Consistency

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A brief story will suggest my theme: A speed trap on Interstate 80 keeps three judges busy disposing of cross-country drivers who are cited for speeding and who choose to defend. Twelve defendants challenge identical charges of driving 75 m.p.h. in a 55 m.p.h. zone. Four of these cases come before each judge; all defendants are found guilty of the charge. There is nothing in the facts to distinguish one case from another. The governing rule from the motor vehicle code allows fines from zero to one hundred dollars. The first judge, following his inclination, fines his four drivers $25 each; the second, who weighs the matter differently, fines his defendants $75 each; the third judge fines two of his defendants $25 and the other two $75.

The behavior of the third judge is the only implausibility in this tale; most would find it puzzling and offensive, even though each fine fits the rule. Few would criticize either the first or second judge for his particular response to the act of speeding. Objection there might be, but it would take this form: whatever their personal judgment of the optimal decision, judges #1 and #2 ought to dish out the same penalties for the same offense. This Essay is a reconnaissance of these common perceptions which rest upon premises that need first to be clarified, and then to be either justified or discarded.

I

OF CONSISTENCY, RULES, AND TREATMENT

Like cases should be treated alike: This formula of Aristotle\(^1\) is widely accepted as a core element of egalitarian moral and social philosophy. Here I will call it simply "the maxim," and the word "consistency" will represent the maxim in its claim to order legal and moral relations.

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1. See ARISTOTLE, ETHICA NICOMACHEA V. 3. 1131a-1131b (W. Ross trans. 1925). Aristotle repeatedly defined justice in terms of equality. See, e.g., ARISTOTLE, MAGNA MORALIA I. 33. 1193b-1194b (W. Ross ed. 1925). ("The just, then, in relation to one's neighbor is, speaking generally, the equal; . . . since, then, the just is equal, the proportionally equal will be just."). The content of this sentiment remains a matter of dispute.
across time. That is, consistency prescribes like treatment for successive cases governed by the same rule of law or morality. This principle may seem self-evident, but I will suggest a reason to doubt both its perspicuity and its soundness. At least as a part of equality theory its office is elusive. In reality it is a classic tangle, a gift of riddles accepted from the Greeks before we learned to beware.

This Essay suggests ways of understanding both consistency and inconsistency of treatment under a rule. I begin by disentangling various interpretations of consistency and offering the unorthodox suggestion that the concept of a rule is compatible with inconsistency of treatment. I define inconsistency and identify examples, thereby setting limits on empirical claims for consistency. I criticize the ideal of consistency and justify the prudent instrumental use of inconsistent outcomes. Finally, I argue that consistency, like inconsistency, is better understood and employed as an instrument than as an end. There is no expectation to put all these issues at rest; my purpose is to explore, not to exhaust.

The maxim that like cases should be treated alike can be given three interpretations, two of which are mutually conflicting. First, it can be taken as a distinct and active first principle of law and morals—a good in itself. So understood, it provides an independent reason in successive "like" cases to repeat the outcome of Case #1. It is this interpretation which permits the irony that, if Coons is a villain, at least he is a consistent villain; there is one good thing to be said for anyone who treats like cases alike—even if he mistreats them. If traffic judges gave uniform fines, this uniformity would be a good however dubious its magnitude. And, even where repetition in successive cases has separate justification such as predictability, deterrence, or reliance, this good called consistency still adds its own independent moral weight. I shall refer to this ideal variously as pure consistency, consistency for its own sake, and consistency itself.

Second, the maxim can be understood as a purely formal proposition having no independent effect. Like cases are defined as those governed by the same rule; hence, it is said, the maxim is inevitably superfluous. If a rule applies—well, it applies, and that is an end of it. A rule needs no assistance from any separate norm of consistency in order to govern successive like cases. The maxim is thus a blank cartridge—a moral illusion; consistency so viewed we will call "formal" or "empty." 3

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2. This is the view of Professor Kent Greenawalt. See Greenawalt, How Empty Is the Idea of Equality, 83 Colum. L. Rev. 1167, 1168-69 (1983). It seems to be the implicit view of many other commentators and courts. See, e.g., Watson, Assisting the Jury in Assessing General Damages—Gray v. Alanco Developments Revisited, 48 Can. B. Rev. 565, 574, n. 26 (1970) ("the only test of the 'correctness' of a general damage award . . . is its relative consistency with awards in like cases within [the same] jurisdiction").

Third, consistency can be purely instrumental. Very often, as already noted, there are reasons to repeat the outcome imposed in the first of successive like cases—reasons that are wholly independent of pure consistency. A rule of repetition may provide the predictability necessary to plan intelligently, to deter the criminally inclined, or to protect those who may reasonably have relied on the treatment in Case #1. Some see consistency as a barrier to undiscoverable bias or caprice; others deem it necessary to uphold the majesty of the law in the eyes of the public. Likewise, it can be administratively efficient for the decider who must apply the rule; repetition by rule is easier than considering the matter afresh. Consistency thus can be a means (a tool, an instrument) to various systemic ends, and I will label it as such when that usage is intended.

These interpretations of consistency as pure value, as empty illusion, and as instrument tend to become commingled and confused. The difficulty in maintaining the distinctions may stem from a latent problem regarding the meanings of "rule" and "treatment." Apparently it has been assumed that treatment under a rule must by definition be singular, just as the event that triggers the intervention must be singular. This...

