 U.S. 457 (1892).

flat statutory ban on any employer payment for the importation into the United States of any employee.[109] The Court held that the statute, despite its language, should not apply to churches, because that application would be unreasonable and was not likely intended.[110] But what if a further case arose involving a hospital paying the travel expenses of a doctor, or a university paying the travel expenses of a scientist, or a charity paying the expenses of an expert on relief of poverty? If an exception would not be made in those cases as well, it would not be because of the literal language of the statutory "rule"—the issue of literalism was settled by *Holy Trinity*—but because the argument for an exception would be found less plausible in those cases than in the church case. The strength of the claim for an exception cannot depend on anything other than social judgments and understandings. Certainly we can imagine a culture in which the absurdity of the application would be greater for a hospital than for a church, or greater for a charity than for anything else. And on this score, we can imagine changes across space and time, as different social judgments enter into assessments of absurdity.

In an especially illuminating discussion of the virtues and vices of rules, Frederick Schauer argues for "presumptive positivism," in which interpreters take rules in their literal meaning except in the most absurd or unreasonable cases.[111] The argument is plausible under imaginable assumptions,[112] but notice that there is a large difference between literal interpretation and presumptive positivism, since the latter calls for a form of casuistry, in which interpreters are always faced with the question: "Is this application bizarre?" The change from literalism to presumptive literalism is a change from rule-bound decisions to a species of case-by-case judgment, though it is a distinctive species to be sure.

In short, the mere possibility of an exception or an excuse in all or almost all cases involving rules—excuses found through a familiar interpretive route—means that there is a possibility of an exception or an excuse everywhere, or almost everywhere. It means that even the most well-specified rules do not offer a full *ex ante* specification of legal rights. When an excuse is found insufficient—when in the speed limit case, Collins is not allowed an exemption merely because he was late for work—it is not only because of the text, but also because of some judgment (usually tacit and rarely made in advance of the actual case) whether the application of the statute is absurd or grossly unjust.

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109. *Id.* at 472.

110. *Id.*

111. SCHAUER, *supra* note 37, at 196-206.

112. We would have to know something about the capacities of rulemakers and interpreters; if rulemakers do their job fairly well, and correct silly rules, the case for literal interpretation is strengthened; so too if the interpreters are unreliable. *See infra* notes 230-232 and accompanying text.

My conclusion is that when the interpretation of rules seems not to involve substantive *ex post* judgments, an *ex post* judgment is really being made to the effect that the application is not bizarre or unjust. Judgments of this kind are usually tacit and obvious—usually so extremely obvious that they take place very quickly and do not appear to be judgments at all. But they are nonetheless *ex post* judgments.

We can go further. In cases decided under rules, courts also engage, much of the time, in a form of analogical reasoning. This is a counterintuitive claim. Interpretation of rules is often said to be at an opposite pole from analogical reasoning. Of course, common law courts engage in analogical thinking, dealing with precedents, but—it is often said—judges do nothing of the kind when they deal with statutes. This opposition is far too simple. Often interpretation of rules involves analogy, too.[113] In this way, we might try to vindicate Justice Holmes' emphasis on the interpretation of rules through examination of "the picture" that the words "evoke in the common mind."[114]

Some intriguing work in cognitive psychology tends to support Holmes' suggestion. Suppose that we have a single class of things: birds, or vehicles, or nations, or works of art, or mammals. How do we know whether members of a single class are alike or different? It turns out that people generally have a mental picture of a model or typical example of the category, and they then reason analogically, asking whether a member of the class is "like" or "unlike" the model or typical example.[115] Thus people tend to think that a canary is more "bird" than a penguin, though both are birds; a truck is more "vehicle" than an elevator; an apple is more "fruit" than a coconut. Experiments show "the robust *psychological reality of the typicality of a single exemplar of a given class* . . . . The typicality of an exemplar is then routinely measured by the *distance* between the exemplar and the class as a whole."[116]

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113. Hart makes the same point in his discussion of the distinction between law via examples and law via rules. *See* HART, *supra* note 25, 127-29. Consider especially this suggestion:

> [T]he authoritative general language in which a rule is expressed may guide only in an uncertain way much as an authoritative example does. The sense that the language of the rule will enable us simply to pick out easily recognizable instances, at this point gives way; subsumption and the drawing of a syllogistic conclusion no longer characterize the nerve of the reasoning involved in determining what is the right thing to do. Instead, the language of the rule seems now only to mark out an authoritative example, namely that constituted by the plain case. This may be used in much the same way as a precedent . . . . [A]ll that the person called upon to answer can do is to consider (as does one who makes use of a precedent) whether the present case resembles the plain case "sufficiently" in "relevant" respects.

Id. at 127.

114. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931). *Cf.* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 83 (G.E.M. Anscombe trans., 3d ed. 1971) ("But if a person has not yet got the *concepts*, I shall teach him to use the words by means of *examples* and by *practice*.—And when I do this I do not communicate less to him than I know myself.")

115. I borrow here from the discussion in MASSIMO PIATTELLI-PALMERINI, INEVITABLE ILLUSIONS 147-58 (1994).

116. *Id.* at 152.

What these experiments reveal is that categories receive their human meaning by reference to typical instances. When we are asked whether a particular thing falls within a general category, we examine whether that thing is like or unlike the typical or defining instances. Very much the same is true in the interpretation of rules. The process of examining whether an application is absurd or unjust occurs through seeing whether the application is fundamentally different from the core or defining applications; consider the speed limit and *Holy Trinity* cases discussed above. When there is a fundamental difference, the case at hand is declared dissimilar, and the rule does not apply. In subsequent cases the judgment will turn on whether the new instance is similar to the defining or core applications, or similar instead to the case previously found dissimilar to those applications.

Turn now to a case that involves more than one rule. Suppose the Supreme Court says that in the face of interpretive doubt, statutes should be construed so as not to apply outside the territorial boundaries of the United States,[117] and also that in the face of interpretive doubt, statutes should be interpreted with deference to the views of the administrative agency charged with enforcing them.[118] Suppose that a case arises in which the agency charged with enforcing a civil rights law concludes that the law applies outside the United States. What should a court do when faced with interpretive rules that conflict? A legal system may contain no rule-like answer to this question. If it does not, disputes will break out at the point of application, when judges exercise discretion so as to accommodate the two rules, or to develop principles for harmonizing them. If judges or others are concerned to ensure that the system really is one of rules, they may come up with rules of priority, so that conflicts between rules can be resolved by reference to rules. But the rules of priority will not always be identified in advance. At least in some cases, they will have to be settled at the point of application.

In short: We should acknowledge that the meaning of rules is a product of substantive, *ex post* judgments, often at least partly political or moral in character. This point seems decisive against approaches that insist that from the internal point of view, it is possible to say what the law is without making some judgments at the point of application about what the law should be.

117. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 258-59 (1991) (holding that Title VII does not apply when U.S. firms employ American citizens abroad).

118. *See, e.g.*, Sullivan v. Everhart, 494 U.S. 83, 89 (1990); Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (holding that when congressional intent is unclear, courts must interpret statutes in accordance with "permissible" interpretations of the agency charged with enforcement).

C. *The Rule of Law Chastened but Mostly Intact*

How damaging are these *ex post* judgments to the project of following rules, or to the rule of law? They are not as damaging as they might seem.

Almost all real-world cases involving the meaning of rules are very easy. Although they are contestable, the *ex post* substantive judgments that underlie readings of rules are often widely shared, or at least supported by good reasons even if not widely shared. Usually the literal application of statutory language does not produce absurdity.[119] Rules of priority, laid down *ex ante,* are sometimes available when more than one rule applies.[120] These refinements are enough to allow the rule of law to survive as a project.

It is often feasible to rely on the literal or dictionary definition of legal terms, and courts could do this even when such reliance leads to apparently unreasonable applications.[121] Probably we must acknowledge that a good legal system will allow exceptions in cases of absurdity or gross injustice, and it is revealing that virtually all legal systems do this.[122] But it is also feasible not to allow exceptions, and the category of exceptions, if it exists, might be reserved for the most bizarre cases.[123] Literalism or presumptive literalism might be urged for pragmatic purposes—indeed for some of the same pragmatic reasons that support rule-ness in general—as a means of promoting predictability and limiting judicial discretion at the point of application. Whether those reasons are persuasive depends on the context.[124]

If officials cannot look into the reasonableness of the application, some unfortunate results will follow in particular cases,[125] but we might believe that the results will be superior, in the aggregate, to those that would follow from allowing officials to apply rules literally only in cases in which the application makes sense. We might distrust a situation in which judges felt free to explore the justification for the rule and the reasonableness of the application when deciding whether to apply the rule.

Read literally, rules are generally overinclusive and underinclusive if assessed by reference to their purposes. There is always a gap between the justification for a rule—usually taking the form of a standard—and the rule

119. This is a central point in Schauer's endorsement of presumptive positivism. *See* SCHAUER, *supra* note 37, at 202-03.

120. *See, e.g.,* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) (holding that statutory grants of rule-making authority do not include the power to make retroactive rules, absent express authorization). In *Bowen,* the principle of deference to agency interpretations was trumped by the principle of non-retroactivity.

121. *See* SCHAUER, *supra* note 37, at 205 (advocating adherence to the literal meaning of a rule's language unless the result is "egregiously at odds" with common sense moral judgments).

122. *See* Summers & Taruffo, *supra* note 106, at 485.

123. *See* SCHAUER, *supra* note 37, at 205.

124. *See infra* notes 130-141 and accompanying text.

125. A vivid discussion appears in PHILLIP K. HOWARD, THE DEATH OF COMMON SENSE 1-53 (1994).

itself. Indeed, there is a plurality of possible descriptions of justifications for every rule, with some very specific (banning vehicles from the park "to ensure that the park is quiet") and some very general (banning vehicles from the park "to make the world better"). The gap between justification and rule is part of a familiar argument against rules, and perhaps an argument for an approach to rule-following that allows exceptions in cases of absurdity or injustice. But it is not an argument that literal readings are infeasible.[126] Hart's argument about the "open texture" of language seems too rapid insofar as it fails to recognize the possibility of literalism as an interpretive strategy even when aims are indeterminate and situations unforeseen.[127]

Whether literal readings, when feasible, are reasonable or right is a complex issue, having to do with our faith in interpreters, our faith in those who make rules in the first place, the aggregate risk of error, and the possibility of legislative corrections of absurd results in particular cases.[128] The choice between literal meanings and exceptions for absurdity is itself a decision about the appropriate nature of law. But this is not a point about feasibility.

We have concluded, then, that rules cannot be interpreted without shared understandings of various sorts, and without resort to substantive *ex post* arguments of certain kinds. We have concluded as well that a degree of law-making power in the form of casuistry is exercised at the point of application, at least in a system in which literal language will not be understood to produce absurdity or gross injustice. In this way the case for rules must be chastened and sometimes cautious. Whether rule-bound decisions are preferable to the alternatives is another question; it is to that question that I now turn.

VII
AGAINST RULES, III: ARE RULES OBTUSE?

