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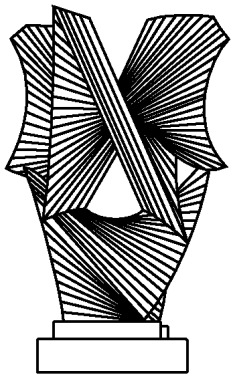

# Rules and Rulelessness

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# Rules and Rulelessness

*Cass R. Sunstein*[*]

*[T]he establishment of broadly applicable general principles is an essential component of the judicial process.*
—Justice Antonin Scalia, *The Rule of Law is A Law of Rules*

*[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, *Principles of Psychology*

## Introduction

There are two stylized conceptions of legal judgment. The first, associated with Jeremy Bentham and more recently with Justices Hugo Black and Antonin Scalia, 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 Blackstone and more recently with Justices Felix Frankfurter and John Marshall Harlan, places a high premium on *law-making at the point of application* through case-by-case decisions, narrowly tailored to the particulars of individual circumstances. 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.

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It would not be easy to overstate the importance of the controversy between the two views. Such issues arise in every area of law; they often involve fundamental liberties. 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 is incoherent. Few if any judgments about a particular case 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. 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. In short, the costs of making rules, and of adhering to rules, are often extremely high.

One of my principal goals in this essay is to respond to a pervasive social phenomenon: extravagant enthusiasm for rules and the rule of law. Case-by-case decisions are an important part of legal justice. At the same time, we should keep in mind the characteristic vices of rulelessness, which include bias, unequal treatment, and high costs. Particularism is even worse than a mixed blessing for law; it is an invitation to error and abuse.

As a way of reducing the risks of both rules and case-by-case judgments, I suggest two principal alternatives. The first is pragmatic. It involves a highly contextualized inquiry into the levels and kinds of error and injustice via rules or via rulelessness. Surprising progress can be made through such inquiries. Rules cannot be fa-

vored or disfavored in the abstract; everything depends on whether, in context, rules are superior to the alternatives. The second involves a presumption in favor of 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. 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 a wide range of corrections to the operation of economic markets.

## I. SOURCES OF LAW

Law has a toolbox, containing many devices. Lawyers have customarily opposed rules ("do not go over 60 miles per hour") to standards ("do not drive unreasonably fast"), with rules seeming hard and fast, and standards seeming open-ended. There is indeed a difference between rules and standards. But the rules-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 them; my goal is only to clarify some terms that will come up throughout.

First, however, a cautionary note. It will be apparent that whether a legal provision is a rule, a presumption, a principle, a standard, 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. The American Constitution, for example, says that "Congress shall make no law abridging the freedom of speech." 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 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. 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 le-

gal 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 (see below), 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, and the lawmaker has 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 lights. As we will see, the interpretation of seemingly rigid rules itself 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. But perhaps some police officers come very close to this sort of authority, in light of the practical unavailability of review.

As we will soon see, it is too simple to oppose rules to discretion. The basic problem with this opposition is that interpretation of rules involves discretion, and that 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. In fact there is no such polar opposition. Rules do not eliminate discretion. There is a continuum from rules to untrammeled discretion, with factors and standards (see below) falling in between.

The key characteristic of rules is that they specify outcomes before particular cases arise. Rules are defined by the ex ante character

of law. By a system of rules, I therefore mean to refer to something very simple: *approaches to law that make most or nearly all legal judgments under the governing legal provision in advance of actual cases*.[1] 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. Rules do not and indeed cannot contain all of the necessary instructions for their own interpretation. Nonetheless, it is possible to ensure that a wide range of judgments about particular cases will occur in advance.

On this view, a system of rules exists to the extent that most or all of the real work of deciding cases and giving content to the law has been done before the actual applications. 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 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 does when, for example, a judge decides whether someone is liable for nuisance by seeing 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" (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 with more substantive understandings 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

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[1]This understanding is close to that in Louis Kaplow, Rules and Standards: An Economic Analysis, 42 Duke LJ 469 (1992).

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 60 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, indeed nearly impossible, 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 President to suspend the writ of habeas corpus in time of war. Other constitutions say that certain rights can be abridged under unusual circumstances. We might go so far as to say that almost all rules have at least some implicit exceptions.

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 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 government 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. 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 a particular degree. The line between presumptions and rules with emergency exceptions is 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 ways of proceeding with approaches that allow particular judgments to emerge *through the decisionmaker's assessment and weighing of a number of relevant factors, whose precise content has not been specified in advance*. The key point is that several factors are pertinent to the decision, but there is no rule, 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 decisionmaker 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 rules must determine at least some of their content. In a system of factors, moreover, the decisionmaker cannot do whatever she wants. But 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 assessment of particular cases.

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." These factors were "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 and production of fuels; (8) economic efficiency; and (9) minimization of interference with market mechanisms."[2] 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 explicit 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 way, so as to allow unanticipated, additional considerations to apply.

*F. Standards*

Rules are often compared with standards.[3] A ban on "excessive" speeds on the highway is familiarly thought to involve a standard; so too with a requirement that pilots be "competent," or that behavior in the classroom be "reasonable." As standards, these might be compared with a 55 miles per hour speed limit, or a ban on pilots who are

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[2]Act Nov. 27, 1973, P.L. 93-159, @ 1, 87 Stat. 627 (1973).

[3]See, e.g., Louis Kaplow, Rules and Standards: An Economic Analysis, 42 Duke LJ 469 (1992); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv L Rev 1685 (1976); Kathleen 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 LJ 65 (1983)

over the age of 70, or a requirement that students sit in particular, assigned seats.

The contrast between rules and standards is very 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. With a standard, it is not possible to know what we have in advance. The meaning of a standard depends on what happens with its applications. The important feature of standards is that they share with factors a refusal to specify outcomes in advance. Standards depart from factors in refusing to specify the sorts of considerations that are relevant in particular applications. It would not be right, however, to say that standards offer more discretion than factors. The amount of discretion depends on the context.

Here too, moreover, the nature 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 whenever it is over 60 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. Or we may instead end up with a set of factors or a presumption. Perhaps anyone who goes over 60 miles per hour will be presumed to have gone excessively fast, unless special circumstances can be shown. Or perhaps the judgment about excessive speed will be based on need, weather conditions, traffic, time of day, and so forth. The principal distinction between rules and standards turns on the fact that we do not know what a standard is, or means, until it is applied.[4] Something of the same kind can be said of rules (see below), but it cannot be said nearly so bluntly.

*G. Principles*

In law, principles are often said to be both deeper and more general than rules. We might say that rules are justified by principles. The justification of the rule could be used to interpret its meaning; hence courts will resort to the principle in trying to understood the rule. For example, there is a 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 governing homicide. There is a prin-

[4]See Kaplow, supra note 2.

ciple to the effect that it is wrong not to keep your promises; hence the law contains a range of rules for enforcement of contractual obligations. A common use of the term "principle" in law involves the justifications behind rules.

There is another and quite different understanding of the notion of principle in law. Any legal system contains explicitly formulated principles as well as rules; these principles do not lie behind rules but instead bear on the resolution of cases. 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. 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. Usually they operate as factors. But principles are not rules. We might say that principles are more flexible than rules, in the sense that principles bear on cases without disposing of them. The distinction should not be overstated. Since any given rule *X* is unlikely to resolve all cases that fall under the literal language of rule *X*, the difference between rules and principles is one of degree rather than of kind.

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 we understand a principle as 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 cases, whereas a principle is a background notion that does not by itself cover an individual case, but is instead brought to bear on it. This is a lamentably vague formulation. But the distinction makes intuitive sense. Compare a standard banning unreasonable risks with a principle to the effect that statutes should be construed so as to avoid constitutional doubts.

One final complication. It is sometimes said that a decision in a case turns 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, and at some points below, I will use the terms interchangeably.

*H. Analogies*

The last category is not a simple alternative to the others. Sometimes a legal system proceeds by comparing the case at hand to a case (or to cases) that have come before. 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. The rule emerges from comparison of cases, and it is applied only after it has been specified. Analogical thinking is rule-based (or standard-based) only in the sense that it depends on a rule (or a standard); but analogical thinking does not involve simple rule-application (or standard-application) because the rule (or the standard) is not given in advance. Analogical reasoning is thus not a form of rule-application.