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4. Thereby hangs another tale of our traffic judges: Two were on their way to a seminar, each driving his own car. A trooper clocked both at 75 m.p.h. and arrested them together. The next day the first judge pleaded guilty before the second, who fined him $25. The second then pleaded guilty before the first, who fined him $100, answering the consistency objection with the observation that, "We have to do something to stop this crime wave." The first judge was an instrumentalist and the second a purist.

5. See infra note 127 and accompanying text.

6. Presumably, to both the purist and the formalist, instrumental use of repetitive treatments is morally inoffensive, so long as the particular ends served are acceptable. Likewise, many a plausible end will not require repetition—or not require it in every instance. Even the "bias" rationale of consistency might allow private views of successive decisionmakers to produce occasional conflict. For if either of two inconsistent treatments would have been justified in the first case, the reasons to exclude a "biased" judgment on succeeding like occasions would not be so obvious; at least this would be so where the preference of the second decider was principled and not merely a personal animus respecting one of the parties. Much turns, of course, on the definition of inconsistency. See Part II, infra.

7. See, e.g., Greenawalt, supra note 2. This interesting essay was to be a refutation of Westen's exposure of the maxim as merely formal or empty. See, Westen, supra note 3. Professor Greenawalt begins by assuming the point at issue—i.e., "the moral power of the formal principle." Greenawalt, supra note 2, at 1173; see also infra note 110 and accompanying text. Note that in so doing he has confounded the useful distinction between form and substance, one necessary to Westen's purpose and to mine. That is, if a principle has "moral power"—if it affects decisions—it is not formal. Of course, all principles have form; but formal principles have form only. They do not decide cases. For these and other reasons I have cited Greenawalt as a supporter of "pure consistency" and not (merely) formal consistency. For a more recent example of the tendency to commingle, see Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).
may be the unspoken view of those who deem the maxim "empty": There is a likeness; there is a treatment. Or conversely, given an obvious plurality of permitted treatments, some convention nevertheless deems them one for the purpose of delineating the governing rule. Prison and probation must somehow be assimilated. This view could be a simplifying and ordering convenience for jurisprudence, but it could also be misleading. If, instead of asserting that one-rule means one-treatment, we concede that certain rules of law allow the deciders of like cases a choice among inconsistent treatments, the terms of the debate about the maxim might need recasting. The central hypothesis of this Essay is that there are such rules.

This claim will concern only the predicate of any rule; my sole interest is in the selection of a treatment once the rule has been found to apply. Whether a rule applies is one question; what treatment is appropriate is a distinct, sequential concern. Maintaining this separation is important. The initial and traditional problem of identifying "like cases" (does the rule apply?) is real and will always be with us. But it is a distraction to conflate the issue of factual likeness with that of the appropriate response to that likeness. Rules and the treatments for their breach are obviously related, but until the rule is conceived by the rulemaker, there is literally nothing that can even bear the label "treatment." There can be no therapy for a nonexistent disease; and, until bargaining in bad faith becomes a tort, there can be no conception of remedies—consistent or otherwise. This distinction between "premise rules" and "remedy rules" will be a convenience when I later refine the definitions.

One reason that our images of rules and treatments tend to merge may be that, in certain conflicts, declaration of the winner actually constitutes the treatment. This can be an effect of the way the question is posed in litigation. In a suit to quiet title where the issue is who owns Blackacre, the judgment itself constitutes the remedy—the declaration is itself the sanction. Sometimes this convergence comes from the form of the rule. The criminal law, for example, may impose a fixed statutory fine with no alternative. By contrast, the rules of civil liability for negligence make the issues of liability and of damages more obviously separable. Whatever the form of the rule, however, these two elements of decision—the judgment that the rule applies and the selection of treatment—are discrete in principle.

Repeated reference shall be made to "Case #1" and "Case #2." This is shorthand for like cases that are successive in time; by definition they form a set governed by one rule. It will be assumed that, within

each set, the cases are identical in every relevant detail except the moment of their resolution. A second assumption will be that Case #1 of each set is the first application of the particular rule; hence it is also the first determination in practice of the treatment or treatments that the rule entails. Case #2 will be proxy for all successor cases of the same set; it thus poses the issue of consistency over time.

"Treat" and "treatment" will constantly reappear. Treatment is not a typical lawyer's word, but it is the word used in the maxim; I will retain it, using the words "outcome," "remedy," and "sanction" occasionally as synonyms. Were I writing on a fresh slate, "outcome" might be nearest my intended meaning.

The term "inconsistent treatment" will shortly be given a comprehensive definition; for the moment let it identify treatments different in ways that would trigger moral conflict among decisionmakers of ordinary sensibility who must apply a rule in Case #1 and in successive like cases. That is, these are options that invoke opposing philosophies held by individual deciders.

Inconsistency, so defined, excludes the view that the maxim is necessarily an empty formalism. An example adapted from Professor Kent Greenawalt will show this. Assume that treatment must be meted out successively in Case #1 and Case #2 for the violation of a certain criminal rule. Make the defendants co-conspirators of the same age, experience, intelligence, complicity, and attitude—twins, if you will, in every relevant sense. Assume also that the law permits two treatments, $T_1$ (probation) and $T_2$ (prison). That is, either would satisfy the rule if chosen in Case #1. Nevertheless, these treatments can be inconsistent in the sense that judges of ordinary sensibility clash over their morality as a solution for this constellation of facts. The rule itself makes neither treatment superior to the other; it is indifferent to the judge's choice between $T_1$ and $T_2$ as the outcome of Case #1. Suppose, then, that the judge in Case #1 chooses probation. The question that arises for the decider of Case #2 is whether this original choice in Case #1 by itself mandates the same outcome. If so, consistency would be a substantive principle, for it would then be the maxim of like treatment and not the particular rule that would require the outcome of Case #1 to be repeated. Conversely, on the same assumptions, if it remained appropri-

9. See infra text at p. 70.
10. Note that there are two separate occasions of inconsistency that will be encountered in the discussion. The first is the original application of a rule (Case #1). At that time the decider must choose among permitted treatments. Here inconsistency, if any, arises among the treatments initially available under the rule. The second occasion is Case #2 (and all succeeding instances). If the original set of treatments remains available at that point, the decider faces the further issue of inconsistency between the outcomes of successive decisions. (Case #1 and Case #2)
11. See Greenawalt, supra note 2, at 1171-72.
ate in Case #2 to apply either $T_1$ or $T_2$, then the maxim would be impeached; that is, like cases need not as such be treated alike.\textsuperscript{12} So, on these assumptions, if a rule exists which in its first application could have been satisfied by mutually inconsistent treatments, the maxim would be a pure value if it dictated the second outcome, and it would be simply false if it did not.\textsuperscript{13} It is an empirical question whether such rules exist; it is a prior question of definition whether they could exist.

Before turning to either of these puzzles, however, I concede the difficulty in specifying the actual effect, if any, of the choice made in Case #1. In the previous paragraph I simply assumed that pure consistency "mandates the same outcome" for successive cases. Empirically, such a connection might or might not hold; a systemic commitment to consistency for its own sake might not be needed to explain conforming treatment in Case #2. There could have been reasons for repetition other than consistency itself. For example, even given original treatment options, the choice made in Case #1 could have altered the relevant universe: over time the market has adjusted to the outcome; a product has been withdrawn; an institution has ceased to exist. In that event, the treatment left unchosen in Case #1 may no longer be appropriate—or even available—and the issue of consistency evaporates.

Further, even if the original array of inconsistent treatments remains intact at the time Case #2 is decided, a repetition of the treatment chosen in Case #1 might be explained by a number of purely utilitarian concerns. These could include predictability, deterrence, efficiency of bargaining and of insuring, or other practical considerations that support strict stare decisis regarding treatment. A final makeweight for repetition could be that Case #1 has given ground for reasonable reliance.\textsuperscript{14}

\textsuperscript{12} Professor Greenawalt implicitly agrees. He makes the judge in Case #2 struggle with the option. \textit{Id.} at 1172. Being committed to consistency for its own sake, Greenawalt sees the second judge "pulled toward probation," though he believes imprisonment to be better. This "may finally lead the judge to impose a sentence different from that which he would otherwise have picked." \textit{Id.}

The reality is that it \textit{may or may not} have this effect. We are watching a judge who is free under the rule to follow his private version of the good. That is my point.

\textsuperscript{13} This would hold whether the maxim is to be tested as a norm or a proposition of fact. Of course, ultimately that distinction could be important. \textit{See} Part \textit{V}, \textit{infra}.

\textsuperscript{14} Such a claim is circular. The reasonability of any reliance on the treatment in Case #1 rests upon an assumption that repetition is already prescribed by some systemic norm; this, of course, is the very question at issue. This may, however, be the implicit position of Ronald Dworkin and others. \textit{See infra} notes 114-20 and accompanying text.

Another problem with reliance lurks in the curious notion of an actor's relying upon a prior remedy (as opposed to a premise rule). The relevant actor in our case may be a wrongdoer. Is a tortfeasor entitled to invoke reliance to limit his liability? The severity of the sanction ought to be regulated by the rather different principle of fair notice. The idea of reasonable reliance has not been thought to embrace the commission of crimes, torts, and other wrongs, and its adaptation to that end would only confuse.
In short, we might be witnessing the employment of consistency as an instrument instead of a value.

I say we might. It would not follow from the possibility of other explanations that pure consistency was irrelevant to the decision to apply the same treatment in successive cases. Consistency could have been valued for its own sake, just as the purists would have it; but, in order to discover its contribution to the choice of like treatment in Case #2, pure consistency would have to be disengaged from a tangle of other values and its separate weight determined. This would be no simple task; in no instance of consistent treatment by rule have I been able to exclude the possibility that repetition was justified by values other than consistency itself. And so long as the actual effect of the pure value of consistency upon Case #2 remains invincibly indeterminate, conclusions about the emptiness or substantive character of the maxim are barred.

On the other hand, the discovery of rules that permit the inconsistent treatment of Cases #1 and #2 would yield one firm conclusion: The maxim could not be taken as decisive. It would not follow that pure consistency had no weight at all in these cases; that, again, is but one possibility, and its actual weight might or might not be ascertainable. It would be clear, however, that considerations favoring retention of remedial options for Case #2 can outweigh sheer consistency. Such considerations might include, for example, subtle institutional advantages in retaining the discretion of a deciding agency such as a judge or jury, or the value in experimentation with conflicting outcomes, a policy which might be frustrated by strict stare decisis in the outcome. Inconsistency too begins to look instrumental.

Given the variety of possible relations among the treatments permitted in Cases #1 and #2, the message becomes more complex, containing now two conclusions. First, if in its initial application, a rule could have been satisfied by any one of mutually inconsistent treatments, only an unpromising factorial analysis of repetitive outcomes could reveal whether pure consistency had had effect, and if so, in what degree. Second, if there are rules that allow options for inconsistent treatment to survive in successive cases, the maxim to that extent fails as a description.

II

A Vernacular Definition of Inconsistency

In the search for rules of law that allow inconsistent treatments, much will turn on definition. This Essay, however, makes no effort to exhaust the possible moral and legal meanings of consistency or to establish one meaning as primary. My three "interpretations" of consistency avoided defining the term itself. My need is the narrower one of estab-
lishing the conditions of inconsistency. Once that is done, consistency will remain the residual category.

The task of defining inconsistency at first appears too easy. Taken literally, the maxim forbids mere unalikeness of treatment, thereby suggesting that difference itself is inconsistency. By common understanding this is obviously too broad. There is a superabundance of merely different treatments under the same rule. For example, identical personal injuries rarely produce exactly the same jury awards, but to perceive every such difference as an inconsistency would both trivialize and confuse the issue. Many such differences represent nothing more than diverse opinions among deciders regarding the sum of money necessary to compensate a mutually perceived loss. The disagreement is solely about the efficient means to an agreed end. Such differences are inevitable and are best regarded as background noise. Accordingly, the idea of inconsistency of treatment will be limited to conflict not about the means, but rather the ends of social intervention. A definition drawn in that medium would carve the relevant universe at a more interesting and, certainly, a more controversial joint.

The task of defining inconsistency becomes, then, a delicate one. No obvious standard appears in the literature of rules. The lawyers and philosophers who have considered the issue have assumed that inconsistency of treatment is problematic; but, generally they merely identify the beast without actually defining it. This escape from definition is managed in either of two contrasting ways. One is the nominalist observation that Cases #1 and #2, while superficially alike, could have been viewed by their deciders as distinguishable; hence they can be presumed consistent—that is, they fall under different rules. The other tactic is to admit that like cases are receiving inconsistent treatment but to justify these disparities with other policy considerations that outweigh pure consistency. For example, in like criminal cases an occasional stiff sentence may be needed as a deterrent. But whatever types of treatment these commentators examine (sentences, damages, admissions to law school) the differences in like cases are simply assumed to represent inconsistency; there is no concern to distinguish inconsistency from mere difference. The answer to the question is thus finessed.

One could also elude the question by confecting a definition for which there could be no examples. Very simply, the concept “rule” could be shaped so as to exclude the possibility of inconsistency; indeed, for those who have perceived the maxim as merely formal and empty, such a definition may be implied. Under this view, in every case, either

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15. This is Westen’s view. See supra notes 3, 8 and accompanying text.
there is consistency between two treatments under a rule, or there is simply no rule that permits both. Such a formalism can harmonize any result including decisions for and against capital punishment\textsuperscript{17} and the giving and withholding of lifesaving surgery for defective newborns.\textsuperscript{18} By definition the choices for life and death are consistent in these cases, because the governing rule permits them; or, if these choices must be deemed mutually inconsistent, the rule can be declared to exclude one or the other. The maxim thus remains a tautology, and any hypothesis of inconsistent treatments under a rule would rank with the effort to square the circle. I have not found precisely this point of view in the literature. Peter Westen's bruising analysis of equality has language compatible with the assumption that one rule implies but one treatment.\textsuperscript{19} However, none of the major figures in jurisprudence has explicitly considered the separability of "premise rules" from "remedy rules," hence the possibility of inconsistent treatments remains unclarified.

To define away the possibility of inconsistency would be mere escapism.\textsuperscript{20} The common perception of inoral conflict within the system deserves a response in its own terms. The definition I will offer will be vernacular in form, capturing unreflective uses of the profession and responding to common lay perceptions of courts. The most impressive authorities are the unsystematic reports of litigators. These professionals commonly emphasize the decisive effect of the judge's or juror's personal philosophy when applying rules regulating matters as diverse as the setting of alimony and the imposition of consecutive sentences. The principles that are allowed to determine treatment are perceived to be multiple and discordant; the rules seem to play host to warring moralities of the deciders. Testing this image empirically would require a definition cast in a dimension of ethics—specifically, the ethics of those who must apply the rules. I must distinguish between the rulemaker and the decider of particular cases, stressing the experience of the latter.

Most of what follows then, concerns rules that give decisive effect to potentially conflicting principles held by individuals. I will often refer to these principles as "private" or "peculiar" to the particular deci-
tionmaker, whether he be a judge, arbitrator, juror, or bureaucrat. This usage is not intended to suggest that the views (or values) of these deciders are somehow narrow or parochial. These private principles of action may be externally grounded in nature or authority; they may be embracing and communitarian; they may be transcendental or materialistic. The point is this: Whatever their ground or content, these patterns of moral attitude are individuated in deciders who must apply the rule in particular cases. Inconsistency under a rule is specified in terms of moral conflict among deciders over treatments each of which is permitted to be imposed by a rule.

When remedies are contrasted, differences that are merely instrumental should be disregarded. This distinction between moral and instrumental choices is important and can be illustrated. Consider the doctor who must choose among recognized and equally effective remedies for a life-threatening syndrome afflicting an unconscious emergency patient with no one to consent for him. Suppose that each of the various remedies available for this pathology risks a different side effect such as blindness, brain damage, impotence, or loss of limb. Assume also that no priority among these risks is established by the canons of medicine or law. Potentially, then, these treatments embody moral conflict among individual doctors who might be called upon to decide these cases; indeed, the particular example implicates mutually hostile premises respecting the meaning of life itself. Such treatments might fairly be called inconsistent. By contrast, where the various recognized remedies for this syndrome generate no material "dissensus" regarding the significance of their side effects, the choice among them is purely descriptive or instrumental; the only purpose then implicated is the cure of the particular pathology. With respect to that end there is agreement, and the choice among equally effective treatments is a matter of moral indifference.21

Where our doctor faces medical options that are morally inconsistent, it remains his duty under the rule to save the threatened life by any of these effective methods. Lacking an external authority for selection, he nonetheless chooses, making his decision according to his own values however these were originally derived. His selection of a treatment entails a choice among morally distinguishable side effects; this is not an instance of moral indifference. Yet, when the next shift takes over the emergency room, the treatment decision in a like case may go a different way; indeed, even the same doctor may choose a different course. Such outcomes are inconsistent.

21. Professor David Daube reminds me that, side effects apart, a decider's preference among instruments may itself be subjectively driven in a sense recognizably "moral." Conflicts of this sort could be incorporated in my theme, but I do not wish to depend upon them.
The distinction between instrumental and moral choices can also be illustrated by an example from the arena of school desegregation. Assume that de jure behavior has left two very similar school districts awaiting orders from separate judges. These two courts may share one objective, each hoping to establish what are effectively identical states of affairs in the districts. They may hold this goal in common either because the governing rule specifies the outcome required, or simply because their personal principles happen to coincide on a certain outcome that the rule does not forbid. In either case the judges may choose different remedial techniques for the achievement of this uniform purpose. So long as these techniques do not entail predictably different side effects—thereby implicating other ends—the only issue is whether each has equal prospect of achieving the common goal. This difference is instrumental only; there is no inconsistency.

These deciders might not, however, share the same end. One judge’s enthusiasm for affirmative integration might lead him to order coercive busing over long distances. Another’s passion for neighborhood schools might move him toward compensatory awards with limited transfers. A third judge with a preference for individual choice might work out a system of voluntary busing; another might even order a district to subsidize a family’s choice of school in the integrated private sector. Again, the point is that under some rules, the repertoire of plausible outcomes in like cases may be broad enough to include choices that are conflicting inter se, if viewed from the moral perspective of the deciders. Other examples illustrate this. Criminal sentencing and parole decisions in like cases can involve the starkest conflict between retributive and rehabilitative ideals; restoring competition under the Sherman Act may put judges in like cases at loggerheads over the moral relevance of bigness and the use of divestiture.

In theory all such differences in the forms of intervention could be explained as the toothless reality that two deciders held the same objectives and merely chose different means—that all differences of treatment are instrumental. Any convincing answer to this lingering doubt must

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22. The distinction between moral conflict and instrumental difference is seldom remarked. In the litigation context, conflict among deciders can involve three kinds of issues: (1) which facts of injury have been proved; (2) which means will satisfy a loss warranting compensation; and (3) which losses deserve amelioration. Courts and commentators tend to ignore these distinctions making it difficult to know whether the problem is one of inconsistency among deciders in the sense used in this Essay or merely a disagreement about facts or means. Here is a classic example of commingling taken from a prominent scholar:

The leeway of the jury’s freedom from control in fixing the amount varies with the certainty or uncertainty of the standard which the law furnishes for measuring the damages. The tests . . . for limiting the trial judge’s interference with the award . . . apply particularly to awards of unliquidated damages for bodily injuries, pain, mental anguish, and injuries to family relations and social relations. Their emphasis upon leaving the jury a wide range of uncontrolled discretion in arriving at amount, is especially appropriate in
be an empirical one of the sort I will present in the next Part.23 I move on, therefore, to embody the possibility of moral conflict under a rule in a definition of inconsistency.

This definition is vernacular in form, serving the analytical objectives of this Essay while respecting the common sense of the English word and the common opinion of lawyers: Inconsistency is the legitimation under one rule of a plurality of results that would be recognized by different deciders of like cases as being in moral conflict.24 Stated more formally, inconsistency under a rule is any difference among treatments that arises from ends left to the will of the individual decisionmaker. It is a sufficient condition of inconsistency that decisionmakers be entitled to order ends privately in choosing among different outcomes while still applying the same rule. For convenience, I shall occasionally refer to this phenomenon as inconsistency-by-rule.

Note that this definition does not include decisions that are incorrect under the rule invoked; my subject is variety among correct decisions. Further, although the definition includes normative elements, the enter-

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It is fairly clear that Professor McCormick is not referring to factual disputes among jurors. But he gives us no way to distinguish instrumental conflicts from value conflicts. On the one hand two jurors might pursue the same end—say compensating for sterility—but differ as to the dollars necessary to satisfy this common objective. By contrast, they might seek inconsistent ends; one might not value fecundity.

Elsewhere McCormick more plainly recognizes that jurors may conflict over ends as well as means in regard to punitive damages: "The jury is always privileged to limit the plaintiff's damages to 'one cent,' even though they find that he has a cause of action, if for any reason they disapprove of the suit or sympathize with the defendant." Id. at 73. Later he goes even further:

Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable.

Id. at 318. This last version of indeterminacy in the process goes beyond even what I allow. I would prefer to suppose that, as to each juror, the moral (if not dollar) importance of any injury can often appear very distinct—that is, the opposite of arbitrary.

23. Plainly the argument that all differences are instrumental is reversible; differences could as easily represent only value conflicts. If dollars were accurate proxies for the lost good, any difference (we would say) is a difference in the decider's estimate of "true worth." But, I see no reason to believe this either.

24. Those familiar with Ronald Dworkin's harmonizing uses of the concepts of principle and rule might wish to draw the following contrast: Dworkin looks for the one right answer under each rule based upon a sensitive weighing and ordering of background principles. This Essay looks for rules that permit plural right answers based on the inconsistent principles of individual decisionmakers. Dworkin has the one harmonizing jurist, Hercules; I have the judges and jurors of Alameda County. See R. Dworkin, Taking Rights Seriously 35-36 (1977). (As to whether Dworkin views the issue of treatment as separable in his analysis of rules and principles, see infra text accompanying notes 114-21).
prise remains resolutely empirical; rules that allow conflict among private values will be objects for identification but not for evaluation. It will matter that a rule allows individual deciders to realize moral inconsistencies, but the content and justifications of those inconsistencies are irrelevant.

Such a test needs further elaboration, for the ends of individual deciders can be ordered differently in at least three senses. First, they can be inconsistent in the sense that they are contradictory; what one person values another reproves. Jones prizes religious tolerance; Smith opposes it. Second, ends can conflict in the lexical sense that two individuals hold the same two values but assign them different priorities in those instances where they cannot be satisfied simultaneously. Thus, in deciding for or against a certain surgical procedure, Jones puts absence of pain ahead of mobility; Smith reverses the order. Finally, ends can differ in the weights that individuals accord them. Though holding identical priorities, Jones might give little weight to either the absence of pain or mobility, while for Smith each represents a powerful concern.

These three forms of ordering might respectively be labeled contradiction, priority, and weight. They can be difficult to distinguish in particular cases; what seem to be contradictory values in certain conflicts often turn out to be differences of priority or weight. An example is provided by the elemental struggle over abortion policy. Many who favor women's choice profess a devotion to life as strong as that of their "pro-life" opponents. This is logically possible, and no evidence could falsify their claim, which may reduce to a lexical preference for female autonomy. This explanation would stand independent of any conviction as to when life begins; for choice could literally be valued more than the life of the unborn, where both are valued. Their pro-life opponents imaginably could give less weight to both life and choice while giving life priority.

It is, in any case, quite proper to view these three forms of ordering as true moral conflicts precisely insofar as each can drive deciders to different practical choices. Two jurors who must award punitive damages for a police officer's violation of my rights might agree upon both the relevance and priority of deterrence and reprehensibility and yet be profoundly at odds over their weight; one juror emphasizes, the other discounts, their importance. This conflict could express itself in choices of substantial and nominal damage awards respectively.

There is no hierarchy among these three forms of inconsistency that compose the vernacular definition. No metric establishes that a flat contradiction between two very weak preferences—say one for and one against the death penalty—is more (or less) meaningful than a towering difference over the weight to be accorded some other interest such as reputation. There is no scale but only a profusion of scales represented in
the individual minds that enter the scene as deciders, first to judge us by a premise rule and, then—using a remedy rule—to choose a treatment or sanction. It is the discretion of these diverse individual deciders to enforce their private values that will interest us. The universe of discord over ends, then, consists of contradictions, lexical orderings, and differing weights; these exhaust the categories of inconsistent treatment under a rule. Except for the irrelevant instances of mistake or fraud, inconsistencies can arise only out of the value commitments of individual decisionmakers.25

So defined, the issue of inconsistency can be understood as an intellectual suburb of the traditional problem of "discretion." Discretion is that puzzling activity of decisionmakers who simultaneously are bound by a rule, yet free to exercise judgment. How this can be and what it can mean have engaged some of our best minds.26 The issue is generally cast as a search for the right decision or for some range of right decisions.27 This Essay likewise is concerned solely with correct decisions; considered as part of the discretion literature, it would add the hypothesis that under some rules the repertoire of right outcomes includes treatments not mutually consistent. To discretion theorists this could seem either a corruption or a reform and might support an interesting dialogue. Such a

25. Cases in which deciders simply "see the facts differently" are no exception. Wherever the facts are perceived to vary, by definition the problem is no longer one of like cases—or even of the same rule. Of course, one could simply assume that every apparent inconsistency in treatment represents some implicit difference in factual perception. In that event all problems about rules evaporate (along with the rules) into a nominalistic formlessness. Here it has been assumed that like cases can be and are correctly identified by decisionmaking systems. The problems of definition thus remain manageable because our interest in inconsistency is limited to the narrow universe of treatments.


Post's purposes and mine are different. Superficially his analysis of "delegated" discretion would seem to allow my view. He argues that "appeal courts delegate to trial courts the power to determine the legal standard by which the correctness of their decisions will be judged," id. at 215, and that "the judge can (within limits) choose the standards that will guide the sentencing process, and the appellate court will not interfere." Id. at 209. See generally Id. at 208-18. Post is not, however, so much concerned with whether trial courts should remain consistent with one another, nor does he deal with the definition of inconsistency; he focuses upon the judge's role in the individual case. So far as I see, none of the literature justifying discretion allows the possibility that the moral precept informing a treatment decision could legitimately be that of the decider rather than embodied in a rule by which the decider is bound. That, of course, is our question.

27. One tradition restates the question as that of how much error a decider can get away with on appeal, conceding thereby that a decision can be wrong but unreviewable. See Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 653 (1971) (describing discretion as the "trial judge's limited right to be wrong without reversal"). The most general treatment is K.C. Davis, Discretionary Justice: A Preliminary Inquiry (1969); the newest is D. Galligan, Discretionary Powers (1986); the best in its limited compass is M. Kadish & S. Kadish, Discretion to Disobey (1973).
dialogue is beyond the scope of this Essay, but these alternative perspectives should be remembered throughout.

The issue of inconsistency can arise only in the course of applying a rule; hence, despite the analytical separability of treatment from rule, the latter term requires a more detailed discussion. A primary premise here is that rules are more than disinterested predictions of the decisions that will be reached by the arbiters who employ them. Every rule is normative in the sense that it defends some perfection recognized by society. Rules embody this normative element in verbal forms that mix description with judgment. The factual premise of a liability rule bespeaks some imperfection in the relation; the description is itself a judgment, for crimes and torts exist only to be condemned. Rules thereby achieve the miraculous wedding of fact and value that makes the legal and moral worlds go round.

Rules, then, consist at least of description and judgment. Is treatment also a defining criterion? Lacking a constituent remedy, can a rule be said to exist? The answer is not obvious, but I will assume that the violation of every rule by definition sustains an intervention with the status quo. This view represents a realist jurisprudence of the twentieth century and focuses the inquiry upon purely legal phenomena. For our purpose, emphasis on positive law is justified because the legal system represents the central redoubt of normative consistency. Rules of law constitute an order generally thought to value consistency for its own sake. To make the case for inconsistency here would be most difficult, and hence, if successful, would be the most telling empirical criticism of the maxim.

I assume, then, that the very idea of a rule entails at least one treatment that is correct for the decisionmaker to impose. To be correct, any proposed outcome must clear two hurdles: The treatment must further the rulemaker's purposes; and the treatment must be equal to or superior to any other in serving that end. Where superior, it becomes the sole treatment; it may be short of perfection, but it is the best. As such it holds the status of an imperative.

Could two treatments be correct under one rule and still be inconsistent? It is easy enough to see that two treatments could be superior to every other while remaining equally efficacious. Both would be correct for Case #1 under the rule. But could they also be inconsistent with one another as now defined? The answer seems yes, so long as we accept the

28. Even among Anglo-Saxon lawyers there has survived, if only as a heresy, the idea of a right without a remedy. This was, of course, a major criticism by Holmes in The Path of the Law, 10 Harv. L. Rev. 457, 461-62 (1897). In matters of pure morality, rules abound that seem to prescribe no particular action beyond the cessation of the immoral behavior; drunkenness and adultery are examples.
perspective of individual deciders viewing one another's choices in like cases.

Another medical example will exemplify the role this perspective plays in my thesis. Suppose that either judges or legally recognized guardians must determine medical treatment for institutionalized or neglected minors. The chosen treatment must serve "the best interest of the child." In practice this broad principle differentiates into particular rules governing specific recurrent pathologies such as spina bifida and Down's Syndrome. That is, there are sets of like cases to be decided in the child's best interest. In approaching Case #1 of any such set, a decider must eliminate those medical treatments that would not serve the purposes behind the rule as effectively as would some other proposal. As in the earlier emergency room example, one can postulate a plurality of alternatives, none of which is inferior to any of the others in serving those purposes. Each then would be correct for the case. From the point of view of the rulemaker (or a disinterested interpreter of the rule), choice among them would appear indifferent; that is, simply, the rule permits all of them. Individual deciders, however, could see these same treatments as inconsistent, for they involve different probabilities of death, disfigurement, mental impairment, and other consequences that commonly inspire diverse moral responses. Inconsistency in this sense is very likely.

To make this example more concrete, suppose that a child from a state orphanage has a certain common form of brain tumor. The decider is asked to authorize medical intervention. Based upon considerable experience the medical professionals who testify agree as follows: left untreated, the chance of spontaneous remission is one in fifty; chemotherapy offers a one-in-ten chance of recovery with certain nasty although temporary side effects; radiation raises the chance of a cure to one in five with similar side effects plus the long range danger of creating more tumors; radical surgery raises the chance of life to even odds with a three to one probability of blindness and an even probability of substantially diminished intelligence. The story, in short, is a variation of the familiar "tragic choice" problem.

From the viewpoint of the rulemaker (and of the neutral observer), the rule is indifferent to the actual choice. But individual deciders may not be. They will compare misfortunes such as blindness and retardation, evaluating these by private standards. Their decisions concerning intervention will likely be diverse. Their personal philosophies will render the disparate outcomes of these particular medical processes good

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29. See supra text at p. 68.
or bad, lexically distinct or deserving of different weights. Each decider is entitled to take his own predilections into account in decreeing a course of action. It is important to see that this holds not because the decider's discretion is valued as contributing some added element of rationality.\textsuperscript{31} To the contrary, he enjoys such discretion only as the necessary tool of selection among these treatments, any of which will do.\textsuperscript{32}

My focus will be the remedies that enforce legal norms. The setting is one in which a court or other arbiter has already applied the governing rule and discovered the need for official intervention.\textsuperscript{33} At that point, the remaining issue is that of which intervention to order. My task will be to discover sets of permitted interventions that meet the definition of inconsistency. Since that definition includes a moral element, the subject will be not only the treatments actually chosen, but the liberty of the decider to set the reasons that determine the choices.\textsuperscript{34}

\textsuperscript{31} The literature has put the issue the other way round, supposing discretion to be intended by the legal system as a contribution to rational choice. See R. Dworkin, \textit{supra} note 24, at 31-39, 68-71. This, indeed, is the target of criticism in Dworkin's introduction to the distinction between rules and the principles that regulate their interpretation. It is nowhere considered that a rule could allow selection among conflicting treatments to be driven by private values of the decider.

\textsuperscript{32} Doubtless the decider is subject to a limitation of good faith; he could not properly choose an outcome simply to secure his own private advantage. He could, however, in one instance be "arbitrary." This occurs where the decider's values put his mind in equilibrium among permitted treatments that others would array in a clear moral order. As among the distinctive risks of outcomes from surgery, radiation, and chemotherapy, for example, his mind could be in equipoise. In that event the logic of his role requires him to make an arbitrary selection. The process tends to disguise this; for institutional reasons a judge often will justify such a choice in an opinion. A sophisticated observer may perceive that nothing drove the result except the duty to decide. Yet, so long as the judge's choice among treatments is appropriate under the rule, there is nothing amiss—except, perhaps, the disingenuousness of the justification. \textit{See infra} text at p. 76.

The word "arbitrary" will reappear. As here employed, it is not a pejorative connoting irrationality. The inconsistent options open to deciders are assumed to be rational. The term "arbitrary" is taken in its primary dictionary meaning of "subject to individual will." This is a neutral usage describing a choice of the decisionmaker as to which the rulemaker is indifferent. For the contrary usage see Galligan, \textit{Arbitrariness and Formal Justice in Discretionary Decisions}, in \textit{Essays in Legal Theory} 145 (D. Galligan ed. 1984) (describing arbitrariness as "the antithesis of rationality").

\textsuperscript{33} Some interesting and relevant universes of treatments are left unconsidered here. I avoid most of them (and emphasize the remedies of litigation) because these others would complicate our subject without further illuminating it. Thus—with one exception—inconsistencies in the allocation of benefits by bureaucratic systems are excluded here precisely because they require additional excursions into definition. For the exception, see \textit{infra}, note 100. Many private moral issues present the same problem.

\textsuperscript{34} Finally, the terms "decider" and "decisionmaker" are synonymous with one another and are co-extensive in their use with the concept "rule." That is, a rule of law exists precisely to be applied by deciders of legal issues. Just who qualifies for this role in a given case is not a concern here. What is important is that the private values activated by deciders necessarily fall within the range of the normal. Eccentricity is not our subject. This is so by definition, for inconsistency occurs only as permitted by rule. Rules of law, being politically derived, inhabit the range of normality.
III
ARE THERE RULES OF LAW ALLOWING INCONSISTENT TREATMENT?

My search here is primarily for rules, and only secondarily for cases. It would, of course, be helpful if there proved to be sets of cases with identical facts and conflicting outcomes. Scholars and judges who complain of inconsistent treatments think they see such sets of cases. I am skeptical, however, that many could be identified even from complete records (or, especially from complete records); rarely can one eliminate the possibility of some element too subtle to perceive. My scattered references below to reported decisions, therefore, will be less to show particular inconsistent choices than to suggest the scope of treatment allowed by a given rule. My aspiration is to discover rules that provide the opportunity for conflict.

Inconsistency-by-rule can be identified in various forms within the legal system. It is not limited to rules about children or unconscious patients nor even to jury awards (though the latter may be the most numerous category). The principal difficulty is to be systematic in the search for examples. From the beginning many a promising target had to be set aside. The life stories of settled rules that mandate consistent treatment could not be unraveled (at least by me); if options for treatment existed when Case #1 was decided, they have slipped into historical oblivion. The culture of rationalistic decisionmaking encourages decisionmakers to make their choices appear nonarbitrary; opinions thus are written as if there were reasons that tipped the balance one way. The decider erases every trace of deadlock, leaving us nothing by which to disentangle the suspected value of sheer consistency from other possible justifications that would support a regime of stare decisis in the choice of remedy.

One strategy is to identify rules governing sets of what lawyers call "hard cases." A traditional example of a hard case is the tussle between the innocent owner and the bona fide purchaser. I let a plausible purchaser try out my expensive bicycle; he disappears after selling it to you under unsuspicious circumstances. The reader may alter the facts as he

35. See infra notes 64-69 and accompanying text.
36. Too late for this Essay, a particular technique may be suggested for the next person who tries: Look for pairs of unlike cases in which the outcomes appear reversed. I cite one example below in which a judge intervenes to save an infant afflicted with Down's syndrome who is apparently much more seriously disabled than children whom other judges have allowed to die in accord with parental choice while invoking the same rule. See infra note 94 and accompanying text. These are dissimilar cases with dissimilar treatments, but they are treatments of a sort opposite to that suggested by the factual dissimilarity. They would be, for my purpose, not only relevant but a fortiori. Such cases could be as simple as larger jury awards for persons injured less severely. The idea now seems obvious.
CONSISTENCY

likes to produce what he regards as a balanced set of equities or a perfect stand-off on an issue of policy. Such equipoise seems, in its Case #1 form, to allow precisely two appropriate and potentially inconsistent treatments. With nothing to distