Political Conflict and Legal Agreement

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ABSTRACT

How is law possible in a heterogeneous society, composed of people who sharply disagree about basic values? Such disagreements involve the most important issues of social life: the distribution of wealth, the role of race and gender, the nature of free speech and private property. Much of the answer to this puzzle lies in an appreciation of how people who disagree on fundamental issues can achieve *incompletely theorized agreements on particular cases.*

Lecture I sets out the basic idea of incompletely theorized agreements and argues that such agreements have many virtues. It offers analogical thinking as a case in point —this is the way that ordinary lawyers and indeed ordinary people often try to solve legal and ethical problems. For a system of law, analogical thinking, as a basis for incompletely theorized agreements, can be desirable because it is so much less sectarian, hubristic, and demanding than deep theories about (for example) equality, or liberty, or economic efficiency. Society is sometimes too sharply divided or confused about such theories to permit them to be foundations for judge-made law, which requires agreements among people who have little time and limited capacities, who must find a way to live together, who believe that values are plural and diverse, and who should show respect to one another's most defining commitments. Hence incompletely theorized agreements play a large role in interpretation of both statutes and the Constitution itself; many of our basic rights are a product of such agreements.

Lecture II opposes rules to rulelessness. Its principal goal is to point the way toward a more refined understanding of the ideal of the rule of law, one that sees a degree of particularity, and a degree of lawmaking at the point of application, as an important part of that ideal. It defends a form of casuistry and describes the

potentially democratic foundations of the casuistical enterprise in law. The lecture begins by describing the distinctive advantages of rules and law via rules, especially as a means for providing a consensus on what the law is from people who disagree on so much else. It also discusses two attacks on decisions according to rule: the view that controversial political and moral claims always play a role in the interpretation of rules, and thus that rules are not what they appear to be; and the view that rules are obtuse, because they are too crude to cover diverse human affairs, and because people should not decide cases without closely inspecting the details of disputes. Giving special attention to the death penalty and broadcasting regulation, it offers two ways out of the dilemmas posed by rules and rulelessness: (a) a presumption in favor of *privately adaptable rules,* that is, rules that allocate entitlements without specifying outcomes, in an effort to promote goals associated with free markets; and (b) highly contextualized assessments of the virtues and pathologies of both options, in an effort to promote *democratic* goals of responsiveness and open participation.

The lectures end with the suggestion that incompletely theorized agreements on particular outcomes play a large role not only in law, but also in many other sectors of social life, prominently including democratic discussion.

LECTURE I.

INCOMPLETELY THEORIZED AGREEMENTS

> We think utility, or happiness, much too complex and indefinite an end to be sought except through the medium of various secondary ends, concerning which there may be, and often is, agreement among persons who differ in their ultimate standard; and about which there does in fact prevail a much greater unanimity among thinking persons, than might be supposed from their diametrical divergence on the great ques-

> tions of moral metaphysics. As mankind are more nearly of one nature, than of one opinion about their own nature, they are more easily brought to agree in their intermediate principles . . . than in their first principles. . . .
>
> —John Stuart Mill, "Bentham," in *Utilitarianism and Other Essays* (1987)

> Why didn't the [Sentencing] Commission sit down and really go and rationalize this thing and not just take history? The short answer to that is: we couldn't. We couldn't because there are such good arguments all over the place pointing in opposite directions. . . . Try listing all the crimes that there are in rank order of punishable merit. . . . Then collect results from your friends and see if they all match. I will tell you they don't.
>
> —Justice Stephen Breyer, quoted in the *New Republic,* June 6, 1994

INTRODUCTION

There is a familiar image of justice. She is a single figure. She is a goddess, emphatically not a human being. She is blindfolded. And she holds a scale.

In the real world, the law cannot be represented by a single figure. Legal institutions are composed of many people. Our courts are run by human beings, not by a god or goddess. Judges need not be blindfolded; what they should be blind *to* is perhaps the key question for law. And judges have no scale. Far from having a scale, they must operate in the face of a particular kind of social heterogeneity: sharp and often intractable disagreements on basic principle.

The problem of social pluralism pervades the legal system, and it takes many different forms. People disagree about what counts as good or right. They disagree about the best way to accommodate different goods and different rights. They disagree about whether the good is prior to the right or vice versa. They disagree about what is even admissible as good or as right.

Some of these disagreements are explicitly religious in character. Some of them involve disagreements among religion, agnosticism, and atheism. Other disagreements might be described as quasi-religious, in the sense that they involve people's deepest and most defining commitments. What is the appropriate conception of liberty and equality? How should people educate their children? Is there such a thing as free will? Is the free speech principle about democracy or instead autonomy? Just how fundamental is the right to private property?

There is much dispute about whether well-functioning democracies try to resolve such disagreements, and about how they should do so if they do try. Perhaps government should seek an "overlapping consensus" among reasonable people,[1] thus allowing agreements to be made among Kantians, utilitarians, Aristotelians, and others. Perhaps participants in a liberal democracy can agree on the right even if they disagree on the good. Thus a sympathetic observer, summarizing a widespread view, refers to the liberal "hope that we can achieve social unity in a democracy through shared commitment to abstract principles."[2]

But an investigation of actual democracy, and of law in actual democracies, draws this view into doubt. Democracies, and law in democracies, must deal with people who very much disagree on the right as well as the good. Democracies, and law in democracies, must deal with people who tend to distrust abstractions altogether. Judges are certainly not ordinary citizens. But neither are they philosophers. Indeed, participants in law may lack a high-level theory of any kind, and they will likely disagree with one another if they have one.

Judges also have to decide a lot of cases, and they have to decide them quickly. Many decisions must be made rapidly in the face of apparently intractable social disagreements on a wide range

[1] See John Rawls, *Political Liberalism* (1993), pp. 133-72.

[2] Joshua Cohen, "A More Democratic Liberalism," *Michigan Law Review* 92 (1994) : 1503–1546.

of first principles. These disagreements will be reflected within the judiciary and other adjudicative institutions as well as within the citizenry at large.

In addition to facing the pressures of time, these diverse people must find a way to continue to live with one another. They should also show each other a high degree of mutual respect or reciprocity. Mutual respect may well entail a reluctance to attack one another's most basic or defining commitments, at least if it is not necessary to do so in order to decide particular controversies.

My suggestion in this lecture is that well-functioning legal systems tend to adopt a special strategy for producing agreement amidst pluralism. *Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes.*[3] They agree on the result and a narrow or low-level explanation for it; they need not agree on fundamental principle. This idea helps organize what might be described as a role-specific account of public reason, designed specifically for participants in law, though it has potential applications elsewhere. The distinctive feature of the account is that it emphasizes agreement on (relative) particulars rather than on (relative) abstractions. This is an important source of social stability and an important way for diverse people to demonstrate mutual respect,[4] in law especially but also in liberal democracy as a whole. For those who emphasize incompletely theorized agreements, the goal is to try to stay with the lowest

[3] Compare the notion of overlapping consensus as set out in Rawls, *Political Liberalism,* at pp. 133-72. The idea of an incompletely theorized convergence on particulars is related. Both ideas attempt to bring about stability and social agreement in the face of diverse "comprehensive views." But the two ideas are far from the same. I am most interested in the problem of producing agreement on particulars, with the thought that often people who disagree on general principles can agree on individual cases. Rawls is more interested in the opposite possibility — that people who disagree on particulars can agree on abstractions, and use that agreement for political purposes; see idem at pp. 43-45. Of course this is also true. I do not attempt here to sort out all of the relations between the idea of an overlapping consensus and the notions I have in mind here. See Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996), ch. 3, for discussion.

[4] There is an exception, having to do with certain kinds of invidious or palpably confused abstractions; see below.

level of abstraction necessary to decide the case, and to raise the level of theoretical ambition only if required.

Consider some examples. People may believe that it is important to protect endangered species, while having quite diverse theories of why this is so. Some may stress obligations to species or nature as such; others may point to the role of endangered species in producing ecological stability; still others may point to the possibility that obscure species will provide medicines for human beings. Similarly, people may invoke many different foundations for their belief that the law should protect labor unions against certain kinds of employer coercion. Some may emphasize the democratic character of unions; others may think that unions are necessary for industrial peace; others may believe that unions protect basic rights. So too, people may favor a rule of strict liability for certain torts from multiple diverse starting-points, with some people rooting their judgments in economic efficiency, others in distributive goals, still others in conceptions of basic rights. Of course people disagree about these matters; what I am suggesting is that such convergence as we have may well emerge from low-level principles. Examples of this kind are exceptionally common. They are the day-to-day stuff of law.

When the convergence on particular outcomes is incompletely theorized, it is because the relevant actors are clear on the result without reaching agreement or being clear on the most general theory that accounts for it.[5] Often they can agree on an opinion, or a rationale, usually offering low-level or mid-level principles

[5] Interesting issues of collective choice lurk in the background here. Important problems of cycling, strategic behavior, and path dependence may arise in multimember bodies containing people with divergent rationales, all of whom want to make their rationale part of law. See Kenneth Arrow, *Social Choice and lndividual Values* (2d ed., 1962). There may also be complex bargaining issues as some officials or judges seek to implement a broad theory as part of the outcome, while others seek a narrow theory, and still others are undecided between the two. Cf. Douglas Baird et al., *Game Theory and the Law* (1994), ch. 1. These important issues are beyond the scope of the present discussion, though it would be most illuminating to have a better grasp, theoretical and empirical, on the sorts of bargaining games that occur as officials and judges decide on the scope of the theory to accompany an outcome.

and taking a relatively narrow line. They may agree that a rule — forbidding discrimination on the basis of sex, protecting endangered species, allowing workers to unionize —makes sense without agreeing on the foundations of their belief. They may accept an outcome —reaffirming *Roe v. Wade,*[6] protecting sexually explicit art —without understanding or converging on an ultimate ground for that acceptance. Reasons are almost always offered, but what ultimately accounts for the opinion, in terms of a full-scale theory of the right or the good, is left unexplained. Higher levels of abstraction are avoided. The approach I have in mind is one in which people from divergent starting-points, or with uncertainty about their starting-points, can converge on a rule of a low-level judgment.

Incompletely theorized agreements have obvious disadvantages; but I believe that in a legal system they have crucial virtues as well. Their virtues in a legal system may extend as well to social life, even workplace and familial life, and also to democratic politics. In many ways incompletely theorized agreements offer an approach to social pluralism that complements or competes with the existing alternatives, including political liberalism, which offers large-scale abstractions on which social agreement may or may not be likely under reasonably favorable conditions. I will note these possibilities without discussing them in detail here.

My emphasis on incompletely theorized agreements is intended largely as descriptive. These agreements are a pervasive and largely unnoticed phenomenon in Anglo-American law. Indeed, they play an important function in any well-functioning democracy consisting of a heterogeneous population. The persistence of such agreements offers a sharp challenge to people who think that areas of law actually reflect some general theory, involving (for example) utilitarian or Kantian understandings.[7] But I want to make some

[6] 410US 113 (1973).

[7] See R. Pomer, *Economic Analysis of Law* (4th ed., 1992); R. Dworkin, *Law's Empire* (1986).

normative claims as well. There are distinctive advantages to incompletely theorized agreements in law (and elsewhere). Such agreements are especially well suited to the institutional limits of the judiciary, which is composed of multimember bodies, consisting of highly diverse people who must render many decisions, live together, avoid error to the extent possible, and show each other mutual respect. We can say this while acknowledging that high-level abstractions play an appropriately large role in democratic politics and that they are sometimes necessary in courts as well.

1. Agreements without Theory

A. In General

Incompletely theorized agreements play a pervasive if infrequently noticed role in law and society. It is rare for a person or group completely to theorize any subject, that is, to accept both a general theory and a series of steps that connect the theory to a concrete conclusion. In fact people often reach *incompletely theorized agreements on a general principle.* Such agreements are incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases. People know that murder is wrong, but they disagree about abortion. They favor racial equality, but they are divided on affirmative action. They believe in liberty, but disagree about employer mandates for health care. Hence there is a familiar phenomenon of a comfortable and even emphatic agreement on a general principle, accompanied by sharp disagreement about particular cases. This sort of agreement is incompletely theorized in the sense that it is *incompletely specified.* When content is given to the agreement, much of the key work must be done by people who have not agreed to the general principle, often at the point of application.

Sometimes constitution-making becomes possible through this form of incompletely theorized agreement. Consider the case of Eastern Europe, where constitutional provisions have been adopted

with many abstract provisions on whose specification there will be (indeed, has been) sharp dispute. A similar phenomenon lies at the heart of contemporary administrative law, for the creation of large regulatory agencies has often been possible only because of incompletely specified agreements, in which legislators converge on general requirements that regulation be "feasible" or "reasonable" or that it provide "a margin of safety." The task of specification is left to people who were not parties to the agreement.

There is a second and quite different kind of incompletely theorized agreement. People may agree on a mid-level principle but disagree about both general theory and particular cases. They may believe that government cannot discriminate on the basis of race, without having a large-scale theory of equality, and without agreeing whether government may enact affirmative action programs or segregate prisons when racial tensions are severe. The connection is left unclear between the mid-level principle and general theory; it is equally unclear between the mid-level principle and concrete cases. So too, people may think that government may not regulate speech unless it can show a clear and present danger, but disagree about whether this principle is founded in utilitarian or Kantian considerations, and disagree too about whether the principle allows government to regulate a particular speech by members of the Ku Klux Klan.

My special interest here is in a third kind of phenomenon — incompletely theorized agreements on particular outcomes, accompanied by agreements on the low-level rules or standards that account for them. Judges have to decide cases, and so it is especially important for those who disagree on high-level theories to agree on particular results. By the term "particular results," I mean the judgment about who wins and who loses a case. By the term "low-level principles," I refer to something relative, not absolute; I mean to do the same thing by the terms "theories" and "abstractions" (which I use interchangeably). In this setting, the notions "low-level," "high," and "abstract" are best understood in com-

parative terms, like the terms "big" and "old" and "unusual."[8] In any case it is notable that large abstractions are rarely reflected explicitly in law.

Perhaps the participants in law endorse no high-level theory, or perhaps they believe that they have none. Perhaps they find theoretical disputes irrelevant, confusing, or annoying. Perhaps they disagree on the right or the good. What is critical is that they agree on how a case must come out. The argument applies to legal rules, which are typically incompletely theorized in the sense that they can be accepted by people who disagree on many more general issues. People may agree that a 60 mph speed limit makes sense, and that it applies to defendant Jones, without having much of a theory about criminal punishment. They may agree that to receive social security benefits people must show "disability," defined in a rule-bound way, without having a theory of which disabled people deserve what. Thus a key social function of rules is to allow people to agree on the meaning, the authority, and even the soundness of a governing legal provision in the face of disagreements about much else.[9] Much the same can be said about other devices found in the legal culture, including standards, factors, and emphatically analogical reasoning.

B. How People Converge

It seems clear that people may converge on a correct outcome even though they do not have a high-level theory to account for their judgments. Jones may know that dropped objects fall, that

[8] There is no algorithm by which to distinguish between a high-level theory and one that operates at an intermediate level; we might consider, as examples of high-level theories, Kantianism and utilitarianism, and see legal illustrations in the many (academic) efforts to understand such areas as tort law, contract law, free speech, and the law of equality as undergirded by highly abstract theories of the right or the good. By low-level principles, I mean to refer to the general class of justifications that are not said to derive from any particular large theories of the right or the good, that have ambiguous relations to large theories, and that are compatible with one or more such theories.

[9] See Joseph Raz, *The Morality of Freedom* (1985), p. 58.

bee bites sting, that hot air rises, and that snow melts, without knowing exactly why these facts are true. The same is true for law and morality. Johnson may know that slavery is wrong, that government may not stop political protests, that every person should have just one vote, and that it is bad for government to take property unless it pays for it, without knowing exactly why these things are so. Judge Wilson may know that under the Constitution discrimination against the handicapped is generally permitted and that discrimination against women is generally banned, without having much of an account of why the Constitution is so understood. We may thus offer an epistemological point: People can know that *X* is true without entirely knowing why *X* is true. Very often this is so for particular conclusions about law.

This is a political point as well. People can agree on individual judgments even if they disagree on high-level abstractions. Diverse judges may believe that *Roe v. Wade* should not be overruled,[10] though the reasons that lead each of them to that conclusion sharply diverge. Some people emphasize that the Court should respect its own precedents; others think that *Roe* was rightly decided as a way of protecting women's equality; others think that the case was rightly decided as a way of protecting privacy; others think that restrictions on abortion are unlikely to protect fetuses in the world, and so the case rightly reflects the fact that any regulation of abortion would be ineffective in promoting its own purposes. We can find incompletely theorized political agreements on particular outcomes in many areas of law and politics —on both sides of the affirmative action controversy, both sides of disputes over the death penalty, both sides of the dispute over health care.

C. Rules and Analogies

There are two especially most important methods by which law might resolve disputes without obtaining agreement on first prin-

[10] 410 US 113 (1973). On the refusal to overrule Roe, see *Planned Parenthood v. Casey,* 112 S Ct 2791 (1992).

ciples: rules and analogies. Both of these methods attempt to promote a major goal of a heterogeneous society: *to make it possible to obtain agreement where agreement is necessary, and to make it unnecessary to obtain agreement where agreement is impossible.*

For purposes of law, reliance on rules might be incompletely theorized in three different ways. People might agree that rules are binding without having a theory of why this is so. They can often agree on what rules mean even when they agree on very little else. They can even agree that certain rules are good, without agreeing on exactly why they are good. And in the face of persistent disagreement or uncertainty about what morality generally requires, people can reason about particular cases by reference to analogies. They point to cases in which their judgments are firm and proceed from those firm judgments to the more difficult ones.

We might consider in this regard Justice Stephen Breyer's discussion of one of the key compromises reached by the seven members of the United States Sentencing Commission.[11] As Justice Breyer describes it, a central issue was how to proceed in the face of disparate philosophical premises. Some people asked the commission to follow an approach to punishment based on "just deserts" — an approach that would rank criminal conduct in terms of severity. But different commissioners had different views about how different crimes should be ranked. In these circumstances, there could be a system in which criminal punishments became ever more, and more irrationally, severe, because some commissioners would insist that the crime at hand was worse than the previously ranked crimes. In any case a rational system would be unlikely to follow from efforts by the seven commissioners to rank crimes in terms of severity.

Other people urged the commission to use a model of deterrence. On this view, criminal punishment might seek sentences that would be worth their cost. There was, however, no empirical

[11] Breyer, "The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest," *Hofstra Law Review* 17 (1988): 1, 14-19.

evidence to link detailed variations in punishment to prevention of crime. Though Justice Breyer does not stress the point, it seems clear that the seven members of the commission were highly unlikely to agree that deterrence provides a full account of the aims of criminal sentencing. And so an approach based on deterrence seemed no better than an approach based on just deserts.

In these circumstances, what route did the commission follow? In fact the commission abandoned large theories altogether. It adopted no general view about the appropriate aims of criminal sentencing. Instead the commission abandoned high theory and adopted a rule — one founded on precedent: "It decided to base the Guidelines primarily upon typical, or average, actual past practice."[12] Hence extreme judicial sentences would be filtered out through adoption of typical or average practices. Consciously articulated explanations, involving low-level reasons, were used to support particular departures from the past. Justice Breyer sees this effort as a necessary means of obtaining agreement and rationality within a multimember body charged with avoiding unjustifiably wide variations in sentencing. Thus his more colorful oral presentation: "Why didn't the [Sentencing] Commission sit down and really go and rationalize this thing and not just take history? The short answer to that is: we couldn't. We couldn't because there are such good arguments all over the place pointing in opposite directions. . . . Try listing all the crimes that there are in rank order of punishable merit. . . . Then collect results from your friends and see if they all match. I will tell you they don't."[13]

The example suggests a quite general point. Through both analogies and rules, it is often possible to achieve convergence on particular disputes without resolving large-scale issues of the right or the good. For judges and officials at least, this is an important virtue. It leads to a role-specific account of public reason, that is, an account of public reason that is designed for particular people

[12] Ibid., at p. 17.

[13] Quoted in the *New Republic,* June 6, 1994, at p. 12.

performing particular roles —though as I have noted, that theory has parallels outside of the legal context.

The fact that we can obtain an agreement of this sort —about the meaning of a rule or the existence of a sound analogy —is no guarantee of a good outcome, whatever may be our criteria for deciding whether an outcome is good. A rule may provide that no one under the age of twenty is permitted to work, and we may all agree what it means; but such a rule would be neither just nor efficient. The fact that there is agreement about the meaning of a rule does not mean that the rule is desirable. Perhaps the rule is bad, or perhaps the judgments that go into its interpretation are bad. Perhaps the Sentencing Commission incorporated judgments that were based on ignorance, confusion, or prejudice.

Some of the same things can be said about analogies. People in positions of authority may agree that a ban on same-sex marriages is analogous to a ban on marriages between uncles and nieces; but the analogy may be misconceived, because there are relevant differences and because the similarities are far from decisive. The fact that people agree that case *A* is analogous to case *B* does not mean that case *A or* case *B* is rightly decided. Problems with analogies and low-level thinking might lead us to be more ambitious. Participants in law may well be pushed in the direction of general theory —and toward broader and more ambitious claims —precisely because low-level reasoners offer an inadequate and incompletely theorized account of relevant similarities or relevant differences.

All this should be sufficient to show that the virtues of incompletely theorized outcomes —and the virtues of decisions by rule and by analogy —are partial. Those virtues should not be exaggerated. But no system of law is likely to be either just or efficient if it dispenses with incompletely theorized agreements; in fact it is not likely even to be feasible.

2. JUSTIFICATIONS AND INSTITUTIONS

A. The Case for Incomplete Theorization

What might be said on behalf of incompletely theorized agreements, or incompletely theorized judgments, about particular cases? As I have said, incompletely theorized agreements may be unjust or otherwise wrong. Indeed, we are accustomed to thinking of incomplete theorization as reflective of some important problem or defect. Perhaps people have not yet thought deeply enough. We are accustomed to thinking of incompletely theorized judgments as potentially wrong. When people raise the level of abstraction, they do so to reveal bias, or confusion, or inconsistency. Surely participants in a legal system should not abandon this effort.

There is a good deal of truth in these usual thoughts; but they are not the whole story. On the contrary, incompletely theorized judgments are an important and valuable part of both private and public life.

First, and most obviously, incompletely theorized agreements are well suited to a world — and especially a legal world — containing social dissensus. By definition, such agreements have the large advantage of allowing a convergence on particular outcomes by people unable to reach anything like an accord on general principles. This advantage is associated not only with the simple need to decide cases, but also with social stability, which could not exist if fundamental disagreements broke out over every incident of public or private dispute.

Second, incompletely theorized agreements can promote two goals of a liberal democracy and a liberal legal system: to enable people to live together,[14] and to permit them to show each other a measure of reciprocity and mutual respect.[15] The use of rules or low-level principles allows judges to find commonality and to

[14] This aspect of liberalism is emphasized in Charles Larmore, *Patterns of Moral Complexity* (1990).

[15] See Rawls, *Political Liberalism.*

decide cases without producing unnecessary antagonism. Both rules and low-level principles make it unnecessary to reach areas in which disagreement is fundamental.

Perhaps more important, incompletely theorized agreements allow people to show each other a high degree of mutual respect, or reciprocity. Frequently ordinary people disagree in some deep way on an issue—the Middle East, pornography, gay marriages—and sometimes they agree not to discuss that issue much, as a way of deferring to each other's strong convictions and showing a measure of reciprocity and respect (even if they do not all respect the particular conviction that is at stake). If reciprocity and mutual respect are desirable, it follows that judges, even more than ordinary people, should not challenge a litigant's or one another's deepest and most defining commitments if there is no need for them to do so. Thus it would be better if judges intending to reaffirm *Roe v. Wade* could do so without challenging the judgment that the fetus is a human being, or if judges seeking to invalidate the death penalty could do so without saying that the punishment of death is invalid because of its brutality.

To be sure, some fundamental commitments might appropriately be challenged in the legal system or within other multimember bodies. Some such commitments are ruled off-limits by the authoritative legal materials. Many provisions involving basic rights have this function. Of course it is not always disrespectful to disagree with someone in a fundamental way; on the contrary, such disagreements may sometimes reflect profound respect. When defining commitments are based on demonstrable errors of fact or logic, it is appropriate to contest them. So too when those commitments are rooted in a rejection of the basic dignity of all human beings, or when it is necessary to undertake the contest to resolve a genuine problem. But these cases, though far from self-defining, are relatively rare. Most cases can be resolved in an incompletely theorized way, and more complete theorization is not justified on grounds of necessity, demonstrable error, or basic dignity.

This point suggests a third consideration. Any general theory of a large area of the law —free speech, contracts, property —is likely to be too crude to fit with our best understandings of the multiple values that are at stake in that area. Monistic theories of free speech or property rights, for example, will be ill suited to the range of values that speech and property implicate. Human goods are plural and diverse, and they cannot be ranked along any unitary scale without doing violence to those very goods.[16] People value things not just in terms of weight but also in qualitatively different ways. Some of the most powerful challenges to the economic analysis of law stress the fact that human goods are valued in diverse ways, and to see them as simple "costs" and "benefits" is to elide some important distinctions. We are unlikely to be able to appreciate the diverse values at stake unless we investigate the details of particular disputes. In the area of free speech, a top-down theory —stressing, for example, autonomy or democracy — is likely to run afoul of powerful judgments about particular cases. For this reason such theories are usually inadequate precisely because of their generality and simplicity.

Analogical thinking —a form of casuistry —is especially desirable here. This way of proceeding allows participants in law to build doctrine with close reference to particular cases and thus with close attention to the plurality of values that may well arise. This plurality will confound "top-down" theories that attempt, for example, to understand speech only in terms of democracy, or property only in terms of economic efficiency. General theories are too likely to contain errors.

Of course a "top-down" approach might reject monism and point to a wide range of plural values.[17] But any such approach

[16] See Elizabeth Anderson, *Value in Ethics and Economics* (1993); C. Taylor, "The Diversity of Goods," in C. Taylor, *Philosophy and the Human Sciences* (1985), pp. 230, 243; Amartya Sen, "Plural Utility," *Proceedings of the Aristotelian Society* 81 (1981): 193; Cass R. Sunstein, "Incommensurability and Valuation in Law," *Michigan Law Review* 92 (1994): 779.

[17] See Sen, "Plural Utility," and Amartya Sen, *Commodities and Capabilities* (1985), for examples.

is likely to owe its genesis and its proof — its point or points— to a range of particular cases to which it can refer. In this way incompletely theorized judgments are well suited to a moral universe that is diverse and pluralistic, not only in the sense that people disagree, but also in the sense that each of us is attuned to pluralism when we are thinking well about any area of law.

Fourth, incompletely theorized agreements have the crucial function of reducing the political cost of enduring disagreements. If judges disavow large-scale theories, then losers in particular cases lose much less. They lose a decision, but not the world. They may win on another occasion. Their own theory has not been rejected or ruled inadmissible. They have not been disenfranchised or ruled out of court. When the authoritative rationale for the result is disconnected from abstract theories of the good or the right, the losers can submit to legal obligations, even if reluctantly, without being forced to renounce their largest ideals. To be sure, some theories should be rejected or ruled inadmissible; this is sometimes the point of authoritative legal materials. But it is an advantage, from the standpoint of freedom and stability, for a legal system to be able to tell most losers — many of whom are operating from foundations that have something to offer, or that cannot be ruled out of bounds a priori —that their own deepest convictions may play a role elsewhere in the law.

Fifth, incompletely theorized agreements may be especially desirable in contexts in which we seek moral evolution over time. Consider the area of constitutional equality, where considerable change has occurred in the past and is likely to occur in the future. If the legal culture really did attain a theoretical end-state, it might become too rigid and calcified; we would know what we thought about everything, whether particular or general. The law of equality would be frozen at a particular point in time. By contrast, incompletely theorized agreements —a key to debates over constitutional equality, with issues being raised about whether gender, sexual orientation, age, disability, and others are analo-

gous to race —have the important advantage of allowing a large degree of openness to new facts and perspectives. Such agreements enable disagreement and uncertainty to turn into consensus. They promote a good deal of flexibility. At one point, we might think that homosexual relations are akin to incest; at another point, we might find the analogy bizarre. Of course a high-level theory of equality might be right and perhaps it should be adopted if right; but judges deciding cases are unlikely to arrive at it through high-level theorizing, and if they do, they may well fail to implement it in light of their institutional limitations.[18]

Sixth, incompletely theorized agreements may be the best approach that is available for people of limited time and capacities. The search for full theorization may be simply too difficult for participants in law to complete, and so too for others attempting to reason through difficult problems. Here too the rule of precedent is crucial; attention to precedent is liberating, not merely confining, since it frees busy people to deal with new matters. And when compared with the search for theory, incompletely theorized agreements have the advantage, for ordinary lawyers and judges, of humility and modesty. To enter into such agreements, one need not take a stand on large, contested issues of social life, some of which can be resolved only on what will seem to many a sectarian basis.

Seventh, and finally, incompletely theorized agreements are well adapted to a system that must take precedents as fixed points. This is a large advantage over more ambitious methods, since ambitious thinkers, in order to reach horizontal and vertical coherence, will probably be forced to disregard many decided cases. In light of the sheer number of adjudicative officials, law cannot speak with one voice; full coherence in principle is unlikely in the extreme. Consider the fact that the world of legislation does not reflect a coherent set of principles, but instead a range of complex judgments and compromises by people who are often self-interested

[18] See Gerald Rosenberg, *The Hollow Hope* (1992).

and whose aspirations and values conflict. The world of adjudication is not so very different. Thus the area of contract law is unlikely to cohere with the field of tort law, or property; contract law is itself likely to contain multiple and sometimes inconsistent strands. The basic point is far from unfamiliar; what I am suggesting is that multiple and sometimes inconsistent strands are a natural outgrowth of incompletely theorized agreements, which are themselves a way of minimizing the extent and depth of conflict.

B. Judges, Theory, and the Rule of Law

There is a close association between the effort to attain incompletely theorized agreements and the rule of law ideal. Insofar as our system involves rule by law rather than rule by individual human beings, it tries to constrain judgments in advance. The rule of law is generally opposed to rule by individual human beings, who are permitted to govern as they wish through making law of their choice in the context of actual disputes. And insofar as the rule of law prevents this from happening, it tries to prevent people in particular cases from invoking their own theories of the right or the good so as to make decisions according to their own most fundamental judgments.

Indeed, a prime purpose of the rule of law is to rule off-limits certain deep ideas of the right or the good, on the view that those ideas ought not to be invoked by officials occupying particular social roles. Among the forbidden or presumptively forbidden ideas are, often, high-level views that are taken as too hubristic or sectarian precisely because they are so high-level. The presumption against high-level theories is an aspect of the ideal of the rule of law to the extent that it is an effort to limit the exercise of discretion at the point of application.

In this way we might make distinctions between the role of high theory within the courtroom and the role of high theory in the political branches. To be sure, incompletely theorized agree-

ments play a role in democratic arenas; consider laws protecting endangered species or granting unions a right to organize. But in democratic arenas, there is no taboo, presumptive or otherwise, on invoking high-level theories of the good or the right.[19] Such theories have played a role in many social movements with defining effects on American constitutionalism, including the Civil War, the New Deal, the women's movement, and the environmental movement.

By contrast, use of large-scale theories by courts is problematic and generally understood as such, within the judiciary (as exemplified by judicial practice) if not within the law schools. The skepticism is partly a result of the fact that large-scale theories may require large-scale social reforms, and courts have enormous difficulties in implementing such reforms.[20] When courts invoke a large-scale theory as a reason for social change, they may well fail, simply because they lack the tools to bring about change on their own. In invalidating or changing a single rule, courts may produce unfortunate systemic effects, which are not visible to them at the time of decision, and which may be impossible for them to correct thereafter. For those who believe in social change in the interest of social justice, it is worthwhile to note as well that, as a general rule, judges are not likely to seek to obtain the sorts of change in which they are interested and that judges who adopt large-scale theories of social justice may well err, because their theories may well be crude or wrong.

More fundamentally, it is in the absence of a democratic pedigree that the sytem of precedent, analogy, and incompletely theorized agreement has such an important place. The need to discipline judicial judgment arises from the courts' complex place in the constitutional system. A theory of legitimacy requires an account of just institutions, and courts are a single actor in a network that is

[19] I am putting to one side the questions raised by "comprehensive views"; see Rawls, *Political Liberalism*.

[20] See Rosenberg, *The Hollow Hope*.

supposed to be Just.[21] To be sure, judges have a duty to interpret the Constitution, and sometimes that duty authorizes them to invoke relatively large-scale principles, seen as part and parcel of the Constitution as democratically ratified. Many people think that judicial activity is best characterized by reference to use of such principles,[22] and it would be wrong to deny that there are occasions on which this practice is legitimate.

To identify those occasions, it would be necessary to develop a full theory of legal interpretation. For present purposes I urge something more modest. Most judicial activity does not involve constitutional interpretation, and the ordinary work of common law judgment and statutory interpretation calls for low-level principles. Indeed, constitutional argument is itself based largely on low-level principles, not on high theory, except on those rare occasions when more ambitious thinking becomes necessary to resolve a case, or when the case for the ambitious theory is so insistent that a range of judges do and should converge on it. There are reasons for the presumption in favor of low-level principles, having to do with the limited capacities of judges, the need to develop principles over time, the failure of monistic theories of the law, and the other considerations traced above.

3. Features of Analogy

I now turn to analogical thinking as an illustration of incompletely theorized agreements on particulars.[23] This way of pro-

[21] This is the problem with the claimed association between legitimacy and integrity in Dworkin, *Law's Empire.*

[22] This is the vision of judicial review in Bruce Ackerman, *We the People,* vol. 1: *Foundations* (1991). Note that it differs dramatically from the understandstanding in Dworkin, *Law's Empire,* in the sense that Ackerman insists that the large-scale principles have sources in actual judgments of "we the people." There is, however, a commonality between Ackerman and Dworkin in the sense that both see the use of such principles as a large part of the Court's work. It is along that dimension that I am doubting both of their accounts.

[23] The discussion that follows draws on Cass R. Sunstein, "On Analogical Reasoning," *Harvard Law Review* 106 (1993): 741. I have, however, added a good deal of material and also made some significant changes.

ceeding is pervasive in law and in everyday life. In ordinary discussions of legal questions, the ordinary mode is analogical. You think that racial hate speech is not protected by the first amendment; does this mean that government can silence George Wallace or Louis Farrakhan? A familiar argumentative technique is to show inconsistency in someone's claim about case *X* in light of that person's views on case *Y*. Analogical thinking is a form of casuistry; it is based on close attention to individual instances. In lecture II, I shall defend casuistry against rule-bound decisions; here I oppose it to use of high-level theories.

In analogical thinking as I understand it here, such theories are not deployed. They seem too sectarian, too large, too divisive, too obscure, too high-flown, too ambitious, too confusing, too contentious, too abstract. But analogizers cannot reason from one particular to another particular without saying something at least a little abstract. They must invoke a reason of principle or policy to the effect that case *A* was decided rightly *for a reason,* and they must say that that reason applies, or does not apply, in case *B*. I will try to show that this method of proceeding is ideally suited to a legal system consisting of numerous judges who disagree on first principles, who lack scales, and who must take most decided cases as fixed points from which to proceed.

1. *Analogies outside of law.* Outside of law, analogical reasoning often helps to inform our judgments. I have a German shepherd dog, and I know that he is gentle with children. When I see another German shepherd dog, I assume that he too will be gentle with children. I have a Toyota Camry, and I know that it starts even on cold days in winter. I assume that my friend's Toyota Camry will start on cold winter days as well. There is a simple structure to this kind of thinking. (1) *A* has some characteristic *X*, or characteristics *X*, *Y*, and *Z*. (2) *B* shares that characteristic or those characteristics. (3) *A* also has some characteristic *Q*. (4) Because *A* and *B* share characteristic *X* or char-

acteristics X, *Y,* and *Z,* we conclude what is not yet known, that *B* shares characteristic *Q* as well.

This is a usual form of reasoning in daily life, but it will readily appear that it does not guarantee truth. The existence of one or many shared characteristics does not mean that all characteristics are shared. Some German shepherd dogs are not gentle with children. Some Toyota Camrys do not start on cold days in winter. For analogical reasoning to work well, we have to say that the relevant, known similarities give us good reason to believe that there are further similarities as well and thus help to answer an open question. Of course this is not always so. At most, analogical thinking can give rise to a judgment about probabilities, and these are of uncertain magnitude.

2. *Analogical thinking in law: its characteristic form.* Analogical reasoning has a simple structure in law. Consider some examples. We know that an employer may not fire an employee for agreeing to perform jury duty;[24] it is said to follow that an employer is banned from firing an employee for refusing to commit perjury. We know that a speech by a member of the Ku Klux Klan, advocating racial hatred, cannot be regulated unless it is likely to incite and directed to inciting imminent lawless action;[25] it is said to follow that the government cannot forbid the Nazis to march in Skokie, Illinois.[26] We know that there is no constitutional right to welfare, medical care, or housing; it is said to follow that there is no constitutional right to government protection against domestic violence.[27]

[24] See *Petermann v. Int'l Brotherhood,* 344 P 2d 25 (Cal 1959).

[25] See *Brandenburg v. Ohio,* 395 US 444 (1969).

[26] See *Collin v. Smith,* 578 F.2d 1197 (7th Cir. 1978).

[27] See *DeShaney v. Winnebago County,* 109 S Ct 998 (1989). In the legal examples we are dealing with noninductive analogical reasoning. We are not making a prediction about likely facts in an unknown case (as in: my German Shepherd is gentle with children, and other German Shepherds will be gentle too), but instead making claims about how an as-yet undecided case should be resolved in light of its similarity to a decided or clear case.

From a brief glance at these cases, we can get a sense of the characteristic form of analogical thought in law. The process appears to work in five simple steps. (1) Some fact pattern *A*—the "source" case—has characteristics *X*, *Y*, and *Z*. (2) Fact pattern *B*—the "target" case—has characteristics X, *Y*, and *A*, or characteristics *X*, *Y*, *Z*, and *A*. (3) *A* is treated a certain way in law. (4) Some low-level principle, discovered in the process of thinking through *A*, *B*, and their interrelations, explains why *A* is treated the way that it is. (5) Because of what it shares in common with *A*, *B* should be treated the same way. It is covered by the same low-level principle.

It should readily appear that analogical reasoning does not guarantee good outcomes or what we might describe as truth in law. For analogical reasoning to operate properly, we have to know that *A* and *B* are "relevantly" similar, and that there are not "relevant" differences between them. Two cases are always different from each other along at least some dimensions. When lawyers say that there are no relevant differences, they mean that any differences between the two cases (a) do not make a difference in light of the precedents, which foreclose certain possible grounds for distinction or (b) cannot be fashioned into the basis for a distinction that makes sense or is genuinely principled. A claim that one case is genuinely analogous to another—that it is "apposite" or cannot be "distinguished"—is parasitic on conclusion (a) or (b), and either of these must of course be justified.

The key task for analogical reasoners is to decide when there are relevant similarities and differences. Categories must be constructed rather than found, and both precedents and statutes force interpreters to make complex evaluations. To see whether a precedent or a statute "applies" to a particular context, we must develop some principles separating the cases that are covered from those that are not—step 4 in the assessment described above. The judgment that a distinction is not genuinely principled of course re-

quires a substantive argument of some kind. What, then, are the characteristics of a competent lawyer's inquiry into analogies?

3. *The features of analogy.* In law, analogical reasoning has four different but overlapping features: *principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction.* Taken in concert, these features produce both the virtues and the vices of analogical reasoning in law. I offer some brief remarks on each of these features.

First, and most obviously, judgments about specific cases must be made consistent with one another. A requirement of coherence, or principled consistency, is a hallmark of analogical reasoning (as it is of reasoning of almost all sorts). It follows that in producing the necessary consistency, some principle, harmonizing seemingly disparate outcomes, will be invoked to explain the cases. The principle must of course be more general than the outcome for which it is designed.

Second, analogical reasoning is focused on particulars, and it develops from concrete controversies. Holmes put it in this suggestive if somewhat misleading way: A common law court "decides the case first and determines the principle afterwards." [28] The suggestion is misleading since in order to decide the case at all, one has to have the principle in some sense in mind; there can be no sequential operation of quite the kind Holmes describes. But Holmes is right to say that ideas are developed from the details, rather than imposed on them from above. In this sense, analogical reasoning is a form of "bottom-up" thinking. Unlike many forms of reasoning, it does not operate from the top down.

Despite the analogizer's focus on particulars, we have seen that any description of a particular holding inevitably has some theoretical components. One cannot even characterize one's convictions about a case without using abstractions of some sort, and

[28] Oliver Wendell Holmes, "Codes and the Arrangements of *Law," Harvard Law Review* 44 (1931): 725, reprinted from *American Law Review* 5 (1870): 11.

without taking a position on competing abstractions. We cannot know anything about case *X* if we do not know something about the reasons that count in its favor. We cannot say whether case *X* has anything to do with case *Y* unless we are able to abstract, a bit, from the facts and holding of case *X*. The key point is that analogical reasoning involves a process in which principles are developed from and with constant reference to particular cases.

Third, analogical reasoning operates without anything like a deep or comprehensive theory that would account for the particular outcomes it yields. On this count analogy-making shares an important characteristic with rule-interpretation. The judgments that underlie convictions about, or holdings in, the relevant case are incompletely theorized, in the sense that they are unaccompanied by anything like a full apparatus to explain the basis for those judgments. Of course there is a continuum from the most particularistic and low-level principles to the deepest and most general. We might compare the idea that government may not discriminate on the basis of point of view with the notion that the first amendment is based on a certain well-developed notion of autonomy. There is no qualitative distinction between the low-level and the deeply theorized. I suggest only that analogizers avoid those approaches that come close to the deeply theorized or the foundational, and that, to this extent, lawyers are generally analogizers.

Fourth, and finally, analogical reasoning produces principles that operate at a low or intermediate level of abstraction. If we say that an employer may not fire an employee for accepting jury duty, we might mean (for example) that an employer cannot require an employee to commit a crime. This is a principle, and it does involve a degree of abstration from the particular case; but it does not entail any high-level theory about labor markets, or about the appropriate relationship between employers and employees. If we say that a Nazi march cannot be banned, we might mean that political speech cannot be stopped without a showing of clear and

immediate harm; but in so saying, we do not invoke any large theory about the purposes of the free speech guarantee, or about the relation between the citizen and the state. People can converge on the low-level principle from various foundations, or without foundations at all. In analogical reasoning, as I understand it here, we usually operate without express reliance on any quite general principles about the right or the good. (Note that I am suggesting that analogical reasoning is not aptly described as a process of reasoning from particular to particular. Principles, though low-level ones, are involved; they are built into the analogical process.)

If we put interpretation of rules to one side, as a partial and arguable exception, reasoning by analogy, understood in light of these four characteristics, is the mode through which ordinary lawyers characteristically operate. They have no abstract theory to account for their convictions, or for what they know to be the law. But they know that these are their convictions, or that this is the law, and they are able to bring that knowledge to bear on undecided cases. For guidance, they look to areas in which their judgment is firm. Analogical reasoning thus works when an incompletely theorized judgment about case *X* is invoked to come to terms with case *Y*, which bears much (but not all) in common with case *X*, and in which there is as yet no judgment at all.

4. *Analogies both ways.* In his classic discussion, Edward Levi also describes the process of legal reasoning as analogical.[29] But my account diverges from Levi's on the important question of what happens when analogies appear to point in different directions. On the description I have offered, the judge must make some judgment about the best controlling low-level principle. By contrast, Levi says that in such cases "words change to receive the content which the community gives to them." Thus "peoples' wants change. . . . [T]he laws come to express the ideas of the community. . . . Reasoning by example shows the decisive role

[29] See Edward Levi, *Introduction to Legal Reasoning* (1948).

which the common ideas of the society and the distinctions made by experts can have in shaping the law. . . . The process is one in which the ideas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions." For Levi, reasoning by analogy therefore has a crucial democratic component, found through the use of public desires (and social science) to help decide the reach of analogies.

Levi did not, however, specify the mechanism by which community wishes help settle the play of analogies. There may be a historical explanation for this seemingly odd suggestion. Levi's book can be understood as a response to the legal realistic attack on the autonomy of legal reasoning and to the associated claim, prominent in the aftermath of the New Deal, that legal reasoning is fatally undemocratic. When Levi was writing, it seemed crucial to establish the relative autonomy of law and especially of the common law method — to show that it had a logic and integrity of its own, but also to establish that it was not wholly independent of social desires. The enduring influence of Levi's account may stem from its apparent success in the endeavor of connecting analogical thinking with democratic judgments.

It would, however, be most surprising if one could identitfy any mechanism translating democratic wishes into analogical reasoning. Perhaps the appointments process supplies some such mechanism; surely there is some connection between community will and judicial outcomes. But any such connection is contingent and highly imperfect. In hard cases, moreover, the community is badly divided. There may be no desire, on its part, to which courts can look in making decisions. In fact the views of the community may be at least in part a function of what the courts say, and here reliance on community views is especially difficult. The pervasiveness of any argument by analogy really turns on something other than community desires. Instead the process works by seeing to what sorts of things people in positions of decision

are most deeply committed. It is in this way that analogizers try to figure out whether there are relevant similarities and differences. Of course their judgments may be informed, to a greater or lesser extent, by the perceived beliefs of the public.

For these reasons Levi's account seems inadequate. But there is a valid and important point in the background. Sometimes it is taken for granted that *A* is analogous to *B*. The judgment to this effect is uncontested. It does not really rest on an argument. Instead it depends on ways of thinking that are constitutive of people's categories. Some analogies rest not on arguments but instead on unquestioned background beliefs. The idea that a cat is "like" a dog, in the sense that both are animals, rests not so much on an argument as on a taken-for-granted view about what an animal is. There are many legal analogues. The view that a ban on racial intermarriage is "like" school segregation is now so widely accepted that it does not, very often, require an argument. Now ideas of this kind may in fact be supportable by an argument, But often judgments about relevant similarities and relevant differences rest on a deep social consensus, and so it is unnecessary to defend them by reference to reasons.

Sometimes, however, there is slippage in the category, so that uncontested judgments become contested and need arguments. Consider the view that regulation of homosexual conduct is like regulation of incest; this judgment, once taken for granted, is now sharply contested. Sometimes the opposite happens, as a contested judgment becomes uncontested, and now operates as part of the backdrop against which lawyers do their ordinary work. Consider the view that discrimination on the basis of sex is like discrimination on the basis of race. At least for the most part, that judgment of analogousness has become part of the legal fabric, and it is not subject to ongoing challenge or defense.

5. *Why analogy?* There is an additional issue. Why might we think analogically? Would it not be better to proceed directly to the merits, rather than to compare cases with one another? (The

case for rules, another alternative to analogies, is explored below.) I think that the ultimate answer is highly eclectic. The case for analogies is pragmatic; it involves an array of diverse social interests.[30] I offer a brief outline here.

First, the analogizer is committed to a certain kind of consistency or equal treatment. A litigant in case *A* may not be treated differently from a litigant in case *B,* unless there is a relevant difference between them. This idea operates as a barrier to certain forms of prejudice and irrationality. Second, analogies can be a source of both principles and policies. A judge who looks at a stock of precedents will be able to learn a great deal. Investigation of analogies may not be the best way to do policy science or to investigate issues of principle. But it may contribute a little bit to that process. Third, the resort to decided cases, as analogies, helps judges to avoid hubris. A judge who respects what others have done is less likely to overstep, by invoking theories that are idiosyncratic, highly divisive, or sectarian. Fourth, analogical reasoning, if based on precedent, promotes the interest in fostering and protecting expectations. Cases may encourage people to believe that the law is a certain way, and they may act on that belief. Fifth, analogical thinking saves time by establishing a wide range of conventions. If judges had to start from scratch in each case, the legal system would be overwhelmed. For judges and lawyers, following precedent is thus enabling rather than constraining. It enables judges to avoid recreating the law from the ground up and thus ensures that people of limited time and capacities can take much for granted. Finally —to return to our main theme —analogies facilitate the emergence of agreement among people who diverge on most or many matters. Judges *A, B,* and *C* may disagree on a great deal. But to say the least, it is helpful if judge *A* can invoke certain fixed points for analysis, so that judges *B* and *C* can join

[30] In this way I reject the idea that "integrity," as understood and defended in Dworkin, *Law's Empire,* is a method of producing political community. Instead I see the interest in integrity as part of a set of broadly pragmatic interests, though I cannot defend this claim here.

the discussion from shared premises. Perhaps judge *B* can invoke some fixed points that argue in a surprising direction. We cannot exclude the possibility that ultimately the judges really do disagree. But with analogies, at least they have begun to talk.

4. Analogies in Law: Common, Constitutional, Statutory

A. The Common Law

As a description of common law cases, this account should be unsurprising. Judges typically decide particular controversies by exploring how previous cases have been resolved. They rely on precedents and reason from them. They look for relevant similarities and relevant differences. In the end, they will produce a rule or a standard, or more likely a series of rules and standards. But any rules are not given in advance of encounters with particulars; they are generated through close encounters with the details of cases. Moreover, the rules that emerge from the cases are not simple rules, for they can be changed at the moment of application, especially when the court encounters a case that seems to have new or unanticipated characteristics.

The fact that the common law operates by analogy does not mean that the common law is without rules. Far from it. The common law is pervaded by rules, many of which are followed even in cases in which a return to first principles, or to the justifications for the rules, would call for some refashioning of the rules during the confrontation with particular cases. In the abstract, a common law system may be even more rule-like than a civil law system. Many of the laws of a civil law system are really standards, filled with ideas like "reasonable" and "good faith" —ideas that have not been given fixed content. Many areas of the common law have eschewed standards or factors and yielded a large number of rules.

Thus if we look at the law of tort, contract, and property, we will find a wide range of so-called principles that really serve as

rules or as something very close to rules. For the most part, it is possible to describe the circumstances in which one person is liable for harms caused to another, or the contexts in which an agreement gives rise to contractual liability. Across most of the domain of the common law, rules are available, settling issues in advance. Nonetheless, it remains true that many common law courts do perceive themselves as authorized to change the rule, or to reconceive the rule, when the particulars of the case so require. Often courts feel free to examine a wide range of policies and principles in deciding whether a previous "rule" makes sense to novel cases.

My point here is thus twofold. Much of the common law has rule-like features, even if the governing law has emerged through analogies and encounters with particulars. But the common law sometimes is not fully rule-like in practice, because some judges believe it appropriate to define the law by elaborating and evaluating the justifications for the rule, and their applicability to the particular case, in the context of resolving controversies.

B. The Constitution

Analogical reasoning is crucial in constitutional cases. Indeed, constitutional law is often constructed from analogies —not from text or history; not from moral theory; and not from existing social consensus. Constitutional law is a form of casuistry, in which judges build low-level theories out of materials that are taken as given. This is a controversial claim, and so it makes sense to spend time in defending it here.

In American constitutional law, it is often suggested that the actual and appropriate foundations of decision are text, structure, and history. The suggestion is right, but it is often a conceit.[31] Sometimes judges do ask about the relation between the case at hand and constitutional text, structure, and history. But this approach often produces insoluble difficulties. The difficulties may stem from the fact that there are large ambiguities in the three

[31] See David Strauss, *Common Law Constitutionalism* (forthcoming).

sources of law. They may result because high-level ideas like "equal protection" must be specified in order to be usable. Or the problem may be that of applying a general document to particular problems, many of which were unanticipated.

Those who believe that constitutional cases often turn on something other than text, structure, and history tend to suggest that large-scale moral or political claims play a role in resolving constitutional gaps. But this view poses problems of its own, especially on a multimember court consisting of people who are uncertain about or who disagree on first principles. Judges do invoke moral principles, to be sure, but usually those principles operate at a low level of abstraction, and judges try to avoid the largest and most disputable claims. This is a key part of the ethos of constitutional adjudication, exemplified not least in the idea that unnecessary constitutional rulings should be avoided, an idea that is meant to limit disagreement over fundamental principles.

Consider, for example, the question whether a ban on flag-burning violates the constitutional protection against laws abridging the freedom of speech. The constitutional text does not say whether flag-burning falls within "the freedom of speech," nor whether laws preventing that act "abridge" any such freedom. The history behind the provision is not very helpful. To come to terms with that history, we need to make complex judgments about the transplantation of the framers' general commitments and particular conclusions to a new era. There is no simple "fact" with which judges can work. Moral and political argument can certainly help here; but if it is abstract, it may produce confusion or stalemate and may not be productive among heterogeneous judges who disagree on a great deal. Many judges will find the moral argument on the free speech principle —about liberty, democracy, utility — too confusing to be helpful. Others will disagree too sharply on the governing values.

Judgments become far more tractable if constitutional interpreters try to proceed, as they do in fact, through analogies. There

is general agreement — indeed there is a holding — that draft-card burning is not protected by the constitution, at least if government is trying to make sure that people do not lose their draft-cards. Is a ban on flag-burning relevantly similar or relevantly different? This is a start of an inquiry into a large number of analogies, some involving decided cases, others involving hypotheticals. This is also how judges proceed. The conclusion is that our constitutional tradition is largely a common law tradition.[32] It has more in common with English constitutionalism, and with our own common law, than is generally recognized.

This understanding of American constitutionalism raises a question of democratic legitimacy. Often the legitimacy of a constitution, or of constitutional law, is traced to the fact that the document reflects considered judgments of the people as a whole. In this view, judicial review — the extraordinary process of judicial invalidation of measures having a democratic pedigree — is justified by the fact that judicial decisions are a product of the people's will.[33] Of course this understanding is in some ways a charade. But most recognizable theories of judicial review attempt to connect constitutional judgments to constitutional text and history, and the absence of some plausible connection would be extremely disturbing to nearly all people concerned with constitutional legitimacy. Without a conception of democratic judgments, on what authority do courts invalidate statutes?

There is much to say on this difficult topic. Part of the answer lies in the rule of law values associated with following precedent. The process of precedent-following disciplines judicial discretion and also makes it plausible to say that there has been public acceptance of, acquiescence in, or at least nonrejection of constitutional decisions. Some of the answer lies in the fact that in constitu-

[32] The best discussion is Strauss, *Common Law Constitutionalism;* see also Harry Wellington, "Common Law Rules and Constitutional Double Standards," *Yale Law Journal* 83 (1973): 221.

[33] This is a widely shared view. For all their differences, both Robert Bork, *The Tempting of America* (1989), and Ackerman, *We the People,* accept it.

tional cases judges rely on defining moments or defining precedents —the Civil War, the New Deal, the civil rights movement, and *Brown v. Board of Education* — that have a high degree of popular approval and that operate as fixed points for inquiry, whatever the judges think of them as a matter of political theory. And a large part of what disciplines judicial judgments, and at least some part of what legitimates them, is not constitutional text or history, but the need, perceived by judges as well as by everyone else, to square current judicial decisions with previous judicial decisions. When a court concludes that a ban on flag-burning violates the constitutional protection of free speech, it may of course seek to connect its conclusion with constitutional text and history and also with a good conception of the free speech principle. But much of the apparatus behind the conclusion is not text or history, and not general principle, but previous judicial decisions —ruling some approaches off-limits, placing others on the table, and in any case establishing tracks along which reasoning must go.

This apparatus is not sufficient for judicial legitimacy. But it certainly contributes to such legitimacy, because it limits judicial hubris, produces a kind of consistency among people who are similarly situated, and builds (under good conditions) on the wisdom of the past. As noted, I do not contend that the process of analogical reasoning is enough for legitimacy by itself. Analogical reasoning does not have the full virtues of judicial integrity, in the form of horizontal and vertical consistency among legal judgments, and the virtues of integrity are themselves quite limited. I return to this issue below.

Let us turn now to the role of moral judgments in constitutional law. Some people think that constitutional law is or should be deeply philosophical,[34] and it is easy to understand the basis of this belief. How can we decide the meaning of the word "equal," or "liberty," or "reasonable" without making philosophical claims? But there is a problem with this view, and the problem is con-

[34] Dworkin, *Law's Empire.*

nected to the fact that legal solutions must operate in a world with distinctive limitations. Some philosophers think, for example, that a free speech principle that places a special premium on political discussion is extremely attractive.[35] But judges may not be able to agree on this idea, and agreement is indispensable in light of the fact that cases have to be decided. Perhaps this approach would be too readily subject to abuse in the real world. Perhaps any institutional judgments about the category of what counts as "the political" would be too biased and unreliable to be accepted. For good institutional reasons, we might adopt a free speech principle of a low-level or philosophically inadequate sort, simply because that inadequate approach is the only one that we can safely administer.

The example is not exotic. Suppose that we wanted to ensure that confessions are made under circumstances in which they are truly voluntary. Suppose that we can generate a philosophically adequate account of voluntariness, and that, with respect to that account, some confessions that come after the *Miranda* warnings are involuntary, while some confessions that are given without those warnings turn out to be voluntary. The *Miranda* rules, in short, turn out to be both overprotective and underprotective with reference to the best philosophical understanding of voluntariness. Do we have a sufficient reason to abandon *Miranda?* Surely not. The *Miranda* approach may be the best means of combining real-world administrability with substantive plausibility. If so, it may be more than good enough despite its philosophical inadequacy. The phenomenon of philosophically inadequate but nonetheless justified legal strategies seems to be a pervasive part of a well-functioning system of law.

All this suggests that legal conclusions need not be justified from the philosophical point of view, and that deep philosophical justifications may not yield good law, because of the institutional

[35] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

constraints faced by participants in any legal system. The point is connected with the role of analogies. Analogical thinking is unlikely to provide an adequate understanding of any area of law. But perhaps analogical reasoning, whatever its limits, is well adapted to some of the institutional disabilities of courts. This is hardly a basis for celebrating analogical thinking in the abstract. But it seems to be enough to see why this way of proceeding has such appeal among participants in law (and among ordinary people approaching moral question as well).

C. Analogy within Status and Rules

I have dealt thus far with the role of analogies at common law and in constitutional law. My goal in this section is to suggest that, in cases to be decided *under statutory rules,* courts also engage, much of the time, in a form of analogical reasoning.[36] This is a counterintuitive claim. Interpretation of rules is often said to be at an opposite pole from analogical reasoning. Of course common law courts engage in analogical thinking, dealing with precedents; but judges do nothing of the kind when they deal with statutes. This opposition is far too simple. Often interpretation of rules involves analogy too.

Consider these cases:

1. A statute enacted in 1720 forbids people to "sell babies." In 1993, Mr. and Ms. Jones hire Ms. Andrea Smith to be a surrogate mother. Does the contract violate the statute?[37]

2. A statute makes it a crime, with a thirty-year mandatory minimum, for someone to "use a firearm in connection with a sale of an unlawful substance." Smith sells a firearm in return for cocaine, an unlawful substance. Has Smith violated the statute?[38]

[36] Hart makes the same point in his discussion of the distinction between law via examples and law via rules. See H. L. A. Hart, *The Concept of Law* (2d ed., 1994), pp. 127–29.

[37] *Surrogate Parenting Assn. v. Kentucky,* 704 SW2d 209 (1986).

[38] *Smith v. US,* 113 S Ct 2050 (1993).

3. In 1964, Congress enacted a law forbidding any employer from "discriminating on the basis of race." Bennett Industries has an affirmative action program, offering preferential treatment to African-American applicants. Does Bennett Industries discriminate on the basis of race, in violation of the 1964 statute?[39]

Here we have three cases involving the meaning of statutory terms. All three cases were hard. All of them produced divided courts. By what method should such cases be resolved? How were they resolved in fact? It would be especially good to be able to decide such cases without invoking large-scale theories of the good or the right. If judges, to decide such cases, must develop a deep account of what lies behind the ban on discrimination, or the prohibition on babyselling, or the ban on the use of guns in connection with drug transactions, things will become very difficult very quickly. Is there a feasible alternative? I think that the answer is affirmative, and indeed that it is the same answer for all three cases, which should therefore be seen as variations on a single theme.

For the dissenting judge, the first case was especially easy. The statute forbids "babyselling." Smith sold her baby to the Jones couple. No controversial claim is necessary in order for us to see that a baby has been sold. The statute speaks unambiguously on the topic. We do not need analogies at all. Much less do we need deep theories of any kind. Here is a simple case of rule-following.

But perhaps things cannot proceed so quickly. Has Smith really sold "her" baby? How do we know whether it was ever hers? Mr. and Ms. Jones say that they are simply purchasing gestational services, and not a baby at all. In this way, they say, the case is quite different from one in which a parent sells a born child who is unquestionably hers; the case is not covered by the statutory language at all. To be sure, it seems natural to think that Smith's biological connection to the baby gives her ownership rights—whether whole or partial—in the child she has brought to term.

[39] *United Steelworkers v. Kaiser Aluminum,* 443 US 193 (1979).

But property rights do not come from the sky or even from nature; property rights as we understand them have legal sources. (The claim that "X has a property right" means that *X* has a legal right of some sort to the interest in question.)

The problem for the court deciding the case is that the legal system has made no decision at all on the subject of ownership. The legal system has not allocated the child to Smith, or for that matter to Mr. and Ms. Jones. It follows that we do not really know whether we have a sale of a baby. A look at the literal language —understood via the dictionary, or in context, or both — will not be sufficient. The use of the literal language to resolve the case is therefore a version of bad formalism, as in the idea that "liberty" necessarily includes freedom of contract, or "equality" necessarily bans affirmative action. We seem to need an argument rather than a language lesson.

Is it therefore necessary to ask why babyselling is prohibition, or to develop the best constructive account of the prohibition, and then to ask whether that account bans surrogacy arrangements as well?[40] We should hope not. In view of the difficulty and contested character of that issue, judges should avoid it if they possibly can. How did the court approach the problem?

In deciding the case, the majority of the court acknowledged that the text was not simple as applied to the situation of surrogacy. In determining its meaning, the court asked: Is a surrogacy arrangement relevantly similar to or different from the sale of a baby? The court therefore reasoned analogically. It held that the surrogacy arrangement was lawful. Its argument took the following form. There is at least a plausible difference between a surrogacy arrangement and the sale of a born child. In the former case, the child would not exist but for the arrangement. A ban on the sale of an existing child causes special risks for the child itself and for necessitous parents, who might be put under particular pressure. The surrogacy situation has a factual difference that

[40] This is Dworkin's suggestion. See *Law's Empire,* ch. 7.

might well make a difference on both counts. The child may face lower risks and the surrogate mother is in a different situation from parents of a born child. In any case, the legislature that outlawed babyselling therefore made no considered judgment to ban surrogacy. The court ought not to take the language of the statute to reach a situation for which no considered judgment was made, at least where there is a plausible difference between that situation and the obvious or defining cases.

It might be tempting to suggest that this approach does take a theoretical stand, and in a way it does. To reason analogically, the judges had to decide whether the sale of a baby is relevantly different from a surrogacy arrangement, and to make that decision, they had to come up with an account of why the sale of a baby is banned. But notice the special form of the argument. The justification behind the ban on babyselling was described at a relatively low level of abstraction. The court did not say that a surrogacy arrangement was, in principle, really different from a ban on babyselling. It said only that there were differences that might be thought relevant. Much of its decision had to do with the allocation of authority between courts and legislatures. A broadly worded criminal statute should not be applied to a controversial situation not within the contemplation of the enacting legislature, and plausibly different from the situation before it, unless and until there has been democratic deliberation on that question.

Despite the bow in the direction of literalism, the dissenting judges appeared to use a similar method. They reasoned analogically and found the analogy apposite. They said that a surrogacy arrangement poses all of the dangers posed by ordinary babyselling. They thought that surrogacy was unlawful because it was analogous to what was unambiguously unlawful. They reasoned that the statutory rule applied to the case at hand because that case was not relevantly different from the cases to which it unambiguously applied. To reach these conclusions they gave no deep account of the ban on babyselling, but invoked instead low-level principles.

Now turn to the second case. In one understanding of the word "use," Smith has certainly "used" a firearm in connection with the sale of drugs. The gun was part of the transaction. But there is another linguistically plausible conception of the word "use," one suggesting that if we read the law in context, Smith has not really violated the statute. Perhaps someone "uses" a gun, as Congress understood the word "use," only if he uses it as a weapon. Smith did no such thing. Perhaps the ordinary understanding of the word "use," taken in this particular context, requires the gun to be a weapon rather than an item of barter. The case is parallel to the surrogacy case in the sense that the statutory term might well be applied in the situation at hand, but might not, and the situation at hand was almost certainly not within the contemplation of those who wrote the term.

The Supreme Court held that Smith violated the statute. Despite a bow in the direction of literalism, the Supreme Court did not really pretend that the words of the statute were clear. Instead it reasoned at least partly in this way: We know that a gun may not be used as a weapon in connection with the sale of drugs. Is the use of a gun as an object of barter relevantly similar or relevantly different? The Court said that it was relevantly similar. It said that Smith's own use of a gun, as an item of barter, poses serious risks to life and limb, since that very use puts a gun into the stream of commerce with people engaged in unlawful activity. Even though this particular gun was used as an item of barter rather than as a weapon, it posed exactly the same dangers as other guns, and was therefore very different from use of mere cash. It follows that Smith must be convicted. Notice here that the Court did generate an account of what lay behind the ban on use of guns, but that the account was quite low-level and that it worked by analogy.

Writing in dissent, Justice Antonin Scalia was quite incredulous. In part he relied on what he took to be the ordinary meaning of the word "use." But in part he too relied on an argument

from analogy. Smith's conduct was relevantly different from that contemplated by the statute. Smith did not threaten to shoot anyone. He should therefore be treated differently from people whom Congress sought specifically to punish. Justice Scalia thus tried to resolve the case by asking whether the application at hand was relevantly different from the applications that were uncontroversial. Since it was, the statute did not apply. Invoking the rule of lenity, Justice Scalia said that the ambiguous statute should not be applied to Smith. In this way his argument paralleled that in the surrogacy case: A statutory term should not be applied to a situation that reasonable people could think different from those called up by the most obvious instances of the term, at least if there is no reason to believe that Congress intended it to apply to that situation.

Now let us go to the third case. The antidiscrimination law prohibits "discrimination on the basis of race." But is an affirmative action program "discrimination on the basis of race"? Are the words themselves decisive, in the sense that the literal meaning admits of no dispute? Perhaps these words have clear dictionary meanings; but if we consult any good dictionary, we will find that the word "discrimination" is ambiguous on the point. That word could be interpreted so as to forbid any form of differentiation and hence any racial differentiation, but it could also be interpreted to include invidious discrimination, or distinctions based on prejudice and hostility, in which case affirmative action programs might be unobjectionable.

Seeing the case like the majority in the surrogacy dispute and like Justice Scalia in *Smith,* the Supreme Court treated the words of the statute as ambiguous in context. Instead of relying on a plain text, it proceeded in the following way. We know that discrimination against members of racial minorities is unlawful. Is discrimination against whites relevantly similar or relevantly different? The Court said that it could be seen as relevantly different. Its purpose and effect were to eliminate second-class citizenship for

blacks, not to perpetuate it. In so saying, the Court relied on the legislative history and context,[41] not for an unambiguous response to the issue at hand, but to get a sense of why the legislature thought that discrimination was wrong, and to test whether the justification for the law applied to affirmative action programs. The Court said something like this: We know that the statute applies to discrimination against blacks; is discrimination against whites, in the form of an affirmative action program, relevantly similar or relevantly different? It concluded that an affirmative action plan was relevantly different and that the statute was therefore inapplicable. The Court appeared to be arguing that the controversial issue of affirmative action should not be resolved through the interpretation of an ambiguous term, if that issue had never been squarely faced by the enacting legislature.

The three cases that I have discussed are hard, and they could be analyzed in many different ways. I do believe that in each of them the statutory barrier should have been found inapplicable. This is not for deeply theoretical reasons, but because of institutional concerns: If it is possible to see a relevant difference between the low-level principle behind the obvious instances and the case at hand, and if there is reason to doubt that the case at hand was or would have been within the contemplation of the enacting legislature, courts should not apply the statutory term. For this reason the "use" case was relatively easy: A thirty-year minimum sentence should not have been applied to a case that was plausibly quite different from the applications that Congress had in mind. A stiff criminal prohibition should not be applied to a plausibly different case from those covered by the rule. The surrogacy case should have been analyzed similarly. The ban on babyselling was not enacted with surrogacy in mind, and surrogacy is plausibly different from babyselling. The court was right to refuse to apply a criminal prohibition of this kind without focused legislative attention to the plausibly different case. The affirmative action case was

[41] 443 US at 201-7.

a bit harder, because it did not involve the criminal law, but it too was rightly decided. Congress had not thought about the problem of remedial programs, and the term "discrimination" need not include such programs, which again are quite plausibly different in principle. The Supreme Court was correct to require focused legislative attention before applying a barrier to a plausibly different case.

However this may be, the three cases appear to support a simple point. Sometimes a statute is ambiguous. Perhaps its words are unclear on their face, or unclear in context, or perhaps there is a question whether they should be interpreted literally because they extend to apparently unreasonable or unanticipated applications. In either case, a conventional approach to interpretation, takes the following form. The court examines what it takes to be the standard or defining applications of the statute — the cases to which it obviously applies. Then it asks whether the application at hand is relevantly similar or relevantly different. In so doing, the court is engaging in a form of analogical reasoning. It is deciding on the meaning of rules through an analogical process. It is not attempting to generate a deep theory for the statute.

5. Analogy and Incompletely Theorized Agreements

In this section, I defend the view that analogical reasoning, like rules, helps people who disagree on first principles to converge on judgments about particular cases.

A. Analogy and Burke

An initial challenge, traceable to Jeremy Bentham, is that the method of analogy is unduly tied to existing institutions and partly for this reason static or celebratory of existing social practice. The objection is that analogical reasoning works too modestly from existing holdings and convictions, to which it is unduly attached. It needs to be replaced by something like a general theory — in short, by something like science. Analogizers are Burkeans, and

their approach suffers from all the flaws associated with Edmund Burke's celebration of the English common law. It is too insistently backward-looking, too skeptical of theory, too lacking in criteria by which to assess legal practices.

At first glance, the claim seems mysterious. Whether analogical reasoning calls for the continuation of existing practice turns on the convictions or holdings from which analogical reasoning takes place. Without identifying those convictions or holdings, we cannot say whether existing practices will be celebrated. It is surely conceivable that the process of testing initial judgments by reference to analogies will produce sharp criticism of many social practices, and, eventually, will yield radical reform. Legal holdings that are critical of some social practices may well turn out, through analogy, to be critical of other practices as well.

In fact analogical thinking has often produced dramatic reform. *Brown v. Board of Education* invalidated racial segregation in education. By analogy to *Brown,* courts invalidated racial segregation elsewhere as well. More than that, they have reformed prisons and mental institutions; struck down many racial classifications, including affirmative action programs; invalidated sex discrimination; and prevented states from discriminating on the basis of alienage and legitimacy. Whether analogical reasoning is conservative or not depends not on the fact that it is analogical, but on the nature of the principles brought to bear on disputed cases.

B. Analogy and Realism

A separate objection to analogical thinking questions whether this way of proceeding actually has the virtue claimed for it. Does it really allow for agreement on particulars by people who disagree on general principles? On one view, reasoning by analogy is utterly indeterminate in the absence of social consensus, or a degree of homogeneity that will exist in no properly inclusive legal system. According to those skeptical of analogical thinking, we can reason in this way only if we already agree on certain

fundamental questions. Otherwise people will simply differ, and there will be no way to reason through their differences.

To some degree the objection is valid. If people think that the government can punish political speech whenever that speech poses any risk of any degree to the government, it will be hard to reason with them, through analogies, to a sensible system of free expression. (Note, however, that it may be possible to undermine this very position with analogies.) In this sense it is right to think that reasoning by analogy depends on a degree of commonality among participants in the discussion. If people have little or nothing in common, they may be unable to talk.

We might ask, however, whether this really amounts to an objection at all. The need for a degree of consensus is hardly a problem distinctive to analogy. It applies to all forms of reasoning.

In coming to terms with this objection, we need to distinguish between analogical reasoning in law and analogical reasoning elsewhere. In law, there are greater constraints on the process. Existing legal holdings sometimes provide the necessary commonality and the necessary consensus. People who disagree with those holdings usually agree that they must be respected; the principle of stare decisis so requires. Within the legal culture, analogical reasoning imposes a certain discipline, and a widespread moral or political consensus is therefore unnecessary. Hence people who could not use analogies to reach closure in politics or morality can often do so in law.

Analogies may well be less helpful in politics or morality, simply because of the possible absence of precedents that can help generate an incompletely theorized agreement on particular outcomes. The differences lead to two important conclusions. First, the method of analogy may indeed be less determinate outside of law. Second, there can be a real difference between the legally correct outcome and the morally correct outcome. The difference lies in the fact that analogies will operate as entirely "fixed points" in legal reasoning, whereas many of these are revisable in morality.

Consider, for example, the fact that lawyers must take *Roe v. Wade* as authoritative so long as it stands, even if they think the decision abhorrent from the moral point of view. If *Roe* is authoritative, it disciplines discussion of certain topics —the right to withdraw medical equipment, the right to use contraceptives, the right to euthanasia — and the discipline would be removed if the abortion issue were itself up for moral judgment.

Even outside of law, however, the objection from indeterminacy is not entirely persuasive. Very diverse people may have sufficient commonality, on fundamental matters, to permit considerable progress. When there appears not to be such commonality, a good deal of movement can occur through simultaneous engagement with what various participants in the discussion say and think — engagement that includes narratives about diverse experiences or history, personal and otherwise, as well as more conventional "reasons." (Note that the case method operates in part through narratives.) Much of moral discussion involves this form of casuistry, in which people test their provisional judgment by reference to a range of actual or hypothetical cases. We have no reason to disparage this process in advance. Sometimes people really do disagree. But analogical reasoning can at least help to discover exactly where they do, and exactly why.

C. *Analogy and Hercules*

The third objection comes from Ronald Dworkin, who describes adjudication as an ambitious endeavor, one that involves high-level theory. When lawyers disagree about what the law is with respect to some hard question —can the government ban hate speech? cross-burning?—they are disagreeing about "the best constructive interpretation of the community's legal practice."[42] Thus Dworkin argues that interpretation in law consists of different efforts to make a governing text "the best it can be." This is his conception of law as integrity. On Dworkin's view, judges

[42] *Law's Empire,* at p. 224.

are obliged to account for the existing legal materials, whether judge-made or statutory, by weaving them together into a mutually supporting framework.[43]

Whether or not these suggestions make for a successful attack on legal positivism,[44] they do help explain what people disagreeing in law are disagreeing about. But it is notable that Dworkin says little about the role of analogical reasoning, which lies at the heart of how lawyers actually think. In his hands, the relevant theories are large and abstract; they sound like political philosophy or moral theory. These theories are derived from and brought to bear on particular problems. But this is not how real lawyers proceed. They avoid broad and abstract questions. Such questions are too hard, large, and open-ended for legal actors to handle. They call for responses that take too long to offer, because they are too deeply theorized. They prevent people who disagree on large principles from reaching consensus on particular outcomes. In this way, Hercules (Dworkin's heroic hypothetical judge) could not really participate in ordinary judicial deliberations; he would be seen as a usurper, even an oddball.

Dworkin anticipates an objection with some of these characteristics. He notes that it might be paralyzing for judges to seek a general theory for each area of law, and he acknowledges that Hercules is more methodical than any real-world judge can be.[45] But Hercules, in Dworkin's view, "shows us the hidden structure of" ordinary "judgments and so lays these open to study and criticism." Of course Hercules aims at a "comprehensive theory" of

[43] Dworkin is not entirely clear on the relationship between fit and good moral theory. In all probability Hercules will not insist on what he sees as the best moral theory if it cannot fit the cases at all, and certainly he will exclude an outlier case if, in so doing, he can knit all other cases together into a morally compelling whole. But it is not clear to what extent fit is sacrificed for the sake of theory, and vice versa. For present purposes let us put these complexities to one side and simply note that the supreme lawyerly virtue of integrity is connected with achievement of principled consistency among similar and dissimilar cases.

[44] On this see Hart, "Postscript," in *The Concept of Law.*

[45] *Law's Empire,* at p. 265.

each area of law, while ordinary judges, unable to consider all lines of inquiry, must aim at a theory that is "partial." But Hercules' "judgments of fit and political morality are made on the same material and have the same character as theirs." [46]

It is these points that I am denying here. The decisions of ordinary judges are based on different material and have a different character. They are less deeply theorized, not only because of limits of time and capacity, but also because of the distinctive morality of judging in a pluralistic society. The point suggests that the ordinary judge is no Hercules with less time on his hands, but a different sort of figure altogether.

From the standpoint of Dworkin and Hercules, we might respond in the following way. There is often good reason for judges to resort to large-scale theory, and it stems from the transparent limits of analogical thinking and of attention to particulars. A judge who operates from the "bottom up," rather than from the "top down," might end up being Herculean too. At least he had better have that aspiration in mind, and thus see Hercules as a kind of goal or model. When our modest judge uses analogical reasoning to say that case *A* is like case *B,* he has to rely on a principle. Perhaps the principle is wrong, because it fails to fit with other cases, or because it is not defensible as a matter of political morality. If the judge is reasoning well, he should have before him a range of other cases, *C* through *Z,* in which the principle is tested against others and refined. At least if he is a distinguished judge, he will experience a kind of "conceptual ascent," in which the more or less isolated and small low-level principle is finally made part of a more general theory, or of something approaching integrity or reflective equilibrium. Perhaps this would be a paralyzing task, and perhaps our judge need not often attempt it. But it is an appropriate model for understanding law.

The conceptual ascent is especially desirable in light of the fact that analogical thinking will allow large pockets of inconsistency.

[46] Ibid.

Some areas of the law may make internal sense, but because the categories with sense are small, they may run into each other if they are compared. We may have a coherent category of law involving sex equality (though this would be fortunate indeed), and a coherent category involving racial equality (same qualification), but these categories may have a strange relation to the categories involving sexual orientation and the handicapped. Various subcategories of tort law may make sense, but they may not fit together. More ambitious forms of reasoning, going well beyond analogical thinking, seem necessary in order to test the low-level principles that are involved in analogies. In this way, we might conclude that analogical reasoning is indeed a part of Dworkin's account, and a part of the best account, but only as an early step toward something both wider and deeper.

There is some truth in this response; to say how much would take me far beyond the present discussion.[47] Perhaps moral reasoners should try to achieve vertical and horizontal consistency, not just the local pockets of coherence offered by analogy. And sometimes judges must raise the level of abstraction in order to decide justly, or in order to decide at all. But the response does not offer a complete picture; it ignores some of the distinctive characteristics of the arena in which real-world judges must do their work. Some of these limits involve what should happen in a world in which

[47] See Raz, *The Morality of Freedom.* Arrow's Impossibility Theorem: see Arrow, *Social Choice and lndividual Values,* who raises important problems for coherence theories in law, notably including Dworkin's account. I cannot discuss those problems here, but on a multimember judicial body, there may be serious cycling problems, in which, paradoxically, result *A* is favored over result *B,* which is favored over result *C,* which is (and here is the paradox) favored over result *A;* or decisions may turn, arbitrarily, on the order in which issues happen to arise ("path dependence"). See Frank Easterbrook, "Ways of Judging the Court," *Harvard Law Reveiw* 95 (1982): 802, 811–31. A strong theory of stare decisis, combined with a commitment to analogical thinking, may alleviate some of the cycling problems and thus produce greater stability in law; but it will simultaneously aggravate the problems of path dependence. Idem at pp. 817–21. The point suggests that it will be difficult to achieve real coherence through decentralized, multimember courts and that the Hercules metaphor will run into real difficulty. A system built on analogical reasoning aspires to less and can diminish cycling; but the problem of path dependence will result in a high degree of arbitrariness.

people face various constraints, as Dworkin acknowledges; but some of them involve judicial morality and appropriate mutual interaction in a world in which people disagree on first principles. In light of these limits, analogical thinking has several major advantages over Hercules' method. Those advantages have everything to do with the virtues of incompletely theorized agreements. Recall here that such agreements involve low-level principles on which people can converge from diverse foundations; that people of limited time and capacities are unlikely to be able to reach full integrity; and that incompletely theorized agreements reduce the costs of enduring agreements and are well suited to the need for moral evolution over time.

For those who favor conceptual ascent, the key problem is that less ambitious analogical reasoning in law is well adapted to a system that must take precedents as fixed points. This is a large advantage over Hercules' method, since Hercules, in order to reach horizontal and vertical coherence, will probably be forced to disregard many decided cases. Lawyers could not try to reach full integrity without severely compromising the system of precedent. Local coherence is the most to which lawyers may aspire. Just as legislation cannot be understood as if it came from a single mind, so precedents, compiled by many people responding to different problems in many different periods, will not reflect a single authorial voice.

Unlike in morality, where revisability is a key aspect of the search for reflective equilibrium, the law tends to fix many particular judgments. The point has major implications for the possibility that lawyers or judges can reach reflective equilibrium. Because of the sheer number of judges in a position to create fixed points on the large number of particular cases, no single participant in the legal culture is at all likely to be able to achieve equilibrium.

There is a final issue. Dworkin's conception of law as integrity contains a theory of what it means for law to be legitimate. Her-

cules can produce vertical and horizontal consistency among judgments of principle in law. The same cannot be said of those who urge incompletely theorized agreements. Perhaps this is a decisive defect. Perhaps it suffers from the standpoint of those who seek legitimacy in law.

A complete response would require a detailed discussion of one of the largest issues of political morality; for the moment a few brief remarks must suffice. In fact the idea of integrity does not provide a convincing theory of legitimacy. Integrity, as Dworkin describes it, is neither necessary nor sufficient for judicial legitimacy. Legitimacy stems not simply from principled consistency on the part of adjudicators, but from a justifiable exercise of authority, which requires a theory of just institutions, which should in turn be founded in (suitably constrained) democratic considerations. Dworkin's conception of integrity offers too court-centered a conception of legitimacy. It sees legitimacy not as an outcome of well-functioning democratic procedures, but instead of a process of distinction-making undertaken by judges. Even if done exceptionally well, distinction-making by principled judges is an inadequate source of legitimacy. Those who stress incompletely theorized agreements insist that adjudication is part of a complex set of institutional arrangements, most prominently including democratic arenas. They attempt to design their theory of judicial conduct as an aspect of a far broader set of understandings about appropriate institutional arrangements and about forums in which the (suitably constrained) public can deliberate about its judgments.[48]

Full integrity, moreover, consists of much more than a legal system of numerous, hierarchically arranged courts can be expected to offer. Judges generally should and will reason from cases with which they disagree —because of the need for predictability and stability in law, because of the need to avoid judicial hubris, and

[48] Ackerman, *We the People,* vol. 1, takes the same basic position, but sees the judicial role as the "synthesis" of constitutional moments. I am questioning the latter claim, saying that, with some exceptions, courts do and should avoid large-scale synthesis.

because similarly situated people should be treated similarly. But across the broad expanse of the law, the resulting judgments are unlikely fully to cohere. If this is so, a legal system may well be able to claim the requisite legitimacy if it is democratic (broadly speaking) and if individual judges seek to produce the limited but important kinds of principled consistency that incompletely theorized agreements can yield.

6. Incompletely Theorized Agreements over Time

Incompletely theorized agreements have virtues; but their virtues are partial. Stability, for example, is brought about by such agreements, and stability is usually desirable; but a system that is stable and unjust should probably be made less stable. In this final section I offer some qualifications to what has been said thus far. In brief: Some cases cannot be decided without introducing a fair amount in the way of theory. If an outcome cannot be achieved at all without a good deal in the way of theorization, courts must theorize a good deal. Moreover, some cases cannot be decided well without introducing theory. If a good theory is available, and if judges can be persuaded that the theory is good, there should be no taboo on its judicial acceptance. Thus the claims on behalf of incompletely theorized agreements are presumptive rather than conclusive.

A. Change

Thus far the discussion has offered a static description of the legal process — a description in which judges are deciding what to do at a certain time. Of course low-level principles are developed over long periods, and a dynamic picture shows something different and more complex. First, the understanding may shift and perhaps deepen. At one point, commercial speech seems analogous to a threat and is therefore unprotected; at another point, it seems more analogous to political speech and is therefore protected.

Second, a characteristic role of observers of the legal process is to try to systematize cases in order to see how to make best sense

of them, or in order to show that no sense can be made of them at all, In any process of systematization, a rather high-level theory might well be introduced. Often observers will try to invoke some higher-level idea of the good or the right in order *to* show the deep structure of the case law, or to move it in particular directions, or to reveal important, even fatal, inconsistencies. A demonstration that the law makes deep sense might be a source of comfort and occasional reform. A demonstration that the law makes no sense, or reflects an ad hoc compromise among competing principles, might produce discomfort and large-scale change.

Third, sometimes the law reflects more ambitious thinking on the part of judges, or reacts to these more ambitious efforts by outsiders. The law of antitrust, for example, is now based in large part on a principle of economic efficiency. This development occurred through the gradual incorporation of economic thinking into the cases, beginning with the judicial suggestion, following academic observation, that some important cases "actually" or "implicitly" were founded on economics, until the point where economics appeared to offer a large ordering role. Some especially ambitious or creative judges will invoke theories too. Some of our great judges were principally nontheoretical thinkers (John Marshall Harlan, Henry Friendly, perhaps Benjamin Cardozo), but some of them —Oliver Wendell Holmes, Louis Brandeis, Thurgood Marshall —had at least ingredients of a large-scale vision of the legal order. They used analogies, to be sure, but often with reference to at least a relatively high-level theory about some area of law. Many areas of law now show the influence of Holmes, Brandeis, and Marshall, and in part because courts, whether or not deploying low-level principles, have adopted aspects of the relevant theory.[49]

[49] The best example is the law of free speech. See *Whitney v. California,* 274 US 357 (1927, Brandeis, J., dissenting); *Abrams v. US,* 250 US 616 (Holmes, J., dissenting), Note, however, that even here no unitary theory of free speech is offered, and nothing very much like a philosophical account appears in the relevant opinions.

It is very rare for any area of law to be highly theorized. Most of the time, people from divergent starting-points can accept relevant outcomes. But I do not mean to say that it would necessarily be bad for theories to be introduced, nor do I deny that small-scale, low-level principles can become part of something more ambitious. A descriptive point first: It is important to note that after a period of time, the use of low-level principles may well result in a more completely theorized system of law. To engage in analogy, a reason is always required, and after a period, the low-level reasons may start to run into each other, perhaps producing debates at a higher level of abstraction. During those debates the concrete rulings may be synthesized and a more general principle may emerge. Sometimes the process of low-level judging will yield greater abstraction, or a highly refined and coherent set of principles. In the area of free speech and discrimination, some such process has occurred, with occasionally ambitious claims, even if it would be far too much to say that full theorization or coherence can be found. An especially interesting phenomenon occurs when a once-contestable analogy becomes part of the uncontested background for ordinary work —or when the uncontested background is drawn into sharp question via analogies.

Now turn to the question of what judges should do. At least if judges can agree on the high-level theory, and at least if the theory can be shown to be a good one, judicial acceptance of a high-level theory may hardly be troubling, but on the contrary an occasion for celebration. Who could object to judicial adoption of what is by hypothesis a good theory? Perhaps this has happened with the triumph of economic thinking in the law of antitrust; perhaps it could be said for the eventual victory of a particular conception of equality in the law relating to discrimination on the basis of race, sex, and sexual orientation. If agreement is possible on a good general theory, a legal system will have done its job especially well. Some areas of law may therefore become more fully theorized than incompletely theorized agreements allow in the

short run. But any such theory will likely have been developed through generalizing and clarifying incompletely theorized outcomes, and doing so by constant reference to concrete cases, against which the theory is measured. The theory will not be free-standing. At least part of the test of the theory—if it is a theory of law meant for judicial adoption—is how well it accounts for considered judgments about the cases, though of course judicial mistakes are possible, and these may be corrected by the theory, subject to the constraints of stare decisis.

I am thus declining to endorse what might be called a strong version of the argument offered here: a claim that incompletely theorized agreements are always the appropriate approach to law, and that general theory is always illegitimate in law. What I am urging is a more modest point, keyed to the institutional characteristics of judges in any legal system we are likely to have. Judges should adopt a presumption rather than a taboo against high-level theorization. In many contexts they will not be able to think of a good theory. In many cases they will not be able to agree on any theory. The effort to reach agreement on an abstract theory may make it hard for judges or other people to live and work together, and unnecessary contests over theory can show an absence of respect for the deepest and most defining commitments of other people.

Of course there are intrapersonal parallels. In our ethical lives as individuals, each of us may avoid choice among theories if we do not need to choose in order to decide what to do in particular cases. But the interpersonal case is perhaps more vivid.

In many contexts, moreover, judges will not be able to know whether an apparently good theory really is right. The acceptance of a theory will create an excessive risk of future error. These possibilities are sufficient for the claims defended here. Judges should adopt a more complete theory for an area of law only if they are very sure that it is correct.

It may even happen that an area of judge-made law will become *less* theorized over time. A once-acceptable general theory

may come to seem inadequate, and confrontations with particular cases may show its inadequacy and make it unravel. The Supreme Court's decisions in the *Lochner* era were well theorized, in the sense that they were founded on a recognizable general theory of the permissible role of the state.[50] The general theory was not replaced with a new one all of a sudden, or even at all; instead it came apart through particular cases that attacked the periphery and then the core. This is a familiar phenomenon, as the process of case-by-case decision tests any general theory and exposes its limits. Over time, an area of law may become more theorized or less so; over long periods of time, it may go from one to the other, and back again.

If all this is right, we ought not to think of incompletely theorized agreements on particulars as a kind of unfortunate second-best, adapted for a world in which people disagree, are confused or biased, and have limited time. The alleged first best — Hercules, or the (exhausted ?) judge who has reached reflective equilibrium — calls for an extra-human conception of law. It is extra-human because it is so obviously unsuited to the real world. To say the least, it is hard to know whether a top-down or highly theorized approach is appropriate for morality. But often, at least, it is easy to know that such an approach is inappropriate for law. The institutional features of the legal system — a human institution with distinctive constraints — require an account of law that is highly sensitive to the characteristics of the system in which it is situated. Among those characteristics are confusion or uncertainty about general theory; deep disputes about the right and the good; and a pressing need to make a wide range of particular decisions.

Of course it would be foolish to say that no general theory can produce agreement, even more foolish to deny that some general theories deserve general support, and most foolish of all to say that incompletely theorized agreements warrant respect whatever their content. What seems plausible is something more modest:

[50] See Geoffrey Stone et al., *Constitutional Law* (2d ed., 1991), ch. 6.

except in unusual situations, and for multiple reasons, general theories are an unlikely foundation for law, and caution and humility about general theory are appropriate for judges, at least when multiple theories can lead in the same direction. This more modest set of claims helps us to characterize incompletely theorized agreements as important phenomena with their own special virtues. They are part of the lawyers' distinctive solution to social pluralism, and in any case a crucial if insufficiently appreciated aspect of the exercise of public reason.

B. Principle, Politics, Law

In the last generation many people have defended the view that courts engage in principled reasoning, elaborating basic social commitments, while the political process involves a kind of ad hoc set of judgments producing unprincipled compromises. This view finds its most vigorous statement in Dworkin's Hercules metaphor, seeing constitutional courts as "the forum of principle."[51] But it seems clear that this view is historically myopic. High principle has had its most important and most defining moments inside the political branches of government, not inside courtrooms. The founding, the Civil War, the New Deal, and others[52] —progressivism, the civil rights movement, the women's movement —suggest that the forum of principle in American government has often been democratic rather than adjudicative. Major exponents of high principle have been James Madison, Abraham Lincoln, Franklin Delano Roosevelt, and Martin Luther King, Jr.; for all their achievements, Benjamin Cardozo, Robert Jackson, Earl Warren, William J. Brennan, and even Oliver Wendell Holmes, Jr., have been secondary figures on this count.

[51] "The Forum of Principle," in Ronald Dworkin, *A Matter of Principle* (1986).

[52] See Ackerman, *We the People,* vol. 1. As noted above, however, I do not agree with Ackerman's conception of the judicial role as entailing high-level "synthesis" of constitutional moments.

The question might therefore be asked if it would be possible to reverse the conventional formulation, with the view that high principle plays an appropriately large role in the democratic arena, and that low-level principles are the more appropriate stuff of adjudication. Any such view would be too simple, but there is a good deal of truth to it. Of course high principle does not characterize ordinary politics, but high principle has had an occasionally defining role in American political life, and in any case the principles that mark American constitutionalism owe their origins to political rather than legal developments. Courts usually work from lower-level principles, even when they interpret the Constitution. There are important exceptions, with courts also making or referring to arguments of high principle —consider the question of segregation —but ordinarily those exceptions consist of vindications of (certain readings of) constitutional judgments made by previous generations. What is important is that these are the exceptions, not the rule, and that in any case the crucial judgments of high principle have come from outside the judiciary. In its fullest form, the argument on behalf of incompletely theorized agreements, as a distinctly legal phenomenon, is therefore part of an argument that fundamental principles are best developed politically rather than judicially.

LECTURE II.
RULES AND RULELESSNESS

> [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* (1890)

> [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," University of Chicago Law Review 56 (1989)

> One other capital imperfection [of Common Law is] . . . the *unaccommodatingness* of its rules. . . . Hence the hardness of heart which is a sort of endemical disease of lawyers. . . . Mischief being almost their incessant occupation, and the greatest merits they can attain being the firmness with which they persevere in the task of doing partial evil for the sake of that universal good which consists in steady adherence to established rules, a judge thus circumstanced is obliged to divert himself of that anxious sensibility, which is one of the most useful as well as amiable qualities of the legislator.
>
> — Jeremy Bentham, *Of Laws in General* (ed. H. L. A. Hart, 1970)

INTRODUCTION

There are two stylized conceptions of legal judgment. The first, associated 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 Justices Felix Frankfurter and John Marshall Harlan, places a high premium on *lawmaking 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 or rules is that they tend to overreach; they may be erroneous or unreasonable as applied to cases not before the court.

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, paying heed to the legacy of equity, 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 seems incoherent. 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 or a recipe for injustice. 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 rules will be too crude, since they run up against intransigent beliefs about how particular cases should be resolved, and since they do not allow affected individuals a sufficient right to participate in rule-formation.

One of my principal goals in this lecture is to respond to a pervasive social phenomenon: extravagant enthusiasm for rules and a

certain conception of the rule of law. Case-by-case decisions are an important part of legal justice. Of course we are familiar with a rule-bound conception of procedural fairness, in which people have a right to be told about prevailing requirements, and a correlative right to test the question whether those requirements have been violated. But there is another, more particularistic conception of procedural fairness, one that is also worthy of respect. Under that conception, people are entitled to argue that they are relevantly different from those that have come before, and that, when their case is investigated in all its particularity, it will be shown that special treatment should be offered. On this view — with potentially democratic foundations — people who are affected by rules should be allowed to participate in the creation of the very rule to be applied to their case.

I argue here that the disadvantages of rules and rule-bound justice are often underappreciated and that legal systems sometimes do and should abandon rules in favor of a form of *casuistry.* In the casuistic enterprise, judgments are based not on a preexisting rule, but on comparisons between the case at hand and other cases, especially those that are clearly or unambiguously within a generally accepted norm. Bounded rationality provides an important reason for proceeding this way. When people lack sufficient information to design (satisfactory or sufficiently finely tuned) rules, they might resort to case analysis instead. But bounded rationality is not the only problem. The argument for case analysis depends as well on the diversity and plurality of values and the likelihood that at some point life will turn up novel combinations of circumstance not possible to foresee in advance. These ideas have an obvious bearing on law, and they have a bearing on ethics too, though I will not discuss that possibility here.

I urge as well that both the old art of casuistry and the old domain of equity can be given democratic foundations. A legal system committed to casuistry might insist that every litigant is entitled to urge that she is distinctive, that she deserves distinctive

treatment, and that her claims to this effect warrant a response. Insofar as a legal system recognizes this claim, its form of casuistry embodies norms of participation and responsiveness.

I do not deny that quite serious risks —including the abusive exercise of discretion, a lack of predictability or a capacity to form expectations, a failure of political accountability, and much more— are associated with any effort to proceed through case-by-case judgments. As a way of reducing those risks, we might invoke both economic and democratic criteria. For this reason I argue against an ingenious solution proposed by Jeremy Bentham and suggest instead two major alternatives. The first is founded principally in market norms rather than democratic ones. It 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. Such rules can help break through some of the dilemmas posed by the choice between rules and rulelessness. Allowing the remedy of "exit" rather than "voice," privately adaptable rules are typically invoked in support of economic markets. I argue here that they also deserve an honored place in a legal system committed to correcting the operation of economic markets.

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

1. 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 legal provision. The second is the person or institution that is *subject to* the provision. The third is the person or institution charged with the power to *interpret* the provision. If we take a rule to be a provision that minimizes lawmaking 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 char-

acter 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) ruleness, 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 exercised 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 ruleness, 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—

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

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 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.

It is familiar too to find rules that operate as presumptions or 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. 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. 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.

C. Rulelessness

There are many alternatives to rules that do not amount to untrammeled discretion. We might first contrast both untrammeled discretion and rule-bound ways of proceeding with approaches that allow particular judgments to emerge through *factors,* or more particularly, *through the decision-maker'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 decision-maker cannot rely simply on "finding the facts" and "applying the law." The content of the law is not given; part of it must be found. There is a degree of ex post allocation of legal entitlements. In this way participants in particular legal controversies are allowed to have a role in the judgment about the content of the governing rule.

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 decision-maker 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.

In most contexts, 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.

Instead of factors, a legal system might proceed with *standards.*[2] 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 mph speed limit, or a ban on pilots who are over the age of 70, or a requirement that students sit in assigned seats.

[2] See, e.g., Kaplow, "Rules and Standards: An Economic Analysis," p. 469; Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89 (1976): 1685; Kathleen Sullivan, "Foreword: The Justices of Rules and Standards," *Harvard Law Review* 103 (1993): 22; Colin S. Diver, "The Optimal Precision of Administrative Rules," *Yale Law Journal* 93 (1983): 65.

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," for example, we may well end up with a rule.

So much for standards. 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 understand 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 principle 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 her own wrong; that she 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.

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.

In lecture I I dealt with analogical reasoning. 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.

2. 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.[3] This idea 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,*[4] 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 "[r]ogues 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.

[3] 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* (1986), p. 210.

[4] 405 US 156 (1972).

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 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.[5] Apparently the Supreme Court believed that this analogical approach to the criminal law raises severe questions under the due process clause.[6]

[5] See Jon Elster, *SoIomonic Judgments* (1989), p. 217, citing an unpublished paper by Hungdad Chiu.

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

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.[7]

1. *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.

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. It is also the case that many laws, including criminal statutes, have a high degree of ambiguity. 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.

2. *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.

3. *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

[7] I claim little originality here, drawing on Fuller, *The Morality of Law,* and Raz, in *The Authority of Law.*

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.

4. 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 seceurity benefits or a driver's license, is entitled to some forum in which to 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.

5. *Separation between lawmaking 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 lawmaking 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.

6. *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.

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.

3. The Case for Rules

In lecture I, I emphasized that 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. 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. 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. The 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. Rule's 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. Some of the costs of rulelessness are purely economic; but many of the costs are political, involving the difficulties of forcing people to agree on first principles in the process of choosing courses of action.

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 occur.

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 disaster. The rules governing emission of pollutants are an example. If each polluter make an individually rational decision, there would be too much pollution in view of the fact that the full costs of pollution are not borne by polluters. 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.

By adopting rules, people can also overcome their own myopia, weakness of will, confusion, venality, or bias in individual cases. Rules make it unnecessary for each of us to examine fundamental

issues in every instance (and in that now-familiar way they can create a convergence on particular outcomes by people who disagree on basic matters). 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. In this way rules can serve as *precommitment strategies,* designed to overcome time inconsistency and related problems. These ideas justify the general idea that rules should be entrenched in the sense that they apply even if their rationale does not.

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.[8]

3. *Rules serve appropriately both to embolden and to constrain decision-makers in particular cases.*[9] 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. This is an important feature of freedom under law.

In one sense rules reduce responsibility for particular cases, by allowing the authorities to claim that it is not their 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 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.

4. *Rules promote predictability and planning for private actors, Congress, and others.* The protection of expectations is of course a central function of law. 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 this way people can form expectations with the knowledge that they will not be defeated when government changes its mind.

[8] See Frederick Schauer, *Playing by the Rules* (1991), pp. 136–37.

[9] See Antonin Scalia, "The Rule of Law Is a Law of Rules," *University of Chicago Law Review* 56 (1989): 1175, 1185.

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 rule-maker 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. Rulelessness is more likely to make citizens into supplicants, requesting official help. 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.

4. Against Rules and for Casuistry: Are Rules Feasible?

I will now identify two arguments against rules. Both arguments are intended to challenge the virtue that I have claimed for rules —that they operate as mid- or low-level generalizations on which people can agree from diverse foundations. Both arguments call for a form of casuistry.

First, however, it is worth attending to a separate point. Both friends and foes of rules and the rule of law often see them as general checks on "arbitrariness" and, partly for the same reason, as specifically requiring free markets.[10] Insofar as the rule of law calls for generality, it may seem to forbid the grant of selective benefits or the imposition of selective burdens. Insofar as the rule of law bans arbitrariness, it may seem to proscribe (for example) price controls or entry barriers, since they tend to be arbitrary.

[10] See Friedrich Hayek, *The Constitution of Liberty* (1960); Morton Horwitz, "The Rule of Law: An Unqualified Human Good?" *Yale Law Journal* 86 (1977): 561.

The problem with these claims about rules and the rule of law is that we cannot know whether a selective benefit or burden is arbitrary without knowing something about the reasons that can be invoked in its favor. An exemption from the antitrust laws, limited to labor unions, may be perfectly legitimate if there are good reasons for the particular exemption. Churches are not subject to the antidiscrimination laws; whether this is arbitrary depends on whether the exemption can be justified. Price controls and entry barriers are often bad and often arbitrary; but a minimum wage law, and a requirement that doctors know how to practice medicine, may be subject to persuasive justification. In short, the bare notion of rules, and the idea of the rule of law, cannot tell us whether selectivity is warranted or not. The rule of law has many virtues, but we should not overstate what it requires.[11]

A. Challenges

Some people deny the feasibility of rules and the rule of law.[12] 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 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.

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.

[11] See Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law* (1985).

[12] Duncan Kennedy," Legal Formality," *Journal of Legal Studies,* 2 (1973): 335.

Let us turn to an example. It is generally agreed that literal language will never, or almost never, be interpreted so as to reach applications in a way that would produce absurdity or gross injustive. Suppose, for example, that a law forbids people from driving over 55 miles per hour on a certain street. Jones goes 75 mph 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. A degree of casuistry is therefore inevitable. We find a case in which an exemption seems clear, and ask whether the case at hand is relevantly similar or relevantly different.

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 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. That claims depends on analysis of concrete cases.

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 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 counts very strongly 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.

B. The Rule of Law Chastened But Mostly Intact

How damaging is this to the project of following rules, or to the rule of law? Does it suggest that a form of case analysis plays an inevitable role in the interpretation of rules? 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. The simplest conception of rule-following is therefore likely to fail, and a form of casuistry therefore emerges as an ordinary part of rule-interpretation. But this is not as damaging as it seems. Almost all real-world cases involving the meaning of rules are very easy, because of social conventions.

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 applica-

tion 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, even with an element of case-by-case thinking.

There is an additional point. It is sometimes 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.[13] 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 allow exceptions, and the category of exceptions, if it exists, might be reserved for the most bizarre cases. 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. To be sure, it is important to acknowledge 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.

Courts might therefore seek to interpret words literally in every case, and thus to avoid making any exceptions at all. This would be an odd and probably harmful interpretive strategy in light of the likely existence of at least a few truly compelling cases for exception. Because of its oddity, no legal system appears to make no exceptions for compelling cases. But the strategy is feasible.

Whether literal readings, when feasible, are reasonable or right is a complex issue, having to do with our faith in interpreters, our

[13] Frederick Schauer, *Playing by the Rules* (1989).

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 that a form of case analysis is likely to play an important role in the interpretation of rules in any well-functioning legal system. 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 is not damaging to a suitably chastened conception of the rule of law. Whether rule-bound decisions are preferable to the alternatives is another question; it is to that question that I now turn.

5. Against Rules: Are Rules Obtuse?

Because they are not attuned to individual circumstances, rules typically produce numerous errors, and they may even be unfair as a procedural matter. Thus in many spheres of life, people do not rely on rules at all. A rule-book 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.[14] They make judgments at the point of application. They adapt their conduct to the particulars.

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

From these considerations, we can find a number of problems with rules and rule-following. These problems are associated with the crudeness of rules —their coarse-grained quality. Consider in this regard the law of the death penalty. In *Furman v. Georgia,*[15] 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 homicidal offenses. No judge and no jury would have discretion to substitute life imprisonment in cases falling within that category, No judge and no jury would have discretion to decide who would live and who would die. In this way, North Carolina attempted to apply sharp rule of law constraints to the area of death sentencing.

In *Woodson v. North Carolina,*[16] 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 "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." 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

[15] 408 US 238 (1972).

[16] 428 US 280 (1976).

> 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 on 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.[17] What is important for present purposes is the alleged obtuseness of rules as a basis for imposing the death penalty, and the lessons of *Woodson* for rules in general.

1. *Rules are both over- and under-inclusive by reference to the reasons that justify them.* If strictly followed, rules often produce significant mistakes and hence arbitrariness in particular cases. As we have seen, the justifications that underlie the rules will not support all applications to which rules 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. If people can adapt their behavior to the rules, perhaps this problem can be minimized. But sometimes private adaptation is not a realistic or fully adequate response.

[17] Of course some justices, most recently Justice Harry 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 nonarbitrary decision, required by *Furman.*

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. 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."[18] 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. Here we come to a democratic characteristic of the old notions of casuistry and equity — at least potentially, casuistical particularism, and equitable adjustments, can allow an individual hearing for affected citizens, a chance to have their say and to be heard.

2. *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

[18] Eugene Bardach and Robert Kagan, *Going by the Book* (1983).

be hopelessly outmoded. Consider the regulation of banking 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 avoid rules altogether, or at least to create a few simple rules that allow room for private adaptation.

3. *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.[19]

By ignoring individual circumstances that good casuists seek to explore, 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. Here the problem of rules lies in their failure to particularize, by taking account of special circumstances that justify special treatment.

[10] See the illuminating discussion of human differences and capabilities in Amartya Sen, *Inequality Reexamined* (1993), pp. 79-87. 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).

4. *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,* 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 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." [20]

5. *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.

6. *Rules can be dehumanizing and procedurally unfair; sometimes it is necessary or appropriate to seek participation in the formulation of rules and individualized tailoring to particular cases.* 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

[20] David Schoenbrod, *Power without Responsibility* (1993), p. 76.

deprivation.[21] 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.

For present purposes, the key point is that this is a democratic conception of appropriate procedure insofar as it emphasizes the importance of "voice" in legal processes. It may not entail actual voting, but it is democratic to the extent that it calls for (a) a right to participate and (b) a right to reasons for the rejection of any arguments that have been made.

7. Rules and rule-following haue unfortunate psychological effects on public officials. A long-standing function of equity is to make exceptions to rules that are senseless or too harsh in individual cases. A possible danger of rules is that they eliminate the equitable spirit, making officials unwilling to exercise the discretion that they do or should have, and allowing them to be indifferent to or even to take pride in their refusal to counteract error or injustice. This consequence of rules is vividly explored in Robert Cover's work on judging in the era of slavery, when a spirit of ruleness stopped the judges from acting within their authority to work against some of the consequences of slavery.[22]

6. Choices, Positive and Normative

The problems with rules can push participants in law in the direction of standards, analogies, factors, or some combination of these. But as we have seen, rules can have many advantages over

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

[22] See Robert Cover, *Justice Accused* (1967).

rulelessness. Recall the problems posed by rulelessness for predictability and expectations; the risk of abusive discretion; the sheer cost of deciding without rules; the humiliation of being a supplicant rather than a rightholder.

How, then, can a legal system minimize the problems posed by unreasonable generality on the one hand and those of potentially abusive discretion on the other? The best approaches involve (a) a search for *market* solutions through 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, and that allows various sorts of "exit" from legal requirements; and (b) a search for *democratic* solutions through highly contextualized, self-consciously casuistical inquiries into the likelihood of error and abuse with either rules or rulelessness, and hence an "on balance" judgment, based on both economic and democratic criteria, about risk.

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.[23] 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.

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

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 it 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,

by exploring whether their justifications create absurdity or injustive, 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. Privately Adaptable Rules

An economic approach to the choice between rules and rulelessness might examine aggregate error costs under the various alternatives, and I shall say something about this below. But a more ambitious strategy, also rooted in economic considerations, emerges from distinguishing between two sorts of rules.[24] 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. A defining example is the "default" provision, which sets out general rules that parties are freely permitted to displace if they wish; default provisions are much of the law of contract, and they are privately adaptable. Consider economic incentives in the forms of financial rewards or penalties; incentives do not mandate conduct but attempt to influence it. Consider too the rules of the road, which establish conventions or solve collective action problems that everyone can obey, but that leave a great deal of flexibility. All these might be described as *privately adaptable rules.* Such rules have the advantages associated with market ordering.

[24] 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.

By contrast, some laws do not merely allocate entitlements, but also minimize private flexibility by mandating particular end-states or outcomes. Consider mandatory provisions for contracts, or price controls, or specified technology for new cars, or flat bans on the presence of carcinogens in the workplace. Rules that specify end-states are common in modern regulation, in the form of "command and control" regulation that says exactly what people must do and how they must do it.

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.[25] 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.[26] (People in Eastern Europe, now undertaking the difficult task of creating markets, have seen this all too well.[27]) Government can hardly avoid the task of creating rules allocating rights.

[25] Hence the Coase theorem will sometimes be wrong insofar as it predicts the initial allocation of the entitlement will not affect outcomes (Ronald Coase, "The Federal Communications Commission," *Journal of Law & Economy* 2 [1959]). See Cass R. Sunstein, "Endogenous Preferences, Environmental Law," *Journal of Legal Studies* 22 (1993): 217.

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

[27] See Friedrich Hayek, *The Road to Serfdom* (1944), pp. 38–39: "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* (1983), pp. 165-66: "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."

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.[28] Hence the rules that constitute markets are entirely acceptable insofar as their ruleness usually does not produce the risks that tend to accompany rules.

People who favor privately adaptable rules, and who distrust rules that specify end-states, are often known as critics of the modern regulatory state.[29] 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

[28] I am speaking here of a presumption. In some cases, rules should not be privately adaptable, because, for example, there are externalities, or because paternalism is justified, or because the private adaptations reflect preferences adaptive to an unjust status quo. I cannot discuss these complexities here.

[29] See Hayek, *The Road to Serfdom;* Richard Epstein, *Simple Rules for a Complex World* (1995).

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 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[30] — 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

[30] See Coase, "The Federal Communications Commission," p. 1.

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.[31] 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. In fact the FCC has experimented with this approach as well, giving credits to women and minority group applicants. The 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.

Notably, this alternative might itself be part of an incompletely theorized agreement, in the sense that it might be chosen by people who disagree on a great deal that is fundamental. Something of this sort has happened in the last decade in many areas of federal regulation, including environmental protection, telecommunications, and occupational safety and health.

C. Casuistry, Democracy, Efficiency, Pragmatic Judgments

As I have said, opposition to rules can be understood as an effort to make a space for the (democratic) idea that people should sometimes have a right to participate in the formulation of the very rule that will determine their fate — not through voting, but through offering reasons that require official response. This opens the possibility for a marriage (unlikely but promising) between the old art of casuistry on the one hand and democratic norms on the other. And in this way, rulelessness is associated with the idea

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

of "voice" as a remedy for perceived harms. But this remedy carries with it significant risks, and an appropriate task is to evaluate the nature and extent of those risks in the relevant context. That task must itself be conducted on a casuistic basis. Notably, rules might be formulated at a democratic level and in that way be a product of democratic discussion. But in some places it is best to have a more local and particularized kind of democratic procedure in which the person specifically affected by the rule can help in the formulation of the rule.

It is helpful here to identify nightmarish and utopian conceptions of the two conceptions of procedural regularity. It would be wonderful if good rules could be developed before the fact by a well-functioning democratic process; perhaps the resulting rules create little injustice in particular cases, and perhaps democratic representatives, well-informed of the facts and able to reach closure on basic values, set out governing requirements. (This is an idealized view of what happened in the United States with new social security disability guidelines, displacing case-by-case inquiry.) It would be terrible if the effort to set out rules before the fact produced a large rate of error and injustice, as uninformed representatives, buffeted about by political pressures and short-term self-interest, enact hopelessly crude rules. (This is one view of the mandatory death sentence and of the "three strikes, you're out" policy for criminal convictions.)

There are corresponding visions for rulelessness. It would be wonderful if rulelessness could produce small, highly responsive democratic arenas, in which affected parties are able to participate in the proceedings that give rise to governing rules. In such cases, casuistry could be performed extremely well. (Perhaps certain university disciplinary proceedings can be so described.) It would be horrible if efforts to proceed without rules produce abusive and discriminatory acts of discretion, as citizens become mere objects for governmental control and use. (This is an understanding of what happened in *Papachristou* and Furman.) By attending to these

various possibilities, we can see that the choice between rules and rulelessness is an important and often neglected topic in democratic theory. We can see too that the choice might well be described in economic terms, as legal officials attend to the error costs associated with the competing possibilities.

If a legal system seeks to avoid the nightmarish conceptions and to approach the utopian ones, it might make the choice between rules and rulelessness on the basis of a highly contextual inquiry into the nature and level of likely errors and abuses. It is hard to say much about this in the abstract, but we can offer some rough-and-ready generalizations. Most broadly, rules are best 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 democratic dissensus within rule-making institution, so that the political costs of rules are too high to justify them, (3) when people in a position to decide whether to have rules —often elected representatives —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.

Most of these factors are commonsensical and self-explanatory, but I offer a few additional words by way of clarification. 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 rulelessness when there is no special reason to distrust those who will make particular choices; perhaps those who make the choices will give an appropriate hearing to individual citizens. So too, individualized decisions are likely to

be dispensed with when it is possible to come up with rules that fit well.

Viewed as an aspect of democratic theory, 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. Without rules, however, the agents might become uncontrollable. This is so especially in light of the fact that a system of factors allows the agents to weigh each factor as they choose. The result is that a system of rules might be adopted as the best way, overall, to control the agents' discretion, at least if there is a measure of distrust of some or all agents.

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 two 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.

A special argument for rules arises when 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. The avoidance, however, 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.

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. Here there is a good argument for allowing everyone to be heard on a particularized basis.

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. 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. When so many decisions must be made, the costs of individualized inquiry will be exceptionally high. Similarly, rules can be avoided when few decisions need to be made, or when each case effectively stands on its own.

There is a final problem. Sometimes the pragmatic inquiry will show that both rules and rulelessness are intolerable. In such a case, 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 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, emerging from a pragmatic inquiry, 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 irrele-

vant or illegitimate considerations will enter the decision to impose capital punishment. When judgments are to be made about who is to live and who is to die, a high degree of accuracy is necessary, and errors based on confusion, variable judgments, bias, or venality are intolerable. The problem is that human institutions cannot devise a system for making capital decisions in a way that sufficiently diminishes the risk of error. Rule-bound systems create 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 an incompletely theorized agreement is possible in this controversial area, its sources, I think, lie in evidence of this sort.

The general conclusion is that 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. We have to know about error rates and about the democratic responsiveness of any body entrusted with making rules in advance or with giving content to the law after the fact.

FINAL THOUGHTS

1. Legal Reasoning, Rule of Law

Participants in the legal system often disagree on first principles. Sometimes they have no convictions about large-scale issues of the right and the good; sometimes they find these issues deeply confusing. They must nonetheless make a wide range of particular decisions. They have to do this in a short time, and in the midst of considerable social heterogeneity. I have argued that in accomplishing this task, they do and should seek to achieve incompletely theorized agreements on particular cases.

The characteristic lawyer's methods —through rules, analogies, standards, factors —might seem inferior to the search for reflective equilibrium, or to the application of some large theory. In some ways they are. But both rule-following and analogical thinking are admirably suited to a legal system consisting of diverse people who disagree on first principles; who have limited time and capacities; who cannot be expected to invent the system of law from the ground up; who are not sure what they think about the largest problems; and who want to avoid hubris.

With these various points, we have come far from some familiar understandings of the rule of law. That ideal does not require full ex ante specification of legal entitlements. This is an impossible goal. Instead it requires, more modestly, a degree of conformity with past decisions, as incorporated in rule-like provisions, in cases to be used as analogies, in standards, or in sets of factors. The argument for conformity with past decisions is intensely pragmatic, pointing to an eclectic range of considerations involving minimization of the burdens of decision, equal treatment, and judicial modesty in the face of limited wisdom and experience of the court at the time of decision. What degree and kind of conformity with the past depends on context, not on anything that can be said a priori. In any event casuistry has a continuing role in the legal culture, even in the interpretation of rules;

and it may not be too venturesome to say that casuistry will continue to be a key part of ethics as well.

2. RULES, ANALOGIES, JUSTICE

What is the relation between rules and justice? Between analogies and justice? It cannot be said that the rule of law itself is just, or that analogical thinking produces just outcomes. Many genuine rules are unjust. To take just one recent example, the fundamental problem with the system of apartheid in South Africa was emphatically not that it violated the rule of law. On the contrary, the fundamental features of apartheid could be made entirely consistent with the rule of law. The rule of law is not a sufficient guarantor of justice.

Similarly, a great deal of injustice has been brought about through analogical thinking. When analogies produce injustice, we have to insist that the principles or policies that undergird analogies are wrong. But nothing internal to analogical thinking will support the claim of wrongness —just as nothing internal to the rule of law will support a claim that a rule has been drawn up too narrowly or otherwise unjustly.

From this it emerges that the virtues of rules and analogies are partial. But they are considerable. It is obvious but worth emphasizing that rules operate to constrain the exercise of arbitrary power. Rules also create a space in which people can act free from fear of the state. By subsuming people under a single umbrella, rules make irrelevant differences that might otherwise be a basis for prejudice, ignorance, or invidious discrimination. While a rule is on the books, everyone subject to state power may invoke its protections and disabilities. The requirements of consistency and of a form of neutrality are vital social goods.

Like rules, analogies force people in positions of authority to be consistent. But they insist on particularity as well as generality. In analogical thinking, a wide range of possible similarities and differences are in play. Rules put much less at issue; they reduce

(though they do not eliminate) the work that must be done by the judge. Of course analogies allow people to ask: If you have treated *X* that way, must you not treat me that way as well? But they also allow people to say: You treated *X* that way, to be sure; but my case is different; should you not treat me differently? Rules are impartial because they are blind. A comparative advantage of analogies is that they characteristically see a great deal.

When a case operates as an analogy, it has some of the features of a novel or a poem. It is subject to frequent revisiting, in which new or unexpected features may emerge. The meaning of an analogous case may be inexhaustible; consider the lawyers' (and the public's) disputes over not just the legitimacy but also the real meaning of *Brown v. Board of Education, Roe v. Wade, Lochner v. New York.* The true lesson of the analogy is never given in advance. And in a system based on analogy, each participant in the legal system is entitled to say that when her case is investigated, it will appear that previous cases mean something quite different from what had been thought before. In this way analogy places a premium on ongoing participation and particularity, just as rules place a premium on advance settlement and generality.

We can connect this idea to an important and insufficiently appreciated understanding of procedural justice. That understanding entails an opportunity for each person to argue that her case should be treated differently from those that have been decided —that her personal participation is warranted in the formulation of the rule to be applied to her, and that if we investigate her situation in all its detail, we will see that special treatment is warranted. If this is an ambiguous and partial virtue, it is nonetheless a familiar part of all legal systems that aspire to do justice, and it is doubtful if any well-functioning legal system should entirely dispense with it.

Is it better to be faced with the benefits and burdens of rules, or instead to proceed with analogies? No general answer could

make sense. Most tyrannical systems are tyrannical in significant part because officials are not constrained by rules. But some systems are tyrannical because citizens are not allowed to claim that they are relevantly different. Undoubtedly excessive rulelessness poses the more severe risks. Those risks are easy to underestimate, especially by officials confronting the seemingly insistent details of the particular case. But if what I have said here is right, perhaps excessively rule-bound judgments pose a risk in more subtle and more revealing ways.

3. THE LIMITS OF THEORY

General rules may not decide concrete cases, and case-by-case particularism may have some advantages over the creation and application of broad rules. But for participants in a legal system, there are importantly common strengths to these competing approaches. As I have emphasized, both of them allow people who disagree on first principles to converge in their own ways on outcomes in particular cases.

The impulse to theory should hardly be disparaged. In some areas of law, we cannot think very well without embarking on a kind of conceptual ascent from the analogical process, and the conceptual ascent will require us to say broader and deeper things than analogies require. But judges must decide many cases quickly; they have limited time and capacities. They must also work with each other, and contests over the right and the good can make it hard for them to do this. Like ordinary people, judges should obey a norm of mutual respect, or of reciprocity, and this norm can incline judges to avoid large-scale contests, at least when they involve people's deepest or most defining commitments.

I have offered these considerations as part of a role-specific account of public reason —an account of public reason designed specifically for participants in law. But it would not be surprising if at least some of these points turned out to connect with some of the broader aspirations of a well-functioning deliberative democ-

racy. Like judges, ordinary people have limited time and capacities; they too must live with one another. Even more than judges, they should find a way to discuss their disputes in ways that entail mutual respect, through avoiding unnecessary controversies over fundamental commitments.

Surely general theory and broad claims about the right and the good play an appropriate role in the political sphere. In law, I have argued that there is, and should be, a presumptive taboo against making broad and general claims; there is, and should be, no such taboo in the world of public reason. But citizens and representatives, like judges, must make decisions about concrete controversies in the face of sharp or even intractable disagreements on first principles. Entirely outside of law, and in the world of ordinary democratic discussion, incompletely theorized agreements on particular outcomes occupy an important domain.

4. CODA

There is, however, an important exception to the general claim that I have made throughout these lectures. In order for participants in law (or democracy) to accept that general claim, they must accept at least one general theory: the theory that I have attempted to defend here. This is the theory that tells them to seek incompletely theorized agreements, at least as a general rule. It is doubtful whether that theory can itself be accepted without reference to general theoretical considerations, and because the theory has concrete implications for judicial and legal practice, its acceptance or rejection will not itself be incompletely theorized. People who claim that law should reflect a high-level theory of the right or the good will not be satisfied with incompletely theorized agreements, and the choice between the two approaches will turn on issues that are both high-level and quite controversial.

This is an important matter, for the defense of the incompletely theorized agreement cannot itself be incompletely theorized. But the components of that defense are in fact readily available.

Perhaps the best evidence for this belief is the legal culture itself: Incompletely theorized agreements are the usual stuff of law, and participants in the legal culture are highly suspicious of much in the way of theoretical ambition. They have reasons for that suspicion. What I have tried to do here is to spell out those reasons, and to connect them to some of the notable characteristics of thinking in law.