In many spheres, people do not rely on rules at all. A rule-book for telling jokes would not be all that helpful: maybe people who rely on such books are funnier than they would otherwise be, but if you really tried to tell jokes by following clear rules laid down in advance, you probably would not be very funny. There are no clear rules for dealing with friends in distress. Doctors are familiarly said to follow rules, and surely they often do, but some illuminating accounts treat medicine as largely a matter of casuistry, in which experienced people do not follow rules, but instead build up judgments analogically and from experience with past cases. They rely

126. *See* SCHAUER, *supra* note 37, at 214.
127. *See* HART, *supra* note 25, at 128-36.
128. *See infra* notes 191-194 and accompanying text.

on "rules of thumb" rather than mandatory rules.[129] They make judgments at the point of application.

A. *Rules Are Both Overinclusive and Underinclusive if Assessed by Reference to the Reasons that Justify Them*

The first problem with rules is that it can be very hard to design good ones. In many areas, people lack enough information to produce rules that will yield sufficiently accurate results. Consider, for example, the regnlation of cyberspace. Many observers and participants think that it is premature for Congress to design rules for this activity, and that it would be far better to rely on common law methods of case-by-case judgment and analogy.[130] Production of rules entails high *ex ante* investment of political and informational costs. Sometimes those costs are too high for lawmakers, who do not know enough to produce good rules, and for affected persons, who would be faced with excessive rigidity.[131]

Now suppose that a rule is in place. If strictly followed, the rule will often produce arbitrariness and errors in particular cases. As we have seen, the justifications that underlie the rule will not support all instances to which the rule applies by its terms.[132] More generally, experience will turn up considerations or contexts that make it odd or worse to apply the rule.[133] For this reason it is sometimes inefficient[134] to make decisions by rule, because any rule that people can generate will produce too much inaccuracy.

Consider, for example, the case of college admissions. We might think that any simple rule would produce too many errors from the standpoint of the goal of obtaining a good student body. Even a complex formula, allowing several factors to count but also weighting them and hence minimizing discretion, might produce many mistakes. Consider as well the social security grid[135] which is sometimes said to produce excessive generalization,[136] giving rise to conspicuous injustice in individual

129. *See generally* KATHRYN M. HUNTER, DOCTORS' STORIES: THE NARRATIVE STRUCTURE OF MEDICAL KNOWLEDGE (1991).

130. *See generally* Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743 (1995).

131. *See* KAPLOW, *supra* note 24, at 591 (noting that "a rule is more costly to promulgate than a standard *of the same degree of complexity.*").

132. *See supra* notes 104-112 and accompanying text.

133. *See, e.g.*, Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 673, 719-29 (1987) (arguing that rules limiting the power of banks to form branches and deal in securities have become obsolete).

134. I use here the Kaldor-Hicks understanding of efficieney. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 13-16 (4th ed. 1992).

135. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, tbl. 1 (1994) ("Rcsidual Functional Capacity: Maximum Sustained Work Capability Limited to Sedentary Work as a Result of Severe Medically Determinable Impairment(s)").

136. *See* the discussion of arguments both ways in JERRY L. MASHAW, BUREAUCRATIC JUSTICE 87-88, 117-20 (1983). Mashaw notes that the social security disability grid has been criticized for its

cases. At least in principle, it is possible that the aggregate error rate would be lower with individualized decisions. Or consider the matter of criminal sentencing. While open-ended discretion has been persuasively criticized,[137] it seems clear that the range of relevant variables is very wide and that rigidly rule-bound decisions could produce much error and injustice.[138]

In modern regulatory law, this problem is associated with the pervasive phenomenon of "site-level unreasonableness."[139] This phenomenon occurs when a general rule is applied to situations in which it makes no sense. Consider a requirement that all eating places have two fire exits, or that all places of employment be equipped with ramps as well as staircases, or that all pollution sources use certain expensive antipollution devices.[140] The general rule can produce enormous costs for few benefits in the particular site or in many particular sites; yet administrators often insist on mechanical compliance with the general rule. Perhaps it would be best to dispense with rules and instead to allow firms to comply by showing adequate performance under a set of factors, a process to be overseen by flexible inspectors.[141]

B. Rules Can Be Outrun by Changing Circumstances

Rules are often shown to be perverse through new developments that make them anachronistic.[142] Those who issue a rule cannot know the full range of situations to which the rule will be applied, and in the new circumstances, the rule may be hopelessly outmoded. Consider the regulation of banking and telecommunications. With the development of automated teller machines, prohibitions on branch banking make absolutely no sense; with the rise of cable television, a regulatory framework designed for three television networks is built on wildly false assumptions.[143] Even well-designed rules in the 1970s may be utterly inadequate for the 1990s. In the

"irrational overgeneralizations." *Id.* at 87. *See also* Itzhak Gilboa & David Schmeidler, *Case-Based Decision Theory*, 110 Q.J. ECONOMICS 605 (1995).

137. *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 901 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685 (1992).

138. *See, e.g.*, Alschuler, *supra* note 137, at 902 (arguing that the move away from individualized sentences that has taken place is "worse than sentencing disparity"); Freed, *supra* note 137, at 1683-84 (arguing that the current guidelines system leaves the judge torn between "allegiance to rigid rules and an urge to do justice in individual cases").

139. *See* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK 7 (1982).

140. Many more examples could be added. *See* HOWARD, *supra* note 125, at 12-22 (discussing OSHA, the FAA, and other regulatory regimes).

141. *See id.* at 175-77. Consider also the endorsement of performance standards over design standards in Executive Order No. 12,866, discussed in Pildes & Sunstein, *supra* note 55.

142. *See* Larry Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1174-82 (1993) (discussing the problem of interpreting old texts in light of a new context and the possibility of faithful interpretations that engage in acts of translation); *see generally* Langevoort, supra note 133.

143. For a criticism of the current regulatory regime as applied to television today, see generally THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING ELECTRONIC BROADCASTING (1994); *see also* BRUCE M. OWEN & STEVE S. WILDMAN, VIDEO ECONOMICS 16-18 (1992).

face of rapidly changing technology, current rules for regulation of telecommunications will become ill-suited to future markets. For this reason it may be best to avoid rules altogether, or at least to create only a few simple rules that allow room for private adaptation. Some rules can harness the informational advantages of private actors and thus diminish the problem of obsolescence. Of course, sometimes changed circumstances might be irrelevant, especially under well-designed rules.[144]

An argument for rules is that they provide fixity and allow stability even when circumstances have changed.[145] A legal system that changes whenever circumstances have changed may give too much room for discretion and allow too little in the way of predictability. But it is sufficient for present purposes to say that rules may badly misfire under new conditions, and that sometimes this is an argument against rules, or at least against certain kinds of rules.[146] Similarly, courts that proceed casuistically might allow the democratic process large room for deliberation and evaluation.

C. *Abstraction and Generality Sometimes Mask Bias*

When people are differently situated, it may be unfair or otherwise wrong to treat them the same, that is, to apply the identical rule to them. If the rule is that everyone must use stairs, people in wheelchairs will face special disadvantages. If a rule says that everyone must pay to enter museums, people without money will be unable to go to museums. If a rule says that every employee must lack the capacity to become pregnant, many women will be frozen out of the workforce.[147]

By ignoring special circumstances, general rules can harm or discriminate against identifiable groups with distinctive characteristics, and in that sense reflect bias despite or even because of their generality. A familiar understanding of equality requires the similarly situated to be treated the same; a less familiar but also important understanding requires the differently situated to be treated differently, also in the interest of equality. General rules might produce inequality to the extent that they do not allow people to speak of relevant differences.

D. *Rules Drive Discretion Underground*

When rules yield a good deal of inaccuracy in particular cases, people in a position of authority may simply ignore them. Discretion is exercised through a mild form of civil disobedience, and this is hard to police or even

144. See *infra* text accompanying notes 252-263 for a discussion of a kind of rule system that allows evolution with changing circumstances, as through privately adaptable rules. *See also* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

145. *See supra* text accompanying note 56.

146. Privately adaptable rules can reduce the relevant risks. *See infra* Part X.D.

147. For an illuminating discussion of human differences and capabilities, see AMARTYA SEN, INEQUALITY REEXAMINED 79-87 (1992). *See also* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 32-45 (1987) (discussing how rules based on biased norms may produce or ratify inequality).

to see. Thus in *Woodson v. North Carolina,*[148] the Court invalidated the mandatory death penalty not only on the ground that it was excessively rule-bound,[149] but also on the ground that it was too discretionary since the mandatory rule could not possibly be mandatory in practice.[150] In fact juries would refuse to sentence people to death, but for reasons that would not be visible and accessible.

"Jury nullification" of broad and rigid rules is a familiar and often celebrated phenomenon.[151] Similarly, administrative agencies can simply refuse to enforce statutes when they are too rule-like in nature.[152] For example, the Clean Air Act's severe sanctions for listed pollutants, operating in rule-like fashion, led the Environmental Protection Agency to stop listing pollutants at all.[153] Thus "the act's absolute duties to respond to danger prompted officials not to recognize the dangers in the first place."[154]

E. Rules Allow Evasion by Wrongdoers

Conduct that is harmful, and that would be banned in an optimal system, will be allowed under most imaginable rules, because it is hard to design rules that ban all conduct that ought to be prohibited. Because rules have clear edges, they allow people to "evade" them by engaging in conduct that is technically exempted but that creates the same or analogous harms. Rules, in short, are under-inclusive as well as over-inclusive if measured by reference to their background justifications. If judges cannot proceed by analogy, and extend the rule where the justification so suggests, people will be able to engage in harmful conduct because of a mere technicality. This is another possible source of inefficiency through rules.

F. Rules Can Be Dehumanizing and Procedurally Unfair; Sometimes It Is Necessary or Appropriate to Seek Individualized Tailoring

A familiar conception of procedural justice—embodied in the Due Process Clause—grants people a hearing in order to show that a statute or regulation has been accurately applied. Thus, for example, the Supreme Court has held that someone who is deprived of welfare benefits has a right to a hearing to contest the legitimacy of the deprivation.[155] This understanding of due process fits well with a system of rules. The whole point of

148. 428 U.S. 280 (1976).

149. *Id.* at 302-03.

150. *Id.*

151. I discuss legitimate rule revision *infra* at Part X.B.

152. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 75-76 (1993); *cf.* JOHN M. MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION 53-71 (1988) (discussing OSHA and the problem of underregulation under draconian statutory standards).

153. *See* SCHOENBROD, *supra* note 152, at 76.

154. *Id.*

155. Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (holding that "[w]elfare recipients must . . . be given an opportunity to confront and cross-examine the witnesses relied on by the department").

the hearing is to see whether the rule has been accurately applied. The hearing fortifies the rule.

But another conception of due process urges that people should be allowed not merely to test the application of law to fact, but also to urge that their case is different from those that have gone before, and that someone in a position of authority ought to be required to pay heed to the particulars of their situation.[156] On this view, people affected by the law ought to be permitted to participate in the formulation of the very rule (or standard) to be applied to their case. This conception has conspicuous democratic features insofar as it embodies norms of participation and responsivcness. In this way the old art of casuistry might be given democratic foundations. Affected citizens might be permitted to offer the particulars of their case and to demand a particularized response. On the other hand, the process of representation is different at the law-application stage from what it is at the lawmaking stage, with far broader participation at the point of lawmaking.

VIII
RULELESSNESS: USING FACTORS

When a rule fails, a judge may rely on a standard or may instead use the process of analogy, which does not tell us in advance whether we will have a rule, a standard, or something else. Judges and others who reject rules may also rely on a set of factors, and I will discuss judgments based on factors as a useful way to approach and evaluate rulelessness. Like analogies, guidelines, and standards, factors reveal some of the vices and virtues of rulelessness; in their opposition to rules, they overlap with judgments based on standards or analogies. But judgments bascd on factors have some distinctive features as well, and these are of independent interest.

The line between rules and factors is one of degree rather than one of kind. It should now be clear that rules are rarely or never unbending; it is best to speak of degrees of rule-ness rather than of rules or not. Similarly, factors are not open-ended grants of discretion. We can be clearer about decision-making by factors after exploring a few examples, and also after seeing why a system of factors is often thought to be a superior method of decision—required, sometimes, by the Constitution itself. The law governing the death penalty is the best place to start.

156. This is the conception of procedural fairness embodied in the rejection of the short-lived "irrebuttable presumption" doctrine. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-48 (1974) (holding that an irrebuttable presumption of prcgnant woman's unfitness to teach after a predetermined month in her pregnaney is irrational); *see also* Laurence H. Tribe, *Structural Due Process,* 10 HARV. C.R.-C.L. L. REV. 269, 285-86 (1975) (evaluating the irrebuttable presumption doctrine).

A. Examples

In *Furman v. Georgia,*[157] the Supreme Court held that a rule-free death penalty violated the Due Process Clause not because it was excessively barbaric for the state to take life, but because the states allowed undue discretion in the infliction of the ultimate penalty of death.[158] The problem with the pre-1970 death penalty was procedural, in the sense that states did not limit the discretion of juries in deciding who deserved to die.[159]

North Carolina responded to *Furman* by enacting a "mandatory" death penalty, eliminating judge and jury discretion.[160] Under North Carolina law, a mandatory death penalty was to be imposed for a specified category of homicide offenses. No judge and no jury would have discretion to substitute life imprisonment in cases falling within that category. No judge and no jury would have discretion to decide who would live and who would die. In this way, North Carolina attempted to apply sharp rule-of-law constraints to the area of death sentencing.

In *Woodson v. North Carolina,*[161] the Supreme Court held that a mandatory death sentence was unconstitutional *because it was a rule.* Invoking the need for individuation, the Court said that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[162] According to the Supreme Court, a serious constitutional shortcoming of the mandatory death sentence is that it:

> fail[s] to allow the *particularized consideration of relevant aspects of the character and record of each convicted defendant* before the imposition upon him of a sentence of death. . . . A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. *It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.*[163]

What ultimately emerged from *Woodson* is a system in which the death penalty is generally decided through the consideration of a set of

157. 408 U.S. 238 (1972) (per curiam).

158. The opinions of Justices Douglas, Stewart and White, which were critical to the 5-4 outcome, stress this point. *Id.* at 248 n.11 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 311-14 (White, J., concurring).

159. *See id.* at 309-10 (Stewart J., concurring); *id.* at 311-13 (White, J, concurring).

160. *See* Woodson v. North Carolina, 428 U.S. 280, 285-86 (1976).

161. *Id.*

162. *Id.* at 296-97 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

163. *Id.* at 303-04 (emphasis added).

specified factors, in the form of aggravating and mitigating circumstances.[164] It is this system of capital sentencing that, in the current Court's view, walks the constitutionally tolerable line between unacceptably mandatory rules and unacceptably broad discretion. Of course some justices, most recently Justice Blackmun,[165] have contended that the line is impossibly thin—that there is no conceivable system of capital sentencing that adequately combines the virtues of individualized consideration, required by *Woodson,* with the virtues of non-arbitrary decision-making, required by *Furman.*[166]

Woodson arose in an especially dramatic setting, but the Court's preferred method—factors rather than rules—can be found in many areas. For example, the Court has offered no rules for deciding how much in the way of procedure is required before the state may take liberty or property.[167] Any "rules," the Court suggests, would be too inaccurate and too insensitive to individual circumstance.[168] Instead the Court requires an assessment of three factors: the nature and weight of the individual interest at stake; the likelihood of an erroneous determination and the probable value of additional safeguards; and the nature and strength of the government's interest.[169] This somewhat open-ended multifactor test is quite different from what is anticipated by some conceptions of the rule of law. It sacrifices predictability for the sake of accuracy in individual cases. This is a pervasive choice in the American legal system.[170]

B. Factors Without Rules

What are the features of a system based on factors?

1. Multiple and Diverse Relevant Criteria

It is obvious that in a system of factors, decisions are based on multiple and diverse criteria. No simple rule or principle can be successfully applied to the case.

2. Difficulty of Describing Relevant Factors Ex Ante

In a system of factors, it is often impossible to describe in advance exactly what is relevant. People know too little to be able to say. Because of the informational burdens faced by those who lay down the list of factors, two outcomes are likely. First, the relevant terms, as they are identi-

164. *See* Gregg v. Georgia, 428 U.S. 153, 192-95 (1976).

165. *See* Callins v. Collins, 114 S. Ct. 1127, 1136-37 (1994) (Blackmun, J., dissenting); *see also* Godfrey v. Georgia, 446 U.S. 420, 437-42 (1980) (Marshall, J., concurring).

166. I try to defend this view *infra* at Part X.D.

167. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

168. *See id.*

169. *Id.* at 335.

170. A 1995 LEXIS search of the headings and text of the United States Code produced over 1000 references to "factors." *See, e.g.,* 2 U.S.C. § 117e(2) (1994).

fied in advance, may be too general and abstract to contain sharp limits on what can be considered. The legal terms are *exhaustive but vague.* They have to be specified to be made operational, and it is in the specification that a more complete account will be provided. The specification is unlikely to preclude other possible specifications in other settings. A significant degree of law-making power can be found at the point of application. Consider, for example, a law that forbids "unreasonable risk," specifying some but not all of the ingredients of judgments about reasonableness.[171]

The second possibility is that the relevant factors will be listed at a high level of specificity, but there will be some proviso at the end, including, for example, "such other factors as are deemed relevant"—to show awareness that new and relevant factors may come up.[172] The legal terms are *specific but nonexhaustive.* Both of these strategies are pervasive in American law.[173]

3. *Absence of a Clear,* A Priori *Sense of the Weight of the Criteria*

It is typical of a system of factors that the relevant criteria cannot be assigned weights in advance. In deciding how much of a hearing is required before someone may be deprived of something, for example, we do not know how much weight to give to the government interest in efficiency, or how much weight to assign to the individual interest in ensuring against mistaken deprivations.[174] Answers to questions of weight are offered in the context of concrete controversies. As we will soon see, this notion is related to the problem of incommensurability.

4. *Attentiveness to (Much of) the Whole Situation*

The rule of law is abstract in the sense that it attends to only a small part of a complex situation. If people are admitted to college only on the basis of test scores, we have a rule. (I put to one side the case of complex rules or formulas.)[175] But a system of factors tends to look closely at a wide range of particulars. In the college admission setting, for example, officials might examine not just test scores, but also grades, extracurricular activities, family background, geography, race, gender, and much more. In

171. *See, e.g.,* 15 U.S.C. § 1261(s) (1982) (presenting a non-exhaustive list of ways in which an article may present a mechanical hazard by creating an unreasonable risk of injury).

172. *See, e.g.,* 42 U.S.C. § 2000c-4(b) (1994) (allowing the Secretary of Education to consider "other" relevant factors in determining whether to make grants to school boards for desegregation training).

173. Besides the examples cited at *supra* notes 170-172, the former strategy appears in 15 U.S.C. § 2604(5) (1982) (manufacture of toxic substances); the latter arises in 15 U.S.C. § 2206 (1982) (fire prevention training); 21 U.S.C. § 814 (Supp. 1995) (drug regulation); 42 U.S.C. § 300j(c) (1991) (water treatment); 42 U.S.C. § 502 (1991) (social security).

174. Thus *Mathews v. Eldridge,* 424 U.S. 319 (1976), leaves this issue unresolved.

175. With a formula, the factors are fully identified and weighted in advance. Consider, for example, an effort to give precise numerical ratings for factors bearing on medical school admission.

the area of capital sentencing, juries and judges look to a wide range of variables relating to the offender and the offense.[176] In voting rights cases, courts explore many aspects of the context in order to test for discrimination.[177]

On the other hand, it would be a mistake to say that a system of factors is attentive to all aspects of the situation. There is no such thing as attention to "all" particulars. Human and legal perception are inevitably selective. Even in a discretionary admissions program, for example, the authority is not expected to care about an applicant's initials or foot size. Similar constraints are imposed in the context of capital sentencing.[178] The set of relevant factors is disciplined by the context in which the assessment occurs.

These points suggest that a system based on factors attends to much of the whole situation, but certainly not to all of it. And because decision by factors entails attention to much of the whole situation, and thus to a range of particulars, it is familiar to see people arguing that their case is relevantly different from those that have come before. A litigant in case *A* can always say that in some particular way, his case is relevantly different from case *B*.

5. *Attentiveness to Particulars; Avoidance of Abstractions*

In decisions by reference to factors, courts are highly attentive to particulars. Their decisions do not necessarily govern other situations; they are often said to be "fact-bound." Abstractions and broad principles are generally avoided. They may be too broad, contentious, sectarian, divisive, and confusing. A special fear is that abstractions will be both over-inclusive and under-inclusive. A prime goal of decision by reference to factors is the avoidance of error through insufficiently considered rules or principles—insufficiently considered in the sense of insufficiently attuned to the full range of particular cases.[179]

6. *Attention to Precedent; Analogical Reasoning*

Rules provide consistency; but a system based on factors aspires to do the same. Such a system attempts to ensure that all similarly situated people are treated similarly. *A* must be treated the same as *B*, unless there is a principled reason to treat the two differently.

In a system of factors, the relevant consistency is sought through comparison with previous cases. Suppose, for example, that a trial-type hearing has been required before someone may be deprived of AFDC benefits.[180] The question then arises whether a similar hearing is required before some-

176. See the system upheld in Gregg v. Georgia, 428 U.S. 153, 160-61 (1976).
177. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 623-27 (1982).
178. *See Gregg*, 428 U.S. at 160-61.
179. *See supra* text accompanying note 9.
180. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).

one may be deprived of social security disability benefits.[181] Perhaps this case is different because many social security recipients are not poor, or because disability determinations do not turn heavily on issues of credibility. Hence a full trial-type hearing is not required; but the social security recipient is entitled at least to some opportunity to counter the government's claims in writing.[182] Then the question arises what kind of hearing is required before a grade-school student may be suspended from school for misconduct.[183] Here the interest of the individual whose rights are at issue seems weaker still, and here the government can invoke the distinctive interest in avoiding undue formality in the context of school-teacher relations.[184] Through routes of this sort, a system based on factors can generate a complex set of outcomes, all (ideally) rationalized with each other. Analogical reasoning will therefore produce "local coherence," that is, consistency within related areas of the law.

7. *Diversely Valued Goods and Problems of Incommensurability*

Usually the factors at work in law are valued in qualitatively different ways. Moreover, those factors cannot be placed on a single metric; they are not commensurable. To understand these claims, something must be said about diverse kinds of valuation and about the difficult problem of incommensurability.

a. *Diverse Valuations*

It does seem clear that human beings value goods, things, relationships, and states of affairs in diverse ways; all goodness is goodness-of-a-kind.[185] There is of course a distinction between instrumental and intrinsic goods. We value some things purely or principally for use; other things, like knowledge or friendship, have intrinsic value. But the distinction between intrinsic and instrumental goods captures only a part of the picture. Intrinsically valued things produce a range of diverse responses.[186] Some bring about wonder and awe. Consider, for instance, a mountain or certain artistic works. Toward some people, we feel respect; toward others, affection; toward still others, love. Negative valuations are similarly diverse: to lose money is to lose an instrumental good (though one that might be used for intrinsic goods, like the preservation of human life), while to lose a friend is an altogether different matter. Our responses to intrinsic bads are likewise diverse.

181. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976).

182. *Id.* at 345-46.

183. *See generally* Goss v. Lopez, 419 U.S. 565 (1975).

184. *See id.* at 583.

185. *See* ANDERSON, *supra* note 15, at 1-16; Amartya Sen, *Plural Utility, in* PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 193, 194-202 (1980-81).

186. *See* ANDERSON, *supra* note 15, at 8-16.

Many of the relevant distinctions between intrinsic and instrumental goods, and among intrinsic goods themselves, play a role in law, as when beaches must be compared with dollars, or protection of racial equality measured against economic benefits or associational freedom. It is surely possible that the use of a single metric, treating goods as relevantly the same, may have some pragmatic advantages; cost-benefit analysis is based on this judgment.[187] But decisions based on factors tend to involve goods that are understood to be valued in qualitatively diverse ways.

b. *The Relevant Factors to Be Assessed by the Legal System May Not Be Commensurable*

Now let us return to the idea that the Constitution requires deprivation hearings when justified by an assessment of three factors: the individual interest at stake; the likelihood of error and the probable value of additional safeguards; and the government's interest, pecuniary and nonpecuniary, in avoiding complex procedures.[188] It would be odd to say that this assessment can be made through lining up the relevant variables along any single metric. If we devise a scale, we will have to recharacterize the relevant goods in a way that changes their character and effaces qualitative differences. Perhaps this is justified for pragmatic reasons, but something will be lost as well as gained.

As I understand the notion here, incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.[189] By our considered judgments, I mean our reflective assessments of how certain relationships and events should be understood, evaluated, and experienced. The notion of a single metric should be understood quite literally. By this I mean a standard of valuation that (1) operates at a workable level of specificity, (2) fails to make qualitative distinctions, and (3) allows comparison along the same dimension. In deciding cases according to factors, there is often no such metric. Decisions nonetheless are made, and they can be justified or criticized on the basis of reasons. But those reasons do not amount to a single scale of value. Of course, rules are also often developed on the basis of an assessment of incommensurable goods.

These are brisk and inadequate remarks about a complex subject.[190] For the moment my claim is simple: The factors that are typically at stake

187. The *Mathews v. Eldridge* standard is understood as a form of cost-benefit analysis in RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 550 (4th ed. 1992) and in Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28 (1976).

188. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

189. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law,* 92 MICH. L. REV. 779, 795-96 (1994).

190. See *id.* at 795-812 for a more detailed discussion.

in law are valued in different ways, and these factors are not generally commensurable along any scale.

IX
CHOICES

All this leaves two principal questions. Under what circumstances is it appropriate to rely on rulelessness rather than rules? And under what circumstances might a legal system be expected to use one scheme rather than the other?

A. Positive and Normative

It is unlikely that we will be able to generate a reliable and general positive theory on these topics. Legislation is a complex product of legislative self-interest, private influence, and public-spirited motivations on the part of both legislators and those who influence them. Judicial choices between rules and rulelessness are at least equally difficult to attribute to a single behavioral influence or set of behavioral influences. It is hard to imagine a simple testable hypothesis that would not be falsified by many results in the world.

We are likely to do far better by identifying mechanisms by which certain choices might be made, rather than by identifying law-like generalizations by which choices are usually made.[191] Moreover, the occasional role of public spirit in legislative deliberations—from legislators themselves or from people who influence them—means that the normative and the positive cannot be so sharply separated. Normative views about what makes best sense will affect outcomes. The same is true of others faced with the choice between rules and rulelessness, including judges and bureaucrats.

It is still possible to offer some rough-and-ready generalizations. Most broadly, rules will likely be avoided (1) when the lawmaker lacks information and expertise, so that the information costs are too high to produce rules; (2) when it is difficult to decide on rules because of political disagreement within the relevant institution, so that the political costs of rules are too high to justify them; (3) when people in the position to decide whether to have rules do not fear the bias, interest, or corruption of those who decide cases; (4) when those who make the law do not disagree much with those who will interpret the law, and hence when the law-makers do not need rules to discipline administrators, judges, or others; and (5) when the applications of the legal provision are few in number or relevantly different from one another. It follows that rules will be chosen when the error rate with

191. *See* JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 3-10 (1989) (making this claim much more generally).

the particular rules is relatively low, when the error rate for rulelessness is high, and when the number of cases is large.

There can of course be a considerable *ex ante* investment in rulemaking, at least in the nonobvious cases, and at least if we seek rules that have some degree of accuracy. On the other hand, the absence of rules may produce significant costs at the stage when particular decisions are made. An important question is which people bear these costs, and how much power they have to minimize them. Consider, for example, the problems of deciding whether airline pilots over the age of sixty are still able to do their jobs competently. Such decisions will be time-consuming, may produce unequal treatment, and may create a considerable level of error under the pressure of the moment (mistaken stereotypes about people over sixty, or misplaced sympathy for older employees). Such decisions may also impair predictability and thus create high costs for people trying to order their affairs under law.

Where those who make the law are not the same as those who interpret and enforce it, there will be complex pressures. On the one hand, lawmakers may distrust the interpreters and enforcers, and may therefore impose rules.[192] If everyone is aligned in interest, the costs of rulelessness will be diminished, since lawmakers need not fear that interpreters and enforcers will have agendas of their own. On the other hand, a split between lawmaking on the one hand and law-interpreting/law-enforcement on the other can create some pressure to avoid rules. Here is the key point: When lawmaking is separate from law-interpretation and law-enforcement, many of the costs of producing clarity *ex ante* will be faced by lawmakers themselves, whereas many of the costs of producing clarity *ex post* will be faced by others. A lawmaking body that does not enforce law can "transfer" the costs of rulelessness to those who must enforce whatever provisions have been enacted. There may be political and other advantages in doing this—though as we have seen, there are countervailing pressures too.

The odd and perhaps counterintuitive result is that a system of separated powers imposes at least some pressure toward avoiding rules. A system of unified powers does not impose similar pressure, since in such a system people who refuse to make rules *ex ante* will face the costs of rulelessness *ex post.* The rise of administrative agencies combining traditionally separated powers[193] helps counteract the difficulty.

As I have said, the benefits for lawmakers of refusing to make rules may, in a system of separated powers, be countered by other factors. The failure to make rules may be punished by the interests that fear the outcomes within another branch of government, or it may fit poorly with the

192. Examples include the reaction of Democratic Congresses to Republican Presidents in the environmental area. *See* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency,* 54 LAW & CONTEMP. PROBS. 127, 173-78 (1991).

193. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1-5 (1938).

representatives' own political commitments or electoral self-interest. Similar considerations apply to a decentralized, hierarchical judiciary. In such a system, there will be some incentive for the Supreme Court to avoid making rules and to transfer the costs of rulelessness to others.[194] But the incentive can be overcome by other considerations.

B. Notes on England and America

Some of these speculations are borne out by comparing the legal system in England with that in the United States.[195] In England, lawmaking and law-interpretation are far more rule-bound than in the United States. The Parliament is less likely to delegate discretionary authority to judges.[196] For their part, English judges treat statutes as rules, interpreting them literally and sometimes refusing to investigate whether the particular application of the rule makes sense as a matter of policy or principle.[197] In contrast, in the United States, lawmaking often takes place in the process of confrontation with particular cases.[198]

How might this be explained? Is it possible to say that one or the other nation is proceeding more sensibly? Perhaps not; perhaps the differences are attributable to contextual differences.[199] It is notable that laws in England are drafted by an Office of Parliamentary Counsel, a highly professional body that consists of skilled authors of laws.[200] The Parliamentary Counsel brings about a uniform style of drafting. It is also closely attuned to the interpretive methods of English judges, and the Counsel drafts legislation with close knowledge of literalism and of the prevailing canons of construction.[201] The judges' practice is itself uniform and relatively simple. In a parliamentary system, the government and the legislature are allied, and the high degree of party control means that there is a level of homogeneity in England at the lawmaking stage.[202] Moreover, and critically, Parliament revisits statutes with some frequency, and it fixes mistakes that are shown as such when particular cases arise.[203]

The situation in the United States is very different. There is no centralized drafting body, and hence no uniformity in terminology, and little professionalization. In America, the drafters of legislation are multiple and

194. *See* Scalia, *supra* note 2, at 1178-79 (arguing that in our federal judiciary, where the Supreme Court hears so few of the total cases, a rule granting discretion has the effect of forcing the lower courts to be the courts that "clos[e] in on the law," as opposed to the Supreme Court).

195. I draw in this section on the extremely illuminating discussion in ATIYAH & SUMMERS, *supra* note 105.

196. *Id.* at 99-100.

197. *Id.* at 100-02.

198. *Id.* at 88-93.

199. *Id.* at 35-41, 103-12.

200. *Id.* at 315-16.

201. *Id.* at 316-17.

202. *Id.* at 299-306.

203. *Id.* at 318.

uncoordinated.[204] The party system imposes less discipline, and the executive and legislature are hardly aligned.[205] Congress appears only intermittently aware of the judges' interpretive practices, which are themselves not easy to describe in light of the sheer size of the federal judiciary and the existence of sharp splits, on just this point, in the Supreme Court. Congress does overrule statutory decisions to which it objects.[206] But it is not in the business of responding rapidly and regularly to particular cases in which literal interpretations misfire. Hence both lawmaking and law-interpreting practice are very different from what they are in England.

This brief description of the two systems supports the contextual arguments offered above. There tends to be more disagreement in America than in England at the lawmaking stage. In America, the quality of drafting *ex ante* is lower, as is the possibility of legislative correction *ex post.* None of this suggests that England or America has the optimal level of rules in light of its own institutional characteristics. None of this suggests that interpretive practices in the relevant nations are immune from challenge. But it does suggest that the two legal systems are highly responsive to distinctive contextual features.

X
REFORM STRATEGIES

How can a legal system minimize the problems posed by unreasonable generality on the one hand and those of potentially abusive discretion on the other? The best approaches involve (a) a highly contextualized, indeed casuistical inquiry into the likelihood of error and abuse with either rules or rulelessness, and hence an "on balance" judgment about risk; (b) a large space for *legitimate rule revisions*; and (c) a presumption in favor of a particular kind of rule, that is, the *privately adaptable rule* that allocates initial entitlements but does not specify outcomes.

A. Bentham and Acoustic Separation

Jeremy Bentham favored clear rules, laid down in advance and broadly communicated.[207] In at least some of his writings, he also favored adjudicative flexibility, allowing judges to adapt rules to the complexities of individual cases.[208] Bentham was aware that rules could misfire as they encountered particular controversies, especially if we understand the notion

204. *Id.* at 318-20.

205. *Id.* at 306-15.

206. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 151-54 (1994). *See generally* William N. Eskridge, Jr., *Overruling Supreme Court Statutory Interpretation Decisions,* 101 YALE L.J. 331 (1991).

207. *See* POSTEMA, *supra* note 4, at 411-13.

208. *Id.* at 409-10.

of misfiring in utilitarian terms.[209] In courts of law, Bentham concluded, the rules should not be fully binding.[210]

This suggests a paradox: How could someone advocate clear rules without asking judges to follow them? Bentham's ingenious answer involved *the different audiences for law.* The public should hear general rules; the judges should hear individual cases.[211] This is the important idea of an "acoustic separation" for legal terms,[212] justified on utilitarian grounds. There is such a separation in many areas of law, including the law relating to excuses for criminality, and perhaps in tax law as well.[213]

Following this idea, we might suggest that legislatures should lay down rigid rules for the public—"conduct rules"—but that interpreters should feel free to ignore them in contexts where they produce absurdity. Officials might follow more flexible "decision rules" that deviate from conduct rules and indeed that work as standards. In some ways this is the American legal practice.[214] American judges do not create systematic deviations between conduct rules and decision rules; but they do make exceptions to literal language in cases of absurdity. Of course it is important to develop subsidiary principles to discipline the development of decision rules and the general idea of "absurdity," and to give these ideas concrete application in the modern regulatory state. Modern administrative agencies, more than courts, might be entrusted with the job of adapting general rules to particular circumstances.[215]

There are, however, two large difficulties with the Benthamite strategy. The first involves the right to democratic publicity—more particularly, the right to know what the law is. The Benthamite strategy severely compromises that right. The rule of law—and democratic values—would be jeopardized if people are unaware that the law is not what the statute books say that it is. Benthamite approaches are therefore unacceptable to the extent that utilitarian judgments about acoustic separation run into liberal principles of publicity.[216] In a similar vein we might think that it is an insult to the moral autonomy of the citizenry to be told that the law is something other than what it is in fact. There is a serious problem from the standpoint of democratic citizenship, since members of the polity, given the right and duty to decide on the content of law, will by hypothesis lack knowledge of what the law really is. This ignorance will compromise the process of democratic assessment of law.

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209. *Id.*

210. *Id.* at 418-21.

211. *See id.* at 195-96.

212. For an illuminating discussion of this concept, see generally Dan-Cohen, *supra* note 16.

213. *See id.* at 637-48.

214. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 458-59 (1892).

215. I try to support this view in Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

216. See the discussion of publicity in JOHN RAWLS, A THEORY OF JUSTICE 16 (1971).

The second problem with the Benthamite strategy is that it fails to take account of the fact that general rules can create *bad private incentives* as compared with more contextualized approaches. Consider, for example, a speed limit that creates improper incentives in cases in which speeding is necessary to save (the optimal level of) life and limb, or an environmental regulation that requires adoption of expensive technology in cases in which the environmental risks are trivial.[217] The secrecy of the Benthamite approach—the distinction between the law as it is publicly known and the law as it operates in courts of law—will do nothing at all about the problem of bad incentives from crude rules. Indeed, publicizing the exceptions, and telling everyone about the possibility of close judicial attention to the particulars of your case, may well be a good idea if we seek optimal incentives. At least this would be so if people would not react to the presence of exceptions by believing that they can do whatever they want and that the rule effectively does not exist at all.

Too often, then, the Benthamite strategy is neither democratic nor efficient. But there is still a place for what might be thought to be a version of it. A legal system might sometimes provide that in exceptional cases, interpreters should be permitted to change rules, by exploring whether their justifications create absurdity or injustice in particular cases.[218] We might even see a judicial (or administrative) power of this kind as part of the interpretation of rules, not as an authority to change rules. This power should be publicly known—a fully disclosed aspect of interpretation. In some contexts, of course, the possibility of changing rules, or of interpreting them with close reference to whether they make sense in particular circumstances, might be too damaging to the project of rule-following. But this judgment cannot be made in the abstract.

B. Legitimate Rule Revision

Many legal systems allow people to deviate from rules in certain circumstances. Indeed, many public officials have at least a tacit power to revise the rules when rule-following would be senseless. Citizens as a whole often have the same power.[219] Legitimate rule revisions make rules "on the books" operate differently from how they appear. Moreover, rule revisions can help promote the democratic character of the law, by allowing constraints on the application of rules to cases where they no longer fit with public convictions.

The class of legitimate official revisions is large; it helps supplement legislation with a set of post-enactment, or extra-enactment, constraints on

217. *See* Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1335 (1985).

218. *See id. See generally* SCHAUER, *supra* note 37.

219. I borrow extensively in this section from the excellent discussion in MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY (1973).

what government may do. Consider the fact that juries sometimes "nullify" outcomes that the law, if interpreted in a rule-bound way, seems to mandate.[220] The practice of jury nullification is widely understood as legitimate,[221] so long as it does not occur very often. There is a democratic justification for the practice: it allows a salutary public check on rules, or applications of rules, that produce unjust or irrational outcomes.

So, too, police have a widely acknowledged authority to revise rules, by deciding which crimes warrant arrest, and criminal prosecutors have a widely acknowledged authority to revise rules, by refusing to punish certain rule violations. In exercising this authority, police and prosecutors may legitimately depart from rules governing private behavior. Officials refuse to punish conduct that, while violative of rules on the book, is not widely perceived as deserving criminal punishment. Prosecutions are rarely brought for sodomy or adultery, in part because such behavior, even if condemned, is no longer so deplored as to call for jail sentences or criminal fines. We might also understand judicial "softening" or "moderation" of rules—sometimes under the guise of interpretation[222]—as an exercise of a tacitly legitimated authority to reject rules when they make no sense.

Of course, people might question these various exercises of discretion to depart from rules. If, for example, the police refuse to stop domestic violence—because they think that spousal abuse is acceptable or that government should not intervene in the family—we might respond that the refusal is unacceptable, because it produces injustice. The judgments that underlie rule revisions might properly be criticized as confused or unjust. I am suggesting only that when there is no such problem, the revisions, if democratically grounded, are a good response to the problems posed by rule-bound law.

Certainly the existence of enforcement discretion raises doubts about certain understandings of the rule of law.[223] If what I am saying is right, there will often be a gap between law on the books and law in the world, and for good democratic reasons. We might conclude that officials in certain social roles—jurors, prosecutors, police—should believe that rules are generally binding, but that they have authority to depart from the rules in compelling circumstances. This authority has democratic foundations; it might promote liberty as well.

Now let us turn to the situation of the citizen. Ordinarily we think that people must obey the law or face the consequences of violating it. If they are conscientious objectors—consider as examples Martin Luther King, Jr., or abortion protestors—their violation of the law may be a product of

220. *Id.* at 45-66.

221. *See id.*; Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (1980).

222. *See supra* text accompanying notes 101-118.

223. *See generally* FULLER, *supra* note 47.

deeply felt moral judgments, or even heroic; but they must nonetheless face the consequences. This picture has much truth in it, but it is too simple. Often citizens, like officials, are authorized to depart from the rules.

Consider, for example, the fact that citizens who object to the constitutionality of a rule are permitted to violate the rule and seek a judicial judgment on the constitutional issue. Since there is an overlap between moral argument and constitutional argument, the power to test rules against constitutional standards might well be seen as a power to ask that rules be revised when they are especially unjust.

Perhaps this power should not be treated as a genuine power to revise rules, since the Constitution is part of the rules of the American legal system. But citizens have other powers as well, and these powers should certainly be understood as a power to change or to soften rules. Consider the fact that people are allowed to depart from the rules in cases of "necessity"[224] and also in a more controversial category of cases, in which the legal rule no longer claims public support.

We have seen that if someone violates a speed limit law in order to escape from a terrorist, a criminal conviction is highly unlikely. In all probability, the driver will be held to have acted out of necessity, or to have created a "lesser evil." The same result will be reached if Jones trespasses on property in order to prevent someone's death, or if Smith steals a weapon from a third party in order to prevent bodily harm to Young.[225] Of course, citizens are not permitted to decide freely and for themselves whether compliance with a rule is justified in a particular case. But in most legal systems, a citizen will have a legally sufficient excuse for violating the rule if the violation was necessary to avert a greater harm, and the excuse will exist whether or not any legal decision has previously recoguized it as such.

The other, more controversial category of legally permissible violations of law by citizens involves the old notion of *desuetudo,* which forbids the invocation of old, unenforced rules to ban conduct in cases in which people have come to rely on nonenforcement.[226] The idea has a powerful democratic dimension. If a rule, or a particular application of a rule, is founded on a social norm that no longer has much support, we might expect it to be enforced not at all, or only on rare occasions. The rule therefore will be a tool for harassment and not an ordinary law at all. The rare occasions of enforcement might well involve arbitrary or discriminatory factors, resulting, for instance, from a police officer's mood, or personal animus, or bias of some kind. A prosecution for fornication, brought in 1995, might well have such features.

224. KADISH & KADISH, *supra* note 219, at 120-27.

225. *Id.* I am grateful to Michael McConnell for helpful discussion of this point.

226. *Id.* at 128-30.

Consider in this regard the controversial case of *Griswold v. Connecticut*,[227] involving a ban on the use of contraceptives by a married couple. The ban was not enforced directly by prosecutors. No such prosecution could have received public support; it would have been an outrage. The principal function of the ban was to deter clinics from dispensing contraceptives to poor people. The problem with the ban was not that it was unsupported by old traditions but instead that it had no basis in modern convictions. Few people believed that sex within marriage was acceptable only if engaged in for purposes of procreation, and those people could not possibly have commanded a legislative majority, or even made it possible to bring many actual prosecutions against married couples.

Instead of relying on an argument about a broad right of "privacy," the Supreme Court should have invalidated the law on the narrower ground that citizens need not comply with criminal statutes, or applications of criminal statutes, that are unenforced and that find no support in anything like common democratic conviction. A judgment of this kind would have had the advantage of incomplete theorization: it might have produced broader support for the decision among a range of people, including those who reject any "right of privacy" or who are uncertain about its foundations and limits.

Another controversial case, *Bowers v. Hardwick*,[228] involving Georgia's ban on homosexual sodomy, might well be understood as a repeat of *Griswold*. The ban on homosexual sodomy is rarely enforced against consenting adults. Prosecutors simply do not initiate proceedings, for prevailing social norms would not permit many prosecutions of this kind. To be sure, citizens did not successfully seek repeal of the statute; but the statute's nonenforcement made political mobilization most unlikely. The simple fact of widespread nonenforcement strongly suggests that the statute was out of keeping with prevailing norms. Realistically speaking, the ban on consensual homosexual sodomy is instead a weapon with which police officers and others can harass people on invidious grounds. The existence of an unenforced law, used for purposes of harassment, is objectionable for that reason alone. We can draw a general conclusion. Citizens have engaged in legitimate rule revision (or revision of application of rules) when they violate rules that lack support in popular convictions—unless those convictions are themselves demonstrably unjust.

Griswold and *Bowers* involved rules that might be thought to be legitimately disregarded. The same argument would apply to all situations in which rules or applications of otherwise valid criminal statutes have entirely fallen out of popular favor. In disregarding palpably outdated rules

227. 381 U.S. 479 (1965).

228. 478 U.S. 186 (1986).

or palpably outdated applications of modern rules, citizens are participating in a healthy and continuous process of democratic deliberation.[229]

It is not clear whether American law fully recognizes the citizen's right to revise rules in this way; the doctrine of *desuetudo* has no clear place. But the dilemmas posed by rules and rulelessness might be less severe if citizens, like officials, were permitted to depart from rules in the cases I have described. Through this route, we might well respond to Bentham's problem in a way that avoids the dangers of Bentham's solution.

C. *Pragmatic Judgments*

Often a legal system should make the choice between rules and rulelessness on the basis of a contextual inquiry into the aggregate level of likely errors and abuses.[230] In this sense, the choice depends not on any rule, but on a form of casuistry. I have suggested that when judges or other interpreters are perceived to be ignorant, corrupt, or biased, or in any case when they diverge in their judgments from the people who make rules, a legal system should and probably will proceed with rules.[231] Even a poor fit, in the form of overinclusive and underinclusive rules, can be tolerated when individualized decisions would result in a similar level of inaccuracy. We might favor ruleness when there is no special reason to distrust those who make decisions. So too, individualized decisions are likely to be dispensed with when it is possible to come up with rules that fit well.

The choice between rules and rulelessness might be seen as presenting a principal-agent problem. The legislature, as the principal, seeks to control the decisions of its agents. A problem with rules is that the agents might be able to track the wishes of the principal better or best if they are free to take account of individual circumstances. Any rule might inadequately capture the legislature's considered judgments about particular cases. The costs of rulelessness might be acceptable if the legislature does not believe that the court or other interpreter is untrustworthy, perhaps because there is a widely shared view of the relevant problems.

On the other hand, without rules the agent might become uncontrollable. This is so especially in light of the fact that a system of factors usually allows the agent to weigh each factor as he chooses.[232] The result is that a system of rules might be adopted as the best way, overall, to control the agent's discretion, at least if there is a measure of distrust of some or all agents.

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229. *See* Cass R. Sunstein, *Political Deliberation and the Supreme Court*, 84 CALIF. L. REV.— (forthcoming 1996) (defending Supreme Court's casuitical approach to affirmative action as a way of refusing to foreclose options and to allow democratic debate.)

230. *See generally Kaplow, supra* note 24, for a discussion of the context-dependent nature of any inquiry into the benefits of rules and standards.

231. *See supra* notes 70-76 and accompanying text.

232. *See supra* notes 157-190 and accompanying text.

Rules tend to be sensible—and to be adopted in the first place—when social consensus exists within the lawmaking body;[233] risk-free decisions that make use of factors or standards are more probable when there is disagreement. It is not hard to obtain a ban on racial discrimination when people agree that this form of discrimination is illegitimate; it is much harder to obtain a similar ban on discrimination against the handicapped, so standards and factors are pervasive.[234] Consider the fact that Congress often delegates discretionary power to an agency when it is unable to agree on the appropriate rule, because of social conflict, and therefore it tells the agency to act "reasonably." Examples include the areas of broadcasting regulation[235] and occupational safety and health.[236] The costs of laying down rules are increased in the face of disagreement on their content.

Sometimes, too, it is impossible to come up with an adequate rule in a multimember body. Often participants in a dispute begin discussion by attempting agreement on "principles" rather than concrete rules, as in diplomatic controversies over the Middle East.[237] So too people may be able to agree on a set of relevant factors, or perhaps on some particular set of outcomes, without being able to agree on a rule, or on the general reasons that account for particular outcomes.[238] Sometimes people will agree on general principles but disagree on particular cases. Sometimes the opposite is true. When rules do not emerge from legislatures, it may well be because it is impossible to get agreement within a heterogeneous body. Return here to the fact that legislatures that delegate broad discretion can internalize large benefits of rulelessness: economizing on information costs and on the political costs of specificity. They can simultaneously externalize the costs of rulelessness, which will then be faced by administrators. It is administrators who must compile relevant information and face the political heat of making hard and specific choices.

It follows that we are likely to find rules when one group of interests is well-organized or otherwise powerful, and when its adversaries are not. In circumstances of this sort, the well-organized interests can press the governmental body in the direction of rules. A well-organized group is unlikely to allow itself to become at risk through rulelessness when it need not do so (unless it believes that it is even more likely to be successful with discretion-wielding bureaucrats or judges). Consider laws governing the regula-

233. *See* Peter H. Aranson et al., *A Theory of Legislative Delegation,* 68 CORNELL L. REV. 1, 24-27 (1982).

234. *See* Americans With Disabilities Act of 1990, 42 U.S.C. § 12112 (1995).

235. *See* Communications Act of 1934, 47 U.S.C. § 303(r) (1991).

236. See the open-ended standards of the Occupational Safety and Health Act of 1970, 29 U.S.C § 652(8), as construed in International Union v. OSHA, 938 F.2d 1310, 1316-17 (D.C. Cir. 1991).

237. *See* Patrick Laurence, *Negotiation Seen As Only Way Out of South African Impasse,* CHRISTIAN SCI. MONITOR, July 26, 1985; Michael Parks, *Israel and PLO Pave the Way for a Wider Peace,* L.A. TIMES, July 8, 1994, at A1.

238. *See generally* Sunstein, *Incompletely Theorized Agreements, supra* note 57.

tion of agriculture, which are often highly specific, in part because the farmers' lobby is well-organized, while the opponents of such laws are not.[239]

Factors or standards are more likely to be the basis for decision when opposing interests have roughly equivalent power in the lawmaking body, and when they are equally willing to take their chances with a bureaucracy or a judge.[240] This may be so because they are both highly organized, or because they are both weak and diffuse. A possible example is the Occupational Safety and Health Act, which is quite vague,[241] in part because its opponents and adversaries are both powerful.

On the other hand, two well-organized groups might produce a rule when compromise is possible and when there are, to both groups, special risks in relying on an agency or a court. This may be the case, for example, when the regulated class needs to know what the rule is, so it can plan its affairs. Perhaps it is better to have fairly bad rules than no rules at all. When planning is made possible by clear rules, members of the regulated class may have it within their power to avoid (some of) the costs of inaccurate rules. Informed of the content of the rule, class members can adjust their conduct so as to avoid violating the rule in cases in which the rule is overinclusive. On the other hand, this avoidance may itself be an undesirable social cost. Return to the problem of site-level unreasonableness, where application of an overbroad rule forces employers to make workplace changes that produce possibly little gain, and at possibly high cost.[242]

Rules are also more likely to be unacceptable when the costs of error in particular cases are very high. The enormous danger of error can make overinclusive and underinclusive rules intolerable. It is one thing to have a flat rule that people under the age of sixteen cannot drive: the social and economic costs of mistaken denials of a license are relatively low. It is quite another thing to have a flat rule that people falling in a certain class will be put to death. It is for this reason that rule-bound decisions are unacceptable in inflicting capital punishment,[243] and to some extent in criminal sentencing generally.[244] (But here we must believe not only that rules make for error, but also that case-by-case decisions will make for less error.)

This point also helps to explain the dramatic difference between criminal liability, which is generally rule-bound, and criminal sentencing, which

239. *See* 7 U.S.C. §§ 601-674 (1980 & Supp. 1995).

240. *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288-95 (1988). *See generally* THE POLITICS OF REGULATION (James Q. Wilson ed., 1978); Michael T. Hayes, *The Semi-Sovereign Pressure Groups*, 40 J. POL. 134 (1978).

241. *See supra* note 236 and accompanying text.

242. See *supra* notes 137-141 and accompanying text.

243. *Id.*

244. *See generally* UNITED STATES SENTENCING COMMISSION, *supra* note 36 What is important for present purposes is that these are guidelines and not rules. *See supra* notes 36-44 and accompanying text.

is generally less so. Part of the story is that specificity is needed at the liability stage, so that people can plan accordingly, and so that the discretion of the police is sharply cabined. Both interests are weaker at the sentencing stage. Planning is not so insistently at stake. Errors in degree of punishment are less objectionable than errors in subjecting an innocent person to punishment. The discretion of the sentencing judge or jury is also less prone to abuse than the discretion of the police officer, because the former, generally speaking, are less likely to decide on the basis of arbitrary or irrelevant factors.

I have noted that rules are less acceptable in the face of sharp limits in information and experience. When information is lacking, or can be obtained only at high cost, officials will avoid rules. At the same time, rules—once they are in place—economize on information costs at the point of application. For example, there was a dramatic shift from adjudication to rulemaking in American administrative agencies in the 1960s and 1970s, partly on the theory that rules could resolve many cases at once, and limit the informational costs, biases, and errors of case-by-case judgments.[245] But because of the informational demands imposed on those who make rules in the first instance, rules are now exceptionally difficult to promulgate, and there has been a shift in the other direction, toward decision without rules. In the Environmental Protection Agency, for example, it takes over a year and a half to prepare a rule internally; half a year more to receive the legally-required public comments; and sixteen more months to analyze the comments and issue the rules.[246] It is not at all surprising that the result is to shift agencies away from rulemaking and toward less costly options.[247]

Rules are also less acceptable when circumstances are changing rapidly. When circumstances are changing, rules are likely to be inaccurate. Consider, for example, a congressional decision to issue a statutory standard for permissible emissions levels for coal-fired power plants. Surely any such standard will soon be out of date because of technological change. In these circumstances it may be best to enact privately adaptable rules,[248] to delegate decisions to institutions capable of changing them rapidly, or perhaps to allow case-by-case judgments based on relevant factors.

When numerous decisions of the same general class must be made, the inaccurate fit of a rule becomes far more tolerable.[249] Consider, for example, the requirement that all drivers must be over the age of sixteen, or the

245. *See* STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 555 (3d ed. 1992).

246. *See id.* at 107.

247. *See, e.g.*, Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990).

248. *See infra* notes 252-257 and accompanying text.

249. *See* Kaplow, *supra* note 24, at 563.

use of the social security grid to decide disability claims. Infuriating bureaucratic insistence on "the technicalities" may result simply because so many decisions must be made, and because individualized inquiry into whether the technicalities make sense in each case is too time-consuming. Similarly, rules can be avoided when few decisions need to be made, or when each case effectively stands on its own.

We should conclude that the choice between rules and rulelessness cannot be made on the basis of rules. That choice is itself a function of factors. It would be obtuse to say that one or another usually makes sense, or is justified in most settings. To decide between rules and rulelessness, we need to know a great deal about the context—the likelihood of bias, the extent of current information, the location and nature of social disagreement, the stakes, the risk of over-inclusiveness, the quality of those who apply the law, the alignment or nonalignment of views between lawmakers and others, the sheer number of cases. It follows that a well-functioning legal system should be suspicious of two trends in recent writing—extravagant enthusiasm for rules[250] and excessive focus on the possibility of achieving accurate outcomes through fine-grained encounters with particulars.[251]

D. Privately Adaptable Rules

An ambitious strategy might emerge from distinguishing between two sorts of rules, or, more accurately, between rules having and lacking a certain important characteristic.[252] Some rules allocate initial entitlements—these unquestionably count as rules—but at the same time maximize individual flexibility and minimize the informational burden on government, by allowing private adaptation to determine ultimate outcomes. Consider, as a defining example, background rules in the law of contract, which can be adapted by the parties as they choose.[253] A background rule states a presumption: it applies if the parties do not provide otherwise, but the parties are freely entitled to alter it if they choose.

Other examples pervade the legal system. The rules of the road are unalterable in the sense that one cannot make green mean red or vice-versa, or drive on the wrong side; but the rules of the road allow large room for private judgment and thus differ from specific commands. By creating conventions, these rules help facilitate private conduct and permit people to

250. *See generally* Scalia, *supra* note 2.

251. *See generally* Frank I. Michelman, *Foreward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Martha Minow, *Foreward: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

252. Related discussion can be found in HAYEK, CONSTITUTION OF LIBERTY, *supra* note 12, at 148-61, distinguishing between "laws" and "commands." This is a highly illuminating but also confused discussion; I have drawn on some of Hayek's ideas but tried to reduce the level of confusion.

253. An instructive discussion of these issues appears in Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

operate under mutually beneficial arrangements.[254] Perhaps the most basic example can be found in common law rules allocating property rights and thus creating private property, or rules governing entry into agreements. In the same vein, a promising effort to allow private adaptation in current health and safety policy involves taxes imposed on polluting sources.[255] The rules embodied in such taxes are privately adaptable in the sense that people subject to the tax can alter their conduct so as to eliminate the tax or to reduce it; it is for them to decide just how to respond. In the same vein it has been suggested that if stabilizing population is the goal, rigid limits on family size may be inferior, as a policy tool, to more flexible, incentive-based strategies, such as greater education and employment for women.[256] All of these various provisions might be described as *privately adaptable rules.*

By contrast, some laws do not merely allocate entitlements, but also minimize private flexibility by mandating particular end-states or outcomes. Consider price controls, or specified technology for new cars, or flat bans on carcinogens in the workplace. Even if these rules have some flexibility at the margin, they allow little scope for private adaptation. Rules that specify end-states are common in modern regulation, in the form of "command and control" regulation that says exactly what people must do and how they must do it.[257]

The line between privately adaptable rules and commands is one of degree rather than one of kind. What I am describing is a characteristic present to a greater or lesser degree in some rules, not a crisply defined category of rules. Even command-and-control regulation allows a degree of private adaptation, in the sense that people are permitted to go out of business or to change their line of work so as to escape regulation entirely. Notably, all rules, including the most adaptable rules, allocate entitlements. The allocation may well have an effect on people's preferences, since people tend to prefer things that have been initially allocated to them;[258] it might also affect distributions and hence end-states as well.[259]

Indeed, it is insufficiently appreciated that government cannot avoid the task of allocating entitlements and of doing so through rules. Laissez-faire is a chimera; what is familiarly described as laissez-faire is actually a particular set of legal rules. Our rights, as we live them, do not come from

254. *See* HAYEK, CONSTITUTION OF LIBERTY, *supra* note 12, at 157-58.

255. *See* ALLEN V. KNEESE & CHARLES L. SCHULTZE, POLLUTION, PRICES, AND PUBLIC POLICY 69-111 (1975); ALLEN V. KNEESE, ECONOMICS AND THE ENVIRONMENT 260-63 (1977).

256. *See* Amartya Sen, *Population: Delusion and Reality,* 41 N.Y. REV. OF BOOKS 62, 71 (1994).

257. *See, e.g.,* Ackerman & Stewart, *supra* note 217, at 1334-40.

258. *See* RICHARD H. THALER, QUASI RATIONAL ECONOMICS 143-44 (1991).

259. Hence the Coase theorem will sometimes be wrong insofar as it predicts the initial allocation of the entitlement will not affect outcomes. *See* Cass R. Sunstein, *Endogenous Preferences, Environmental Law,* 22 J. LEGAL STUD. 217, 223-24 (1993).

nature. They depend on law.[260] The rules of private property and freedom of contract are rules, and they are legal in character. What I want to emphasize here is that these rules are distinctive in the sense that they allocate initial entitlements, allow private adaptation, and do not specify end-states.

The claim on behalf of privately adaptable rules is not that laissez-faire is a possibility for law. It is instead that law can choose rules with certain characteristics—rules that will reduce the risks of rules, by allowing private adaptation and by harnessing market and private forces in such a way as to minimize the *ex ante* informational and political burden imposed on government. A large part of the ultimate project of minimizing the costs of rigid rules is to favor rules that specify and allocate initial entitlements, and to disfavor rules that specify outcomes. In some cases, of course, private adaptation should not be allowed, because of effects on third parties, costs of administration and monitoring, lack of information, collective action problems, or other factors.[261]

A key feature of privately adaptable rules is their association with free alienability of rights. Ownership rights are of course freely alienable, and in this way they respond well to the fact that owners and prospective purchasers know how valuable the relevant rights are to them. The informational burden on government is therefore minimized. The surrounding rules do not operate as personal orders. To be sure, privately adaptable rules are coercive. The law of property is itself coercive insofar as it prevents nonowners from claiming what they would otherwise claim and doing what they would otherwise do.[262] The virtue of privately adaptable rules is not that they are not coercive and not that they are "natural"; it is that they reduce the costs of rule-making and harness private information and preferences[263] in the service of outcomes that are themselves not identified *ex ante.*

People who favor privately adaptable rules and who distrust rules that specify end-states are often known as critics of the modern regulatory state.[264] The distinction between the two sorts of rules might easily be harnessed in the service of an argument for private property, freedom of contract, simple rules of tort law, and relatively little else. The same insights might, however, be used on behalf of reform strategies that take the modern

260. See the instructive discussion of how cooperation must precede competition in JULES L. COLEMAN, RISKS AND WRONGS 60-62 (1992). This was an important theme in the New Deal era. For general discussion, see CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 40-67 (1993). Some important qualifications emerge from ROBERT C. ELLICKSON, ORDER WITHOUT LAW 156-66 (1991).

261. A discussion of all this would take me well beyond the present topic. *See generally* Anthony T. Kronman, *Paternalism and the Law of Contracts,* 92 YALE L.J. 763 (1983); Cass R. Sunstein, *Legal Interference with Private Preferences,* 53 U. CHI. L. REV. 1129 (1986).

262. *Cf.* SEN, INEQUALITY REEXAMINED, *supra* note 147.

263. Subject to the qualification in *supra* text accompanying note 258.

264. *See generally* HAYEK, CONSTITUTION OF LIBERTY, *supra* note 12; EPSTEIN, *supra* note 144. Although Hayek would allow the state to go well beyond the common law, he is sharply critical of the tendencies of post-1945 regulators.

state as an important social good. Many current regulatory rules are dysfunctional not because they promote the goals of the modern regulatory state, but because they unnecessarily specify end-states.[265] In so doing, they produce both injustice and inefficiency, in the form of overinclusiveness and underinclusiveness, replicating all of the problems typically associated with a refusal to make inquiries at the point of application.

A prominent example of this kind of rule is command-and-control regulation, pervasive in the law of environmental protection; this form of regulation has produced significant problems because of the pathologies of rules.[266] It makes no sense to say that all industries must adopt the same control technology, regardless of the costs and benefits of adoption in the particular case.[267] Command-and-control should generally be replaced by more flexible, incentive-based strategies, which invoke privately adaptable rules. Such strategies could save a great deal of resources by reducing legal rigidity. Liberty would be promoted as well. Instead of saying what specific technologies companies must use, a privately adaptable law might impose pollution taxes or fees, and then allow private judgments about the best means of achieving social goals. The government might also allow companies to buy and sell pollution licenses, a system that would create good incentives for pollution reduction without imposing on government the significant informational burden of specifying means of pollution reduction. The familiar economic argument for incentives is a key part of the argument for privately adaptable rules.[268]

Or consider the area of telecommunications, an area that has for too long been burdened by unduly rigid rules. For much of its history, the Federal Communications Commission has been faced with the task of deciding how to allocate licenses.[269] In making this decision, it has alternated between rules and factors. In using factors, the FCC has referred to local ownership, minority ownership, participation by owners in public affairs, broadcast experience, the adequacy of technical facilities, the background and qualifications of staff, the character of owners, and more.[270] The problems with both rules and factors are entirely predictable—inaccu-

265. This is a large theme in recent works on regulation. *See, e.g.*, Ackerman & Stewart, *supra* note 217; CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 74-110 (1990); *see also infra* note 268 (additional sources).

266. *See* Pildes & Sunstein, *supra* note 55, at 95-124. *See generally* Ackerman & Stewart, *supra* note 217.

267. It is important to consider the degree to which the legal system can compensate for mistakes in rules by adjusting sanctions and providing subsidies. *See* Bundy & Elhauge, *supra* note 23, at 270-78.

268. *See* John P. Dwyer, *The Use of Market Incentives in Controlling Air Pollution: California's Marketable Permits Program*, 20 ECOLOGY L.Q. 103 (1993); DAVID W. PEARCE AND R. KERRY TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT 102-09 (1990). Of course, the success of any such approach would depend heavily on accurate initial pricing of the pollution license. On this issue, see Pildes & Sunstein, *supra* note 55, at 122-23.

269. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 71-95 (1982).

270. *Id.* at 78-79.

racy through excessive rigidity on the one hand, and discretionary, ad hoc, costly, potentially abusive judgments on the other.[271]

What alternatives are possible? In a famous early article, Ronald Coase argued that the government should allocate broadcasting licenses through a system of privately adaptable rules[272]—based on property rights and market transfers, as property law does (for example) for ownership of newspapers and automobiles. In the recent past the FCC has experimented with auctions, and the results have been outstanding.[273] There is an obvious objection to Coase's proposal. Perhaps broadcasting licenses should not be regarded as ordinary property; perhaps the criterion of private willingness to pay is an inadequate basis for awarding licenses. This objection contains an important point.[274] Broadcasting may promote a range of "nonmarket" values, captured in the aspiration to promote education, attention to public affairs, diversity of view, and high-quality programming.[275] But this objection is not a justification for departing from privately adaptable rules in favor of command-and-control regulation. Any non-market values might be promoted by more flexible means. Thus the rules for auctions might be designed so as to ensure auction credits for those applicants who promise to promote nonmarket values.[276] This example shows that privately adaptable rules might well be used not to oppose regulatory goals, but instead to harness market forces in the interest of those very goals.[277]

E. Abolition

Sometimes both rules and factors are intolerable; sometimes market forces cannot or should not be harnessed. Having eliminated both rules and factors, the law might use a lottery instead as a method of allocating costs and benefits.[278] (Of course the decision to hold a lottery is supported by a rule.) This is a possible solution to the problems posed by a military draft, where rule-bound judgments seem too crude, and where rule-free judgments are too obviously subject to discrimination and caprice. Lotteries are used

271. *See id.* at 71-95.

272. *See* R.H. Coase, *The Federal Communications Commission,* 2 J. LAW & ECON. 1, 25-35 (1959).

273. *See generally* John McMillan, *Selling Spectrum Rights,* 8 J. ECON. PERSP. 145 (1994).

274. I try to support this view in CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 53-92 (1993). *See generally* Sunstein, *supra* note 130.

275. *See* ANDERSON, *supra* note 15, at 65-90; Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values,* 92 YALE L.J. 1537, 1580-81 (1983).

276. This route has been taken by the FCC. *See* McMillan, *supra* note 273, at 157-59.

277. I am dealing here with private adaptability within contexts that appear not to involve the symbolic, educative, or expressive problems of (for example) a "discrimination tax" or a "license to discriminate." For a discussion, see generally Robert Cooter, *Market Affirmative Action,* 31 SAN DIEGO L. REV. 133 (1994); *see also* ANDERSON, *supra* note 15, at 190-216 (discussing problems with commodification).

278. See the discussion of lotteries as allocation tools in JON ELSTER, SOLOMONIC JUDGEMENTS 36-122 (1989).

in many other areas as well.[279] Of course lotteries have an arbitrariness of their own, and for this reason, they may be an inferior approach.[280]

Alternatively, the legal system, having found both rules and ruleless-ness inadequate, might abolish the relevant institution or practice itself. (The abolition must of course be accomplished by rule.) Hence the narrowest and probably the best argument for abolition of the death penalty takes the following form. Rules are unacceptable because they eliminate the possibility of adaptation of criminal sentencing to individual circumstances.[281] Privately adaptable rules would make little sense in the context of criminal punishment, with the possible and controversial exception of plea bargaining. Rule-bound death sentences are excessively impersonal. But rule-free systems, including those based on factors, are unacceptable too, because they allow excessive discretion and create a risk that irrelevant or illegitimate considerations will enter the decision to impose capital punishment. When judgments are to be made about who is to live and who is to die, a high degree of accuracy is necessary, and errors based on confusion, variable judgments, bias, or venality are intolerable. The problem is that human institutions cannot devise a system for making capital decisions in a way that sufficiently diminishes the risk of error. Rule-bound systems create too many errors; so too with systems based on factors.

The strongest argument against the death penalty is not that the penalty of death is too brutal, but that it cannot be administered in a sufficiently accurate way. Suppose it could be shown that through individualized consideration in the form of factors, the rate of error is high, at least in the sense that irrelevant or invidious factors play a large role in the ultimate decision of life or death. Suppose that rules are the only way to eliminate the role of such factors, but that rules are objectionable in their own way, because they do not allow consideration of possible mitigating factors. Perhaps evidence to this effect would not be sufficient to convince skeptics that the death penalty is unacceptable. But if it is possible to persuade a sufficiently broad range of people of this conclusion, the sources of the argument lie in evidence of this sort.

CONCLUSION

A system committed to the rule of law is committed to limiting official discretion, but it is not committed to the unrealistic goal of making every decision according to judgments fully specified in advance. Nonetheless, rules are an admirable device for obtaining agreement on the content of law, and also for reducing discretion at the point of application. Often people

279. *Id.*

280. Of course, any real-world draft is likely to include some rules and standards as well. Multiple possible combinations might be imagined.

281. *See* Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

can agree on rules when they disagree about abstract and theoretical issues; they can agree that rules are binding, that rules are good, and that rules have a certain identifiable meaning. Frequently a lawmaker adopts rules because rules narrow or even eliminate the range of disagreement and uncertainty faced by people attempting to follow or to interpret the law. This step has enormous virtues in terms of promoting predictability and planning and reducing both costs and risks of official abuse.

Rules are sometimes thought to be associated with merely formal equality; but the association is misconceived. Hayekian understandings of the rule of law—identifying rules with free markets—introduce into that notion further ideas that should be distinguished and that require an independent defense.

Rule-skeptics say that rules are not what they appear to be. In their view, full *ex ante* specification of outcomes is a chimera. The need for interpretation during encounters with concrete cases means that *ex post* assessments of some sort are an inescapable part of law. Casuistry is a large part of rule-interpretation. There is some important truth in this claim. Almost any judgment about meaning will partake of *ex post* substantive ideas of a sort. It is almost inevitable that some case will arise that will confound the attempt to use rules to specify all outcomes in advance. What I have called "the problem of the single exception" is common in rule-interpretation.

These claims are chastening. But they should not be read for more than they are worth. Certainly they do not defeat the project of those who are enthusiastic about rules. Usually the question of meaning is easy. Often *ex ante* specification is possible for most cases, where shared understandings permit rule-following.

Rules have many goals, but as they operate in law, they are often simple summaries of good decisions in individual cases. In carrying out this task, they reduce costs, ease choice, limit the errors encountered in particular decisions, produce coordination, and make it unnecessary to debate issues of value and fact every time someone does something having social consequences. Because of their *ex ante* character, rules will usually be overinclusive and underinclusive with reference to the arguments that justify them. They will often be outrun by changing circumstances. Usually the crudeness of rules is tolerable, and most of the resulting inefficiency and injustice can be controlled through means short of abandoning rules. But sometimes the crudeness of rules counts decisively against them.

Many of the most difficult issues in law involve the choice between rules and rulelessness in cases in which both seem unacceptable—rules, because of their crudeness and their insensitivity to particulars that confound them; rulelessness, because of the likelihood of arbitrariness and discrimination in application. The Benthamite strategy calls for *ex ante* rules for the public and *ex post* case-by-case particularism for judges. I have

questioned this strategy on both economic and democratic grounds, but sometimes flexible, contextual interpretation of rules, adapting the general to the particular, can bring about something like the best of both worlds.

More generally, privately adaptable rules are a promising effort to minimize the problems of excessive generality, by opting for rules that allow private adjustment, harness private ordering, and reduce the informational costs imposed on government. Some people who favor such rules intend their arguments to be a challenge to regulation and a basis for approval of unrestricted (though rule-governed) "free" markets.[282] But privately adaptable rules may enjoy an important rebirth in the context of government regulation—in the creation of rules that are designed to accomplish regulatory goals, but that do so by specifying initial entitlements rather than final outcomes, and that harness market forces in the interest of socially chosen ends.

I have also suggested that legitimate rule revisions are pervasive, and that the choice between rules and rulelessness might well be based on a highly pragmatic, contextualized inquiry into the costs of the two approaches in the area at hand. Thus understood, the choice would itself be based on the practice of casuistry, in which judgments for or against rules emerge not from rules, but from careful assessments of particular circumstances. I have urged that casuistry may well be given democratic foundations insofar as it places a premium on rights to participate and to receive a response.[283] Casuistry is hardly all there is to a well-functioning legal system, and it has important limitations. But if what I have argued here is correct, a form of casuistry plays an important role in the interpretation of rules themselves, and it occupies a distinguished and prominent place even in a legal system committed to rule-bound justice and the rule of law.

282. *See* HAYEK, ROAD TO SERFDOM, *supra* note 12, at 69-76; *see also* EPSTEIN, *supra* note 144.

283. If casuistry is truly to promote democratic values, as indicated in EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2-6 (1948), a society must ensure that norms of participation and responsiveness are actually and not just theoretically reflected in relevant institutions.

APPENDIX: SOME DISPUTES BETWEEN RULES AND RULELESSNESS

RULE	RULELESSNESS
Roe v. Wade trimester system[284]	*Casey* "undue burden" standard[285]
Miranda rules[286]	"voluntariness" standard[287]
exclusionary rule for illegally obtained evidence[288]	inevitable discovery exception to the warrant requirement[289]
corporate transactions involving interested director voidable on demand[290]	corporate transactions involving interested director voidable when "unfair"[291]
"place of contracting" rule under *First Restatement of Conflict of Laws*[292]	assessment of relevant factors under *Second Restatement of Conflict of Laws*[293]
Social security grid[294]	Judgments before social security grid[295]
Mandatory retirement age[296]	Retirement when incompetence can be demonstrated[297]
Presumption that pre-termination evidentiary hearing is required[298]	Balancing test in determining the need for a hearing[299]
Mandatory death penalty for certain offenses[300] (invalidated)	Untrammeled jury discretion over imposition of death penalty[301]

284. Roe v. Wade, 410 U.S. 113, 163-64 (1973).

285. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2820 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

286. Miranda v. Arizona, 384 U.S. 436, 467-77 (1966).

287. *See* Brown v. Mississippi, 297 U.S. 278, 285 (1936).

288. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

289. *See* Nix v. Williams, 467 U.S. 431, 446 (1984).

290. *See* Wardell v. Railroad Co., 103 U.S. 651, 658 (1880).

291. *See* State *ex. rel.* Hayes Oyster Co. v. Keypoint Oyster Co., 391 P.2d 979, 984 (Wash. 1964).

292. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934).

293. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 188 (1969).

294. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, tbl. 1 (1994).

295. *See* MASHAW, *supra* note 136, at 114-16.

296. As upheld, for example, in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 316-17 (1976).

297. *See* Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(f)(1) (1985).

298. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

299. *See* Mathews v. Eldridge, 424 U.S. 319, 341-49 (1976).

300. This practice was invalidated in Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

301. Upheld in McGautha v. California, 402 U.S. 183, 207-08 (1971), *overruled by* Pitts v. Wainwright, 408 U.S. 941 (1972).

Regulation of speech justified by danger of "imminent and lawless action"[302]	Balancing risk against benefit[303]
No barrier under Tenth Amendment to congressional authority under Commerce Clause[304]	Tenth Amendment barrier to congressional authority under Commerce Clause when "traditional governmental functions" are involved[305]
"Per se" rule in antitrust[306]	"Rule of reason" in antitrust[307]
No contracts without consideration[308]	Promissory estoppel when reliance is reasonable[309]
Absolute protection of endangered species[310]	Consideration of loss of species as a relevant factor[311]
Rule of deference to agency interpretations of ambiguous statutes[312]	Deference to agency interpretations when reasonable to defer[313]
Caveat emptor[314]	Seller liable for "latent defects"[315]
Contract at will—employer and employee may fire or quit as they choose, unless contract provides otherwise[316]	Employer may not discharge in violation of public policy[317]

302. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (per curiam). *Brandenburg* placed strict limits on the "clear and present danger" principle of speech regulation first set out in Schenck v. United States, 249 U.S. 47, 52 (1919).

303. *See* Dennis v. United States, 341 U.S. 494, 508-09 (1951).

304. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985).

305. *See* National League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

306. *See* NCAA v. Board of Regents, 468 U.S. 85, 103-04 (1984).

307. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

308. *See* Dougherty v. Salt, 125 N.E. 94, 95 (N.Y. 1919).

309. *See* Goodman v. Dicker, 169 F.2d 684, 685 (D.C. Cir. 1948).

310. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 173 (1978) (interpreting the Endangered Species Act).

311. *See* § 1(b), 80 Stat. 926 (1966) (precursor to Endangered Species Act). The Endangered Species Act is codified at 16 U.S.C. § 1531 (1985 & Supp. 1995).

312. *See* Chevron USA, Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

313. *See, e.g.*, Baltimore Gas & Elec. Co. v. National Resources Defense Council, Inc., 462 U.S. 87, 97-108 (1983) (upholding a rule adopted by the Nuclear Regulatory Commission which was premised on a conclusion that permanent storage of nuclear waste would have no significant environmental impact).

314. *See* Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 388 (1871).

315. *See* Vandermark v. Ford Motor Co., 391 P.2d 168, 171-72 (Cal. 1964).

316. *See* Payne v. Western & Atlantic R.R., 81 Tenn. 507, 519-20 (1884).

317. *See* Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983).

Plain meaning approach to statutory interpretation[318]	Inquiry into legislative intentions[319]
All administrative/executive authority must be under the President[320]	Administrative/executive authority may be immunized from President if this does not intrude on President's core functions[321]
Negligence per se[322]	Negligence if conduct is unreasonable[323]

318. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 173 (1978).
319. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410-16 (1971).
320. *See* Myers v. United States, 272 U.S. 52, 117 (1926).
321. *See* Morrison v. Olson, 487 U.S. 654, 693-97 (1988).
322. *See* Osborne v. McMasters, 41 N.W. 543, 544 (Minn. 1889).
323. *See* RESTATEMENT (SECOND) OF TORTS §§ 291, 292 (1965).