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 factors—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.

## 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 seems to require a system of

rules.[5] 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. This is particularly important in the area of criminal justice and freedom of speech, where the "void for vagueness" doctrine requires clear rules before the state may regulate private conduct.

It is not an overstatement to say that the void for vagueness doctrine is among the most important guarantees of liberty under law. Consider *Papachristou v. City of Jacksonville*,[6] which is exemplary on the point.

In the early 1970s, it was a crime to engage in "vagrancy" in the City of Jacksonville. The category of "vagrancy" covered "Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers . . . persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons . . . persons able to work but habitually living upon the earnings of their wives or minor children . . . ." A number of people were arrested under this law. Among them were two white women, Papachristou and Calloway, who had been traveling in a car with two black men, Melton and Johnson.

The Supreme Court reversed the convictions on the theory that the Jacksonville ordinance was inconsistent with the due process clause. It was "void for vagueness," because it failed to provide fair notice that contemplated conduct is unlawful, and because "it encourages arbitrary and erratic arrests and convictions." The Court emphasized several points: "The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume that they would have no understanding of their meaning and impact if they read them." Moreover, the "ordinance makes criminal activities that by modern standards are normally innocent." Thus "[p]ersons 'wandering or strolling' from place to place have been extolled by

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[5]Friedrich Hayek, The Road to Serfdom (1944); Lon Fuller, The Morality of Law (1962); Joseph Raz, The Rule of Law and its Virtue, in The Authority of Law 210 (1986).

[6]405 US 156(1972).

Walt Whitman and Vachel Lindsay. . . . The difficulty is that these activities are historically part of the amenities of life as we have known them."

The ordinance was also unlawful because it put "unfettered discretion . . . in the hands of the Jacksonville police." To say this is not to deny that the ordinance could serve important law enforcement purposes. The Court said: "Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the round-up of so-called undesirables. But the rule of law implies equality and justice in its application."

Notably, the Court quoted a law review article to the effect that "'Algeria is rejecting the flexibility introduced in the Soviet criminal code by the 'analogy' principle, as have the East-Central European and black African states." Many systems of criminal justice have made it an offense to engage in conduct that is "analogous" to what is specifically prohibited. The analogical principle has played a large role in Chinese criminal law.[7] Apparently the Supreme Court believed that this analogical approach to the criminal law[8] raises severe questions under the due process clause.

We can take *Papachristou* to exemplify a failure of the rule of law. But what specifically does this concept entail? We can identify several characteristics.[9]

*a. Clear, general, publicly accessible rules laid down in advance.*

It is plain that the rule of law requires rules that are *clear*, in the sense that people need not guess about their meaning, and that are *general*, in the sense that they apply to classes rather than particular people or groups. Laws should be publicly accessible as well. It follows that there is a ban on "secret law." Legal proscriptions must be available to the public. Of course vague laws—banning, for example, excessive or unreasonable behavior—are unacceptable, at least in the criminal context; they are akin to "secret law" in the sense that people cannot know what, specifically, they entail. The idea that law

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[7]See Jon Elster, Solomonic Judgments 217 (1989), citing an unpublished paper by Hungdad Chiu.

[8]England too had analogical crimes. This tradition was of course rejected in the United States.

[9]I claim little originality here, drawing on Fuller, The Morality of Law, supra note 5, and Raz, in The Authority of Law, supra note 5.

should be laid down in advance is associated with the notion that rules, to qualify as such, must specify outcomes before the point of application. When rules are operating, people who interpret or apply the law do not give content to the law in the encounter with particular problems.

In the real world of law, many complexities arise on these counts. It is a fiction to say that would-be criminals actually consult the law in advance of the crime. In fact we do not know the extent to which criminal statutes are understood by the general public. Undoubtedly the answer varies from area to area, and in many cases people could not describe the law with much accuracy. It is also the case that many laws, including criminal statutes, have a high degree of ambiguity. No legal system is without a large degree of discretion to give content to law at points of application, and this means that ruleness will be limited even in legal systems highly committed to the rule of law. Perhaps this is a failure of the rule of law, but it also seems to be a product of the limitations of human language and foresight.

*b. Prospectivity; no retroactivity.*

In a system of rules, retroactive lawmaking is disfavored, and it is banned altogether in the context of criminal prohibitions. In general, laws must operate prospectively only. The ban on ex post facto laws is the clearest prohibition on retroactivity. More modestly, American law includes an interpretive principle to the effect that civil laws will ordinarily apply prospectively. If the legislature wants to apply a law retroactively, it must do so unambiguously, and if it does so unambiguously, there is at least a question to be raised under the due process clause.

*c. Conformity between law on the books and law in the world.*

If the law does not operate in the books as it does in the world, the rule of law is compromised. If there is little or no resemblance between enacted law and real law, the rule of law cannot exist. If the real law is different from the enacted law, generality, clarity, predictability, fair notice, and public accessibility are all sacrificed. People must be permitted to monitor official conduct by testing it against enacted law.

In many legal systems, of course, there is an occasional split between what the law says and what the law is, and often the split is severe. But the frequency of the phenomenon should not deflect attention from the fact that this is a failure of the rule of law.

*d. Hearing rights and availability of review by independent adjudicative officials.*

The rule of law requires a right to a hearing in which people can contest the government's claim that the relevant conduct meets legal requirements for either the imposition of harm or the denial of benefits. Someone who is alleged to have committed a crime, or to have forfeited rights to social security benefits or a driver's license, is entitled to some forum in which he can claim that the legal standards have not in fact been violated. Ordinarily the purpose of the hearing is to ensure that the facts have been accurately found. There should also be some form of review by independent officials, usually judges entitled to a degree of independence from political pressures.

*e. Separation between law-making and law-implementation.*

Legal systems committed to the rule of law separate the task of making the law from the task of implementing the law. For example, the nondelegation principle requires that the legislature lay down rules in advance; it therefore prohibits rules from being created by the people who execute them. The nondelegation principle is now honored much more in the breach than in the observance, in part because there are no clear criteria by which to distinguish law-making from law-implementation. The distinction is one of degree rather than kind. But in some areas of law, people engaged in enforcement activity are constitutionally constrained from giving content to the law. The area of criminal justice is an important example.

*f. No rapid changes in the content of law; no contradictions or inconsistency in the law.*

If the law changes too quickly, the rule of law cannot exist. People will not be able to adapt their conduct to what is required. So too if the law contains inconsistency or contradiction, which can make it hard or impossible to know what the rules are. Needless to say, people should not be placed under mutually incompatible obligations. The problem of rapidly changing law was a prime impetus behind the adoption of the American Constitution. Hence

Madison wrote: "The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded that I do not err in saying that the evils issuing from these sources contributed more to the uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects."[10]

Both of these phenomena—unstable law and inconsistent law—are part of the fabric of the modern regulatory state. Sometimes regulatory law changes very quickly, thus making it difficult for people to plan. Sometimes regulatory law imposes conflicting obligations, so that it is hard for people to know what they are supposed to do. These are important pathologies of modern law, and they produce high levels of inefficiency and injustice.

*g. Likelihood of agreement on meaning of rules from people who disagree on first principles.*

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 law that forbids people from going over 55 miles per hour has the same meaning to Republicans and Democrats, libertarians and socialists, anarchists and members of the Ku Klux Klan. When the rule of law is in place, people can know what the rules are without adverting to first principles. Indeed, adverting to first principles is generally illegitimate, short of civil disobedience. By their very nature, rules ban people from basing their decisions on considerations that are perfectly legitimate in other settings.

This is an oversimplification, as we will see. Disagreements about first principles may break out in disputes over the meaning of rules. But the oversimplification has 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.

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[10]Letter to Thomas Jefferson, October 24, 1787.

## III. THE CASE FOR RULES

A great virtue of rules is that they circumscribe permissible grounds for both action and argument; in doing so, they reduce costs of many diverse kinds. I have said that in a heterogeneous society, containing people of limited time and capacities, this is an enormous advantage. It saves a great deal of effort, time, and expense. But by truncating the sorts of value-disputes that can arise in law, it also ensures 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 here.

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. Of course a rule that counts as a summary of wise decisions may operate, for good pragmatic reasons, as a genuine 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 a pretty accurate summary of good individual decisions, and 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 left-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 left because it is a wise decision, in the individual case unaccompanied by rules, to drive on the left. So too, rules may solve prisoner's dilemmas, in which individually rational decisions can lead to social irrationality or even disaster. The rules governing emission of pollu-

tants are an example. And if each polluter felt free to revisit the justification for the rule, 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*. The rules governing who may marry whom, for example, say something about the institution of marriage and about social convictions of 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.

4. Some rules overcome the problem of *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 period. In these circumstances, a rule that is enforceable through some mechanism—perhaps social sanctions—may be the best way to proceed.

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

### *B. Defending Rules As Rules*

Rules might produce *incompletely theorized agreements*—agreements among people who disagree on questions of theory or on fundamental values. Rules might do this in three different ways. First, people can agree that a rule is binding, or authoritative, without agreeing on a 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.

Second, people can often converge on a rule without taking a stand on large issues of the right or the good. Acceptance of precedents is a familiar practice. So too, people can urge a 60 miles per hour speed limit, a prohibition on bringing elephants into restaurants, a ten-year minimum sentence for attempted rape, 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. 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 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 can usually do so without getting into high-level theory.

Third, rules sharply diminish the level of disagreement among people who are subject to them, and among people who must interpret and apply them. When rules are in place, theories need not be invoked in order for us to know what rules mean, and whether they are binding. This generalization is a bit crude; but it is fundamentally right. In this section, I am concerned principally with the advantages of rules for those who must follow, enforce, and interpret the law.

*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. Without rules, decisions are extremely expensive; rules can produce enormous efficiency gains. Every day we operate as we do because of rules, legal and nonlegal, and often the rules are so internalized that they become second-nature, greatly easing the costs of decisions and making it possible to devote our attention to other matters.

Rules are disabling for just this reason; but they are enabling too. Like the rules of grammar, they help make social life possible. If we know that there will be one and only one President, we do not have to decide how many presidents there will be. If we know that a will must have two witnesses, we do not have to decide, in each case, how many witnesses there must be to a will. It thus emerges that rules both free up time for other matters and facilitate private and

public decisions by establishing the frameworks within which they can be made.

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 investigate to examine fundamental issues in every instance (and in that now-familiar way they can 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 too may 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. Recall two related points: A rule is not really a rule if decisionmakers feel free to disregard it if its application is not supported by its justification; and if decision-makers investigate the grounds for rules before applying them, they convert rules into something very close to standards or factors. There is much to be said on behalf of refusing to inquire into the grounds for rules. If we substitute for rules an investigation of whether their justification makes sense in each instance, we are engaging in a form of case-by-case decisionmaking, and it is easy to underestimate the often enormous 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, of that goal.

Some of the costs of rulelessness are simply a matter of compiling information. To know whether a particular pilot is able to fly competently, we need to know a lot of details. But some of the 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 high costs or great difficulty in producing a rule; proceeding through factors may involve lower cost ex ante. But once a rule is set forth, individual officials can bracket those matters and take the decision as a

given. An advantage of having a rule is that those who must interpret rules need not make difficult judgments about first principles. They can take those judgments as given, at least for the most part.

The high costs—informational and political—of ruleless decisions are often not visible 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 the real content of the law. 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 individuals to align their conduct accordingly, and thus to plan without fear of sanctions. 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, who must give content to the law in particular cases, high costs can be borne by citizens and corporations as well. People will be unable to plan; they will also have to invest large amounts of resources in trying to predict outcomes and to persuade people that the balance of factors favors them in particular cases. For all these reasons, a good justification for insisting on rules involves the multiple expenses of proceeding without them.

As we have seen, rules are also a way of overcoming myopia and some unusual collective action problems. All of us adopt rules in our everyday life, whether presumptive or conclusive. A person may adopt a rule—simply for himself—in order to diminish the costs of decision in particular cases; or in order to protect himself from shortsightedness, in the form of behavior that has high short-term

benefits, low short-term costs, but high aggregate costs and low aggregate benefits; or in order to ensure against the kind of intrapersonal collective action problem that arises when he fails to take adequate account of what we might metaphorically see as the "successive selves" affected by his acts.

For example, Jones might decide never to take a drink during the weekday, or never to go into work on Saturday, or to exercise every other day. Jones may do this in order not to have to make individualized decisions, and in order to adopt rules that produce good aggregate outcomes notwithstanding particular cases of high costs and low benefits. Even to consider whether to make an exception in a particular case may not be worthwhile—because if one exception is possible, the possibility of exception is omnipresent, and the costs of deliberation go up enormously. The phenomenon of imperfect but efficient, optimal, or otherwise desirable rule-bound choice is omnipresent in personal lives.

There are analogues at the social and legal level. Rules may facilitate social decisionmaking by reducing the costs of individualized consideration. If we adopt a rule to the effect that there will be two senators, rather than three or six, we do not have to decide in every case how many senators there will be, and this is a highly facilitative device for a democracy. As a social practice, constitutionalism has this general feature. The rules embodied in constitutionalism, often thought to conflict with democracy, in fact make it possible.

Legal rules can also overcome social myopia. Myopia may take the form of decisions whose long-term costs dwarf their long-term benefits, despite cases where the short-term benefits are high. Consider mandatory retirement rules and the social security disability grid.[11] Constitutionalism is also an attempt to counteract decisions that seem to make short-term sense, but that are in the long run harmful or self-defeating.

Of course these costs may be lower than those produced by some rules, and thus we cannot say, in the abstract, whether rules are better than rulelessness from the standpoint of private citizens. 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

[11]See Heckler v. Campbell, 461 US 458 (1983).

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 college admission.[12]

*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 in the form of confusion or ignorance; they can also counteract something worse, that is, bias, favoritism, or discrimination on the part of people who decide particular cases. In this way they are associated with impartiality. Their impartiality is captured in the notion that the Goddess justice is "blind." Rules are blind to many features of a case that might otherwise be relevant and that are relevant in some social contexts—religion, social class, good looks, height, and so forth—and also to many things on whose relevance people have great difficulty in agreeing.

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 of 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. Should everyone who has exceeded 60 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 fail to promote equal treatment as compared with rulelessness.[13]

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[12]See Jon Elster, Local Justice 169 (1992).

[13]See Frederick Schauer, Playing By The Rules 136-37 (1991).

*3. Rules serve appropriately both to embolden and to constrain decision-makers in particular cases.*[14]

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. Rules that have been set out by the legislature or by the judges themselves may provide the basis for courageous decisions that might otherwise be difficult to reach and to legitimate. The fact that rules resolve all cases before the fact can thus make it possible for officials to stick with certain judgments when they should do so, but when they might be tempted to deviate.

Suppose, for example, that the Supreme Court has set out the Miranda rules, and that everyone knows that they will be applied mechanically and 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 rules should yield before a balancing test to be resolved unfavorably to the defendant. Similarly for the implementing doctrines for free speech. For example, if the rule banning discrimination against viewpoints is well-entrenched in the law of free speech, judges can refer to that rule in invalidating laws banning flag-burning, even in the face of severe and otherwise irresistible public pressure. The key advantage here (one that can be a disadvantage too) is that rules decide cases in advance of the point of application. They also make it unnecessary and even illegitimate to return to first principles. If judges decided on the content of law at the point of (political charged) application, and if they had to go back to first principles, they might not adhere to those principles at all when the stakes are high, or there would be sharp disagreements among people who thought that the rules were bad on balance.

In one sense rules reduce responsibility for particular cases, by allowing the authority to claim that it is not his choice, but the choice of others who have laid down the rule. 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

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[14]See Antonin Scalia, The Rule of Law is a Law of Rules, 56 U Chi L Rev 1175, 1185 (1989).

be binding, the law can usefully stiffen the judicial spine in cases in which this is a valuable guarantor of 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, where judicial discretion is broader at the point of application and where 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 decisions amidst heterogeneity.

*4. Rules promote predictability and planning for private actors, Congress, and others.*

From the standpoint of people who are subject to public force, it is especially important to know what the law is before the point of application. Indeed, it may be more important to know what the law is than to have a law of any particular kind.

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. Under a balancing test, neither the government nor affected citizens may know in advance about their obligations. Consider, by contrast, the Miranda rules. A special virtue of those rules is that they tell the police actually what must be done, and therefore eliminate guessing-games that can be so destructive to planning ex ante. So too in the environmental area, where clear rules are often far better than the "reasonableness" inquiry characteristic of the common law.

*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 the Congress. A large problem with a system based on standards or factors is that no one knows who is really responsible if, for example, the air stays dirty or is cleaned up at excessive cost. If the Miranda rules create a problem, the Court is obviously the source of the problem. But if a due process

calculus based on factors produces mistakes of various sorts, it is possible that the Court itself will escape the scrutiny it deserves. People may blame the lower-court judges assessing the factors, rather than the Court itself.

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. This monitoring is harder to achieve in a system of factors.

*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 conduct that they seek. Rules turn citizens into right-holders, able to ask for certain treatment as a matter of right. Discretion, standards, or factors are more likely to make citizens into supplicants, requesting official help, with officials encountering the details of the situation of each citizen. Importantly, factors allow mercy, in the form of relief from rigid rules. But rules have the comparative advantage of forbidding officials from being punitive, or unmoved, for irrelevant or invidious reasons, by a particular applicant's request.

Compare, for example, a mandatory retirement for people over the age of 70 with a law permitting employers to discharge employees who, because of their age, are no longer able to perform their job adequately. One advantage of the former over the latter is that if you are an employee, it is especially humiliating and stigmatizing to have employers decide whether you have been rendered incompetent by age. A rule avoids this inquiry altogether, and it might be favored for this reason even if it is both over- and under-inclusive.

## IV. AGAINST RULES, I: ARE RULES TOO CONSERVATIVE? ARE THEY ASSOCIATED WITH UNDULY FREE MARKETS?

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 is that rules cannot do what is claimed for them, since disagreements about foundational issues will indeed break out at the

moment of application. The third challenge is that the generality of rules, and their blindness to particulars, is a political vice, because a just system allows equity, or adaptation to the particulars of individual cases. There is nothing in the first challenge, some important truth in the second, and some enduring wisdom in the third.

*A. The Rule of Law As A Check on Legislation*

Some people think that the requirements of the rule of law provide an important check on partisanship or selectivity insofar as these are reflected in law. On this view, the rule of law is a requirement of generality, and the requirement of generality 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.

An influential discussion appears in Justice Robert Jackson's concurring opinion in the *Railway Express* case.[15] 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 the use of advertising on vehicles that are 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. The Court added that "the fact that New York City sees fit to eliminate from traffic this kind of distraction but 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."[16] In this way the Court rejected the idea that the principle of generality imposed serious limits on legislative classifications.

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[15] 336 US 106

[16] Id at 110.

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 an absolute, flat barrier to legislative enactments. In this way it "leaves ungoverned and ungovernable conduct which many people find objectionable." But the equal protection clause is not similarly disabling. "It merely means that the prohibition or regulation must have a broader impact." The requirement of breadth in turn serves a democratic function. "[T]here is no more effective practical guaranty against arbitrary or 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."

In Justice Jackson's view, a requirement of generality helps to flush out illegitimate reasons. 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 public-regarding justifications for the denial of benefits or the imposition of burdens. Moreover, the requirement of generality can bring into effect political checks that would otherwise be too weak to prevent oppressive legislation from going forward.

But how are we to know that a seemingly narrow enactment must be applied generally? Is it illegitimate (for example) to exempt labor unions 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?

To know whether generality is required, we have to know 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 there are relevant differences. 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 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."

We should conclude that any requirement of equal treatment depends on a substantive theory establishing whether there are relevant differences between the cases to which a law is applied and the cases to which it is not. Sometimes the necessary theory is readily available. 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, and Justice Jackson's analysis seems unimpeachable. But sometimes the plea for generality is based on 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, we are not merely requiring generality, but second-guessing 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.[17]

### *B. Is the Rule of Law Associated With Free Markets?*

These points provide reason to doubt Friedrich Hayek's influential discussion of rules and the rule of law. 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 associates the requirement of generality with that of impartiality. Because the rule of law does not pick out particular winners and

[17]See also Raz, The Rule of Law and Its Virtue, supra note 5.

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

But what does the requirement of generality forbid? Hayek does not disapprove of much that is done in the name of the regulatory state. Government provision of public services is on his view unobjectionable.[18] Nor does he disapprove of "general rules specifying conditions which everybody who engages in a certain activity must observe." This category includes regulations of production, maximum hour laws, laws banning dangerous products, or laws protecting conditions in the workplace. Hayek thereby accepts, at least in principle, much of what is done by the modern administrative state.

What, then, is prohibited? Hayek is concerned about those measures that "involve arbitrary discrimination between persons."[19] 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."[20]

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 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 the state may impose occupational qualifications.[21] 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

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[18]Friedrich Hayek, The Constitution of Liberty 223 (1960).

[19]Id. at 224.

[20]Id.

[21]Id. at 226.

qualifications. But the rule of law, standing by itself, does not supply that theory.

What about price controls? It is possible to imagine a system that imposed stable price minima and maxima, as in the minimum wage laws or various regulations governing agricultural requirements. So long as the set prices are stable, these requirements seem consistent with the rule of law (which is of course not at all to say that they are good policy). Hayek is concerned that any prices must be constantly adjusted, but this is an uncertain empirical claim. Hayek also thinks that since they abandon the touchstone of supply and demand, any governmentally-fixed prices "will not be the same for all sellers" and that they will "discriminate between persons on essentially arbitrary grounds."[22] His conclusion is that all controls of prices and quantities "must be arbitrary."

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 obscure. Price controls can satisfy all of the requirements described above; if the controls are stable, public, general, and so forth, they are 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 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 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 about rule-free government. But this conclusion would be too simple. There are at least three common features. First, the rule of law does not make ex post adjustments. Rules operate prospectively; they take the ex ante perspective. The same is true for markets. 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,

[22]Id.

should be "blind." Markets are similarly blind. Third, and perhaps paradoxically, Hayek is concerned to ensure against measures that impose inappropriate informational demands on government. Price-fixing is especially objectionable because it requires government to do something that it lacks information to do well. The same argument can be invoked on behalf of (at least 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 laws that Hayek finds compatible with the rule of law do, in a sense, pick winners and losers. Certainly this is true for minimum wage laws and 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. It is likely, for example, that disabled people are unlikely to do well in a market system run under the common law.

Finally, it is at least a theoretical possibility that a system of planning could comply with the rule of law, at least if the "plans" were announced in advance and if expectations were firmly protected. Probably most real-world systems of planning must shift too rapidly to conform to these requirements. This may in the end by Hayek's point: To produce equality or other social goals,, and to counteract the outcomes of markets, planners must interfere with markets so frequently and on such an ad hoc basis, or displace them so completely, that predictability, protection of expectations, and control of official discretion become difficult or impossible. This point seems both true and important. It is part of the enduring argument against certain forms of socialism. But Hayek seems to have something else in mind, having to do with the way in which plans play favorites. The notion that plans play favorites is parasitic on an unarticulated understanding of fair processes and distributions. That understanding has nothing to do with the rule of law.

These points cast doubt not only Hayek's view but also and for the same reasons on Marxist-inspired attacks on the rule of law. Consider Morton Horwitz' suggestion that "[u]nless 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."[23]

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 are connected with merely formal equality—is therefore unpersuasive. 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 association between rules on the one hand and conservatism, free markets, or inequality on the other.

## V. AGAINST RULES, II: ARE RULES FEASIBLE?

### *A. Challenges*

Some people deny the feasibility of rules and the rule of law.[24] 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 full ex ante allocation of legal rights, it is said, rules are impossible. Encounters with particular

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[23]Morton Horwtiz, The Rule of Law: An Unqualified Human Good. 86 Yale LJ 561 (1977).

[24]Duncan Kennedy, Legal Formality, 2 J Legal Stud 335 (1973).

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, and even when the meaning of a legal term is clear in the abstract or in the dictionary, uncertainty may break out at the point of application. If we are fanatical about limiting interpretive discretion, we will be disturbed to find that laws that apparently amount to rules call for moral or political judgments by interpreters at the point of application. But perhaps this is not a decisive problem with a system of rules. Some laws that appear to be rules are really standards; they invite moral or political judgments, and laws that use words like "equal" or "reasonable" or "carcinogen" may fall in this category. To this extent, such rules do not qualify as rules at all, for they do not specify outcomes in advance. A more fundamental objection to the project of rule-following is that in order for rules to be interpreted, there need be no clear invitation for moral or political judgments from the text of the rule itself, or from the people who wrote the rule. Perhaps laws that appear confining, and quite rule-like, will require interpreters to give them content at the point of application. Perhaps the interpretation of rules *always* requires substantive judgments of some kind—not only the substantive judgment to be bound by law itself, but also substantive understandings that go into the reading 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, and the very fact that the finding of an exception is part of ordinary interpretation, means that in every case, a judge is presented with the question whether the rule is best interpreted to cover the application at hand. Any judgment on this matter depends on a moral or political claim about relevant differences and relevant similarities. Hence the interpretation of rules means that legal entitlements have not been fully allocated ex ante. A degree of contingent, ex post allocation is inevitable.

In short, substantive claims may lie behind all claims about what the law is. When the meaning of law seems to be a simple matter of

fact, it is not because there has been no resort to substantive argument, but because people agree on what substantive argument is 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. The positivist project of identifying the law by reference (solely) to its sources runs afoul of the fact that interpretation inevitably depends on something other than sources of law.[25] And if this is true, ex post judgments are unavoidable.

*B. Substantive Ex Post Judgments Everywhere?*

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

Let us turn to an example. Language will never, or almost never, be interpreted so as to reach applications in a way that would produce absurdity or gross injustice. There is an old maxim, from Chief Justice Coke: *Cessante rationae, cessat ipsa lex*. Suppose, for example, that a law forbids people from driving over 55 miles per hour on a certain street. Jones goes 75 miles per hour because he is driving an ambulance, with a comatose accident victim, to the hospital; Smith goes 90 because she is a police officer following a fleeing felon; Wilson goes 80 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" allowing an exception in these circumstances. If rules have exceptions in cases of palpable absurdity or injustice, 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.

In short, the mere possibility of an exception or an excuse in all or almost all cases involving rules—excuses found as such through a

[25]Some prominent advocates of positivism make this very point. See Joseph Raz, The Authority of Law 47 (1986); Joseph Raz, Ethics in the Public Domain ch. 13 (1994).

familiar interpretive route— means that there is a possibility of an exception or an excuse 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 Collins is not allowed an exemption from the speed limit law 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. So long as we say that absurd applications will not be permitted, it always remains possible to urge, in the context of a case, that the particular application is absurd.

My conclusion is that when interpretation of rules seems mechanical, a 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.

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 to as not to apply outside the territorial boundaries of the United States, and also that in the face of interpretive doubt, statutes should be interpreted in accordance with the views of the administrative agency charged with enforcing them. 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 two interpretive rules that conflict? A legal system may contain no rule-like answer to this question. If it does not, disputes may 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.

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

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

How damaging is this to the project of following rules, or to the rule of law? Certainly it suggests that for judges and administrators, the project of interpreting law solely by reference to ex ante judgments and sources will be incomplete. The sources may leave gaps to be filled at the point of application. But this is not as damaging as it seems. Almost all real-world cases involving the meaning of rules are very easy.

In particular, the contestable, ex post, substantive judgments that underlie readings of rules are often widely shared, or supported by good reasons whether or not widely shared. Usually the literal application of statutory language does not produce absurdity. Rules of priority, laid down ex ante, are sometimes available when more than one rule applies. These points are enough to allow the rule of law to survive as an entirely practical project.

In any case it is often feasible to rely on the literal or dictionary definition of legal terms, and courts could do this even in cases in which such reliance leads to apparently unreasonable applications.[26] Probably we must acknowledge that a good legal system will allow exceptions to rules in cases of absurdity or gross injustice; but it is feasible not to do allow exceptions, and the category of exceptions, if it exists, might be reserved for the most bizarre cases. In this way the category of exceptions might be made exceedingly small; in principle, the category might not exist at all. Literalism might be urged for pragmatic purposes, indeed for some of the same pragmatic reasons that support ruleness in general—as a means of promoting predictability and limiting judicial discretion at the point of application.

It is important to appreciate the fact that if judges cannot look into the reasonableness of the application, some unfortunate results will follow in particular cases; but we might believe that the results will be superior, in the aggregate, to those that would follow from allowing judges 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.

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[26]Frederick Schauer, Playing By The Rules (1989).

Read literally, rules are often over- and under-inclusive if assessed by reference to their purposes. There is always a gap between the justification of a rule—usually taking the form of a standard—and the rule itself. Indeed, there is a plurality of justifications for every rule, with some very specific ("to ensure that the park is quiet") to some very general ("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-interpretation that allows exceptions in cases of absurdity or injustice. But it is not an argument that literal readings are not feasible.[27]

Courts might even seek to interpret words literally in all cases, and thus to avoid making any exceptions at all. This would be an odd interpretive strategy in light of the likely existence of at least a few truly compelling cases for exception. But the strategy is feasible. Recall here that a principal purpose of rules is to specify outcomes in advance of actual decisions, and note that mandatory rules are different from rules of thumb precisely because mandatory rules do not tell their interpreters and their objects to look at the rationale for the rule in particular cases.

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. 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 usually without resort to substantive ex post arguments of certain kinds. We have concluded as well that a degree of law-making power 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, and when (as is inescapable) such language leaves ambiguities or gaps. In this way the case for rules must be chastened and sometimes cautious. If we define rules as full ex ante allocations of legal rights, we are unlikely to have many legal provisions that always operate as rules. But this does not make it impossible to decide cases by

[27]See Schauer, supra note 26.

reference to rules. Whether rule-bound decisions are preferable to the alternatives is another question; it is to that question that I now turn.

## VI. AGAINST RULES, III: ARE RULES OBTUSE?

In many spheres of law, people do not rely on rules at all. A rulebook for telling jokes may be helpful; perhaps 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 on rules of thumb rather than mandatory rules.[28] They make judgments at the point of application.

### *A. Rules are both over- and under-inclusive by reference to the reasons that justify them.*

If strictly followed, rules often produce significant error and hence arbitrariness in particular cases. As we have seen, the justifications that underlie the rules will not support all applications to which they apply by their terms. More generally, experience will turn up considerations or contexts that make it odd or worse to apply the rule to the particular case. For this reason it is sometimes inefficient to make decisions by rule, because any rule that people can generate will produce too much inaccuracy in particular cases. Perhaps any rule now available would produce inefficient outcomes, and perhaps particularized decisions would be better on this score.

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. The social security grid is sometimes said to produce con-

[28]See Katherine Hunter, Doctor's Stories (1989).

spicuous injustice in individual cases, and 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, it seems clear that the range of relevant variables is very wide, and that rigidly rule-bound decisions could produce much error and injustice.

In modern regulatory law, this problem is associated with the pervasive phenomenon of "site level unreasonableness."[29] 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. (Many more examples could be added.) 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.

*B. Rules can be outrun by changing circumstances.*

Rules are often shown to be perverse through new developments that make the existing rules anachronistic. Those who issue rules cannot know the full range of particular situations to which the rules will eventually be applied, and in the new circumstances, the rules 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. Even well-designed rules in the 1970s may be utterly inadequate for the 1990s. In the face of rapidly changing technology, rules for regulation of telecommunications will become entirely ill-suited to contemporary markets. For this reason it may be best to

[29]Eugene Bardach & Robert Kagan, Going By The Book (1983).

avoid rules altogether, or at least to create a few simple rules that allow room for private adaptation.[30]

*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 everyone must use stairs, people in wheelchairs will face special disadvantages. If everyone must pay to enter museums, people without money will be unable to go to museums. If every employee must lack the capacity to become pregnant, most women will be frozen out of the workforce.[31]

By ignoring individual circumstances, general rules can harm 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 abridge equality to the extent that they do not allow people to speak of relevant differences.

*D. Rules drive discretion underground.*

When rules produce 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 it is hard to police or even to see. Thus in *Woodson v. North Carolina*,[32] the Court invalidated the mandatory death penalty in part on the ground that the mandatory rule could not possibly be mandatory in practice. 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. Similarly, administrative agencies can simply refuse to enforce statutes when they are too rule-like in nature. The Clean Air Act's severe provisions for listed pollutants, operating

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[30]See Richard Epstein, Simple Rules for a Complex World (forthcoming).

[31]See the illuminating discussion of human differences and capabilities in Amartya Sen, Inequality Reexamined 79-87 (1993). Sen's discussion of the crudeness of primary goods (if we attend to human diversity) is related to a characteristic challenge to rules (if we attend to the purposes of those rules).

[32]428 US 280 (1976)

in rule-like fashion, led the Environmental Protection Agency to stop listing pollutants at all. Thus "the act's absolute duties to respond to danger prompted officials not to recognize the dangers in the first place."[33]

*E. Rules allow evasion by wrongdoers.*

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 we refer to their background justifications. And a problem with rules is that 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. Here is another source of inefficiency via rules.

*F. Rules can be dehumanizing and procedurally unfair; sometimes it is necessary or appropriate to seek individualized tailoring.*

One conception of procedural justice—embodied in the due process clause—grants people a hearing in order to show that a statute 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.[34] This understanding of due process fits well with a system of rules. The whole point of 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. On this view, people affected by the law ought to be permitted to participate in the formulation of the very principle to be applied to their case.

## VII. FACTORS

When rules fail, judges may rely on standards, or they may instead proceed through analogies, in which we do not know, in ad-

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[33]David Schoenbrod, Power Without Responsibility 76 (1993).

[34]Goldberg v. Kelly, 397 US 254 (1970).

vance, whether we will have rules, standards, or something else. The problems with rules can push participants in law in the direction of standards, analogies, or some combination of the two.

Often judges and others who reject rules rely on instead on a set of factors, and I will be using judgments based on factors as the basic way to approach and evaluate rulelessness. Like analogies and standards, factors reveal some of the vices and virtues of rulelessness; in their opposition to rules, they much overlap with judgments based on standards or analogies. But judgments based on factors have some distinctive features as well, and these are of considerable independent interest.

The line between rules and factors is one of degree rather than of kind. It should now be clear that rules are rarely or never unbending; their interpretation involves a measure of discretion; 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. Often they have rule-like features insofar as they impose constraints on what may happen at the point of application. We can be clearer about decision 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.

*A. Examples*

In *Furman v. Georgia*,[35] the Supreme Court, following *Papachristou*, 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. The problem with the pre-1970 death penalty was therefore procedural. States did not limit the discretion of juries deciding who deserved to die.

North Carolina responded to *Furman* by enacting a "mandatory" death penalty, eliminating judge and jury discretion. 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

[35] 408 US 238 (1972).

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*,[36] the Supreme Court held, strikingly, that a mandatory death sentence was unconstitutional *because it was a rule*. Invoking the need for individuation, the Court said that "The 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." According to the Supreme Court, a serious constitutional shortcoming of the mandatory death sentence

> is its failure 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*.

What ultimately emerged from *Woodson* is a system in which the death penalty is generally decided through the consideration of a set of specified factors, in the form of aggravating and mitigating circumstances. 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, have contended that the line is too thin—that there is no possible system of capital sentencing that adequately combines the virtues of individualized consideration, required by *Woodson*, with the virtues of non-arbitrary decision, required by *Furman*.

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[36] 428 US 280 (1976).

*Woodson* arose in an especially dramatic setting, but the Court's preferred method—factors rather than rules—can be found in many areas of the both life and law. For example, the Court offers no rules for deciding how much in the way of procedure is required before the state may take liberty or property.[37] Any "rules," the Court suggests, would be too inaccurate and too insensitive to individual circumstance. 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. This somewhat open-ended multifactor balancing test is quite different from what is anticipated in *Papachristou*. It sacrifices predictability for the sake of accuracy in individual cases. This is a pervasive choice in Anglo-American legal systems.

### *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 applied to the case.

#### *2. Difficulty of describing relevant factors ex ante.*

In a system of factors, it is often impossible to describe exactly what is relevant in advance. 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 identified 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 of the factors will be provided. The specification is unlikely to exclude other possible specifications in other settings. A significant degree of law-making power can be found at the point of application.

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

[37]See Mathews v. Eldridge, 424 US 319 (1976).

relevant"—to show that new factors may come up. The legal terms are *specific but nonexhaustive*. Both of these strategies are pervasive in American law.

*3. Absence of a clear, a priori sense of the weight of the criteria.*

It is typical of this procedure 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. Answers to questions of weight are offered in the context of concrete controversies, and cannot be given in advance. As we will soon see, this notion is related to the problem of commensurability.

*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.) But a system of factors tends to look closely at a wide range of particulars. In the college admission setting, for example, officers might examine not just test scores, but also grades, extracurricular activities, family background, geography, race, gender, and much more. In the area of capital sentencing, juries and judges look to a wide range of variables relating to the offender and the offense. In voting rights cases, courts sometimes explore many aspects of the context in order to test for discrimination.

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 on the context of capital sentencing. 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 decision 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.

*6. Attention to precedent; analogical reasoning.*

Rules provide consistency; but a system based on factors aspires to do the same. Such a system aspires 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 them differently.

In a system of factors, the relevant consistency is sought through comparison with previous cases. Suppose, for example, that a full trial-type hearing has been required before someone may be deprived of AFDC benefits. The question then arises whether a similar hearing is required before someone may be deprived of social security disability benefits. 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. Then the question arises what kind of hearing is required before a grade-school student may be suspended from school for misconduct. Here the individual interest seems weaker still, and here the government can invoke the distinctive interest in avoiding undue formality in student-teacher relations. Through routes of this sort, a system based on factors can generate a complex set of outcomes, all rationalized with each other. Analogical reasoning will therefore produce local coherence.

*7. Diversely valued goods and problems of commensurability.*

Usually the factors at work in the decisions I have in mind 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. The factors involved in legal decisions are often qualitatively different from one another. 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.[38] 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. Some bring about wonder and awe; consider a mountain or certain artistic works. Toward some people, we feel respect; toward others, affection; toward others, love. People worship their deity. 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). To lose a friend is a different matter. So too, our responses to intrinsic bads are diverse. Many of the relevant distinctions play a role in law, as when beaches must be compared with dollars, or protection of racial equality measured against associational freedom. It is to be sure 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. 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. Return, for example, to the idea that the Constitution requires such hearings as are 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

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[38]See Elizabeth Anderson, Value in Ethics and Economics (1993); Amartya Sen, Plural Utility, Proceedings of the Aristotelian Society 83 (1982-83).

procedures. It would be odd to say that this assessment can be made through lining up the relevant variables along any single metric. There is no scale by which it makes sense to weigh these matters. 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. 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 often developed on the basis of an assessment of incommensurable goods.

These are brisk and inadequate remarks about a complex subject.[39] For the moment my claim is simple: The factors that are typically at stake in law are valued in different ways, and these factors are not commensurable along any scale.

## VIII. CHOICES, POSITIVE AND NORMATIVE

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

It is unlikely that we will be able to generate a reliable and general positive theory on this topic. Legislation is a complex product of legislative self-interest, private influence, and public-spirited motiva-

[39]More detailed discussion can be found in Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich L Rev 779 (1994).

tions on the part of both legislators and those who influence them. Judicial choices between rules and factors are at least equally difficult to attribute to a single behavioral influence, or a 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 law-like generalizations by which choices are usually made.[40] 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 undoubtedly 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, we can suggest that rules will 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 dissensus within the relevant institution, so that the political costs of rules are too high to justify them, (3) when people in 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. Rules might thus be chosen when the error rate with the particular rules is relatively low, when the error rate for rulelessness is high, and when the number of cases is large.

Of course there can 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. One question is who bears these costs, and how much power they have to minimize them. High investments in choosing the content of the law must be made by people

[40]See Jon Elster, Nuts and Bolts for the Social Sciences (1989), making this claim much more generally.

deciding on the particular applications; they must not only find the facts but also find the law. Consider, for example, the problems of deciding whether airline pilots over the age of 60 are still able to do their jobs competently. Such decisions will be time-consuming, may produce unequal treatment, and may create a lot of error under the pressure of the moment (mistaken stereotypes about people over 60, or misplaced sympathy for discharged 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, the lawmakers may distrust the interpreters and enforcers, and may therefore seek to impose rules. If everyone is aligned in interest, the costs of rulelessness will be diminished, since the 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 law-making is split from law-interpretation and law-enforcement, many of the costs of producing clarity ex ante will be faced by law-makers themselves, whereas many of the costs of producing clarity ex post will be faced by others. A law-making body that does not enforce law can "export" 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 helps counteract the difficulty.

As I have said, the benefits for law-makers 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 representatives' own political commitment or electoral self-interest. Similar considerations apply to a decentral-

ized, hierarchical judiciary. In such a system, there will be some incentive for the Supreme Court to avoid making rules and to export the costs of rulelessness to others. But the incentive can be overcome by other considerations. I return to these points below.

*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.[41] English law is far more rule-bound than American law. The Parliament is less likely to delegate discretionary authority to judges. For their part, English judges treat statutes as rules, interpreting them literally and generally refusing to investigate whether the particular application of the rule makes sense as a matter of policy or principle. In England, law-making and law-interpretation are far more rule-bound than in the United States, where law-making often takes place in the process of confrontation with particular cases.

How might this be explained? 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. The Parliamentary Counsel brings about a uniform style of drafting. It is also closely attuned to the methods of English judges, and the Counsel drafts legislation with close knowledge of literalism and of the prevailing canons of construction. 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 law-making stage. Moreover, and critically, Parliament revisits statutes with some frequency, and it fixes mistakes that are shown as such when particular cases arise.

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 uncoordinated. The party system has largely disintegrated, and the executive and legislature are hardly aligned. Congress appears only intermittently aware of the judges' interpre-

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[41] I draw in this section on the extremely illuminating discussion in Patrick Atiyah and Robert Summers, Form and Substance in Anglo-American Law (1987).

tive 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. But it is not in the business of responding rapidly and regularly to particular cases in which literal interpretations misfire. Hence both law-making and law-interpreting practice are very different from what they are in England.

This brief description connects well with the contextual suggestions offered above. There tends to be more dissensus in America than in England at the law-making stage. 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. But it does suggest that the two legal systems are highly responsive to distinctive contextual features.

## IX. 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) highly contextualized inquiries into the likelihood of error and abuse with either rules or rulelessness, and hence an "on balance" judgment about risk; and (b) a presumption in favor of a particular kind of rule, that is, the *privately adaptable rule* that allocates initial entitlements and does not specify outcomes. But there are other possibilities as well.

### *A. Bentham and Acoustic Separation*

Jeremy Bentham favored clear rules, laid down in advance and broadly communicated. In at least some of his writings, he also favored adjudicative flexibility, allowing judges to adapt the rules to the complexities of individual cases. Bentham was aware that rules could misfire as they encountered particular controversies, especially if we understand the notion of misfiring in utilitarian terms. In courts of law, he concluded, the rules would not be fully binding. 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 would hear general rules;

the judges would hear individual cases.[42] This is the important idea of an "acoustic separation" for legal terms, justified on utilitarian grounds. There is such a separation in many areas of law, including tax law and the law relating to excuses for criminality.

Following this idea, we might suggest that legislatures should lay down rules, but that interpreters should feel free to ignore them in contexts where they produce absurdity. In some ways this is the American legal practice. Of course it is equally important to develop subsidiary principles to discipline the general idea of "absurdity" and to give it concrete application in the modern regulatory state. Modern agencies, more than courts, might be entrusted with the job of adapting general rules to particular circumstances.

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 appears to compromise that right. The rule of law and democratic values might well be jeopardized if the law is not what the statute books say that it is. Benthamite approaches might therefore be unacceptable to the extent that utilitarian judgments about acoustic separation run into liberal principles of publicity.

The second problem with the Benthamite strategy is that the strategy fails to take account of the fact that general rules can be unacceptable precisely because general rules can create *bad private incentives* as compared with more fine-grained approaches. The secrecy of the Benthamite approach—the distinction between the law as it is known and the law as it operates in courts of law—will do nothing at all about the problem of poor 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 is so if people would not react to the presence of exceptions by believing that they can do whatever they want and that the rule does not exist at all.

We might conclude that too often, the Benthamite strategy is neither democratic nor efficient. But there is still a place for a version of it. A legal system might sometimes provide that in exceptional cases, interpreters should be permitted to change rules,

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[42]See Gerald Postema, Bentham and the Common Law Tradition (1986).

by exploring whether their justifications create absurdity or injustice, if the particulars of the case so suggest. 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 having rules. But this contextual judgment cannot be made in the abstract.

*B. 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. 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 will proceed with rules. Even a poor fit, in the form of over- and under-inclusive rules, can be tolerated when individual decisions will be inaccurate as well. Thus we might find factors when there is no special reason to distrust those who will assess them. 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 principal's wishes better or best if they are given the freedom 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 likely to be untrustworthy, perhaps because there is a basically shared view of 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 allows the agent to weigh each factor as he chooses. 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.

It is also true that rules tend to make sense and to be adopted in the face of social consensus within the lawmaking body; decisions by factors are more probable when there is dissensus. 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, where balancing tests are pervasive. 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 dissensus, and therefore it tells the agency to act "reasonably." Examples include the areas of broadcasting regulation and occupational safety and health. This route is followed partly because factors, more conspicuously and regularly than rules, drive discretion underground. The costs of laying down rules are increased in the face of dissensus on their content, and this consideration increases the likelihood that we will see factors instead.

Sometimes it is impossible to come up with rules in a multimember body. Often participants in a dispute begin discussion by attempting agreement on "principles" rather than concrete rules, as in controversies over the Middle East. So too people are able to agree on a set of relevant factors, or perhaps on some particular outcomes, without being able to agree on a rule, or on the general reasons that account for particular outcomes. Sometimes people 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 from a heterogeneous body. Return here to the fact that legislatures that delegate broad discretion can internalize two large benefits of rulelessness: economizing on information costs and on the political costs of specificity. They can simultaneously externalize the costs of rulelessness, which are 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 tend to find rules where 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 factors when it need not do so (unless, perhaps, it believes that it is

even more likely to be successful with bureaucrats or judges). Consider laws governing the regulation of agriculture, which are often highly specific, in part because the farmers' lobby is well-organized, and because the opponents of such laws are not.

Factors are more likely to be the basis for decision when opposing interests have roughly equivalent power in the lawmaking body, and when they are willing to take their chances with a bureaucracy or a judge. 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, in part because its opponents and adversaries are both powerful. On the other hand, two well-organized groups might produce rules when compromise is possible and when there are, to both groups, special risks from relying on an agency or a court.

This may be the case when, for example, the regulated class needs to know what the rule is, so that it can plan its affairs. Perhaps it is better to have fairly bad rules than no rules at all. When such 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. Perhaps they can alter their conduct so as to avoid triggering the rule in cases in which the rule is over-inclusive. 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.

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 the over- and under-inclusiveness of rules intolerable. It is one thing to have a flat rule that people under the age of 16 cannot drive; the costs of the rule—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, and to some extent in criminal sentencing generally. (But here we must believe not only that rules make for error, but also that case-by-case decisions will make for less error.)

The point also helps explain the dramatic difference between criminal liability, which is generally rule-bound, and criminal sentencing, which is generally based on factors. 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 far weaker at the sentencing stage. Planning is not so insistently at stake. The discretion of the sentencing judge or jury is less prone to abuse than the discretion of the police officer.

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 them. 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. But because of the informational demands faced by people 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.[43] It is not at all surprising that the result is to shift agencies away from rulemaking and toward less costly options.

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 be out of date in a short time because of technological change. In these circumstances rules will become obsolete very quickly, and it may be best 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 inaccuracy of rules becomes far more tolerable. Consider, for example, the requirement that all drivers must be over the age of 16, or the use of the social security grid to decide disability claims.

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[43]See Stephen Breyer & Richard Stewart, Administrative Law and Regulatory Policy 107 (3d ed. 1993).

Frustrating bureaucratic insistence on "the technicalities" may result simply because so many decisions must be made, and because individualized inquiry into whether technicalities make sense in particular cases 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.

There is a general conclusion. The choice between rules and rulelessness cannot itself 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 them, we need to know a great deal about the context—the likelihood of bias, the location and nature of social dissensus, 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 and excessive focus on the possibility of achieving accurate outcomes through fine-grained encounters with particulars.

### *C. Privately Adaptable Rules*

A more ambitious strategy might emerge from distinguishing between two sorts of rules.[44] Some rules allocate initial entitlements—they unquestionably count as rules—but at the same time they maximize flexibility and minimize the informational burden on government, by allowing private adaptation to determine ultimate outcomes. Consider the rules of the road; taxes imposed on dangerous workplaces; rules allocating property rights and thus creating private property; or rules governing entry into agreements. These 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 the presence of carcinogens in the workplace. Rules that specify

[44]Related discussion can be found in Friedrich Hayek, The Constitution of Liberty (1960), 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.

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.

The line between these sorts of laws is one of degree rather than one of kind. What I am describing is a characteristic of some rules, not a crisp category of rules. Notably, all rules allocate entitlements, and the allocation may well have an effect on both preferences and distributions, and hence on end-states as well.[45] 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 nature. They depend on law.[46]

We own property only because the legal system has allocated property rights to us. In this sense, property rights are anything but natural. Freedom of contract, as we understand and enjoy it, is not part of nature. It is a function of legal rules creating and constituting that form of freedom.[47] 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.

Most generally, freedom to act is itself in important part a function of the legal system, which says, often, that people can do as they wish without public or private interference, and with public or private protection. If all this is right, there can be no system of laissez-faire (short of anarchy); legal rules are pervasive and inevitable, indeed coercive in their own way, even in the most

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[45]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 (1993).

[46]See the instructive discussion of how cooperation must precede competition in Jules Coleman, Risks and Wrongs 60-62 (1992). This was a important theme in the New Deal era. For general discussion, see Cass R. Sunstein, The Partial Constitution ch. 2 (1993).

[47]Some qualifications emerge from Robert Ellickson, Order Without Law (1992).

market-oriented of free market systems.[48] (People in Eastern Europe, now undertaking the difficult task of creating markets, have seen this all too well.) Government can hardly avoid the task of creating rules allocating rights.

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 informational and political burden imposed on government. The ultimate project, then, is to favor rules that specify and allocate initial entitlements, and to disfavor rules that specify outcomes. Hence the rules that constitute markets are entirely acceptable insofar as their rule-ness usually does not produce the risks that tend to accompany rules.

A key feature of privately adaptable rules is their association with free alienability of rights. Ownership rights are of course freely alienable,[49] and in this way they attend to the fact that owners (and 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. They allow large room for individual maneuver. They are coercive, to be sure. The law of property is itself coercive insofar as it prevents non-owners from claiming what they would otherwise claim and doing what they would otherwise do.[50] The virtue of privately adaptable rules is not that they are not coercive and not that they are "natural"; it is that

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[48]See Friedrich Hayek, The Road to Serfdom 38-39 (1944): "The functioning of a competition . . . depends, above all, on the existence of an appropriate legal system. . . . In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other." See also Amartya Sen, Poverty and Famines 165-66 (1983): "Finally, the focus on entitlement has the effect of emphasizing legal rights. Other relevant factors, for example market forces, can be seen as operating *through* a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc.). The law stands between food availability and food entitlement. Starvation deaths can reflect legality with a vengeance."

[49]To be sure, restrictions on free alienability might be justified for many reasons, including collective action problems, externalities, difficulties with commodification, and so forth. I cannot discuss these issues here.

[50]Cf. Sen, supra note 48.

they reduce the costs of rule-making and harness private information and preferences[51] 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.[52] 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 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. In so doing, they produce both injustice and inefficiency, in the form of over-inclusiveness and under-inclusiveness, replicating all of the problems typically associated with a refusal to make inquiries at the point of application.

A prominent example is command and control regulation, pervasive in the law of environmental protection; this form of regulation has been largely unsuccessful because of the pathologies of rules. 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. Command-and-control should be replaced by more flexible, incentive-based strategies, which could use privately adaptable rules. Instead of saying, for example, what technologies companies must use, the law might impose pollution taxes or fees, and then allow private judgments about the best means of achieving desirable social goals. 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.

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

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[51]Subject to the qualification in supra note 45.

[52]See Hayek, supra note 44; Richard Epstein, Simple Rules for a Complex World (forthcoming 1995).

the task of deciding to whom to allocate licenses. 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. The problems with both rules and factors are entirely predictable—inaccuracy through excessive rigidity on the one hand, and discretionary, ad hoc, costly, potentially abusive judgments on the other. It is no wonder that both approaches have largely failed.

What alternatives are possible? In a famous early article, Ronald Coase argued that the government should allocate broadcasting licenses through what I am calling privately adaptable rules[53]— based on property rights and market transfers, as we do (for example) for ownership of newspapers and automobiles. In the last year the FCC has experimented with auctions, and the experiments have produced surprisingly good results. Now 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. The objection contains a real point.[54] Broadcasting protects a range of "nonmarket" values, captured in the aspiration to promote attention to public affairs, diversity of view, and high-quality programming. But the objection is not a justification for departing from privately adaptable rules in favor of command and control regulation via rules or factors. Instead the rules for license auctions might be designed so as to ensure auction credits for those applicants who promise to promote nonmarket values. Th e 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.

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[53]See Ronald Coase, The Federal Communications Commission, 2 J. Law & Econ. 1 (1959).

[54]I try to support this view in Cass R. Sunstein, Democracy and the Problem of Free Speech (1993).

*D. 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. (Of course the decision to hold a lottery is supported by a rule.) This is a characteristic approach to the military draft, where rule-bound judgments seem too crude, and where judgments based on factors are too obviously subject to discrimination and caprice. Lotteries are used in many other areas as well. Of course lotteries have an arbitrariness of their own, and for this reason, they may be an inferior approach.

Alternatively, the legal system, having found both rules and factors inadequate, might abolish the relevant institution itself. (The abolition must of course be accomplished by rule.) Hence the best argument for abolition of the death penalty takes the following form. Rules are unacceptable because they eliminate the possibility of adaptation to individual circumstances. Rule-bound death sentences are excessively impersonal. But 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 system create 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 most people that the death penalty is unacceptable. But if it is possible to persuade a range

of people of this conclusion, the sources of the argument lie, I think, 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 making every decision according to judgments that have been 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 can agree on rules when they disagree about general theory; they can agree that the rules are binding, that the rules are good, and that the 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 of 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. There is some truth in this claim. Almost any judgment about meaning will partake of substantive ideas of a sort. It is almost inevitable that some case can eventually arise that will confound the attempt to use rules to specify all outcomes in advance. These claims are chastening. But 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. A form of rule-following is therefore feasible.

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 un-

necessary 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 over-inclusive and under-inclusive by 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.

Some of the most difficult issues in law involve the choice between rules and factors in cases in which both seem unacceptable—rules, because of their crudeness and their insensitivity to particulars that confound them; factors, 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, 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 particular area at hand. Moreover, privately adaptable rules are a promising effort to minimize the problems of excessive generality, by opting for rules that harness private ordering and thus reduce the informational costs imposed on government. Some people who favor such rules intend their arguments to be a critique of regulation and a basis for approval of unrestricted (though rule-governed) free markets. 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.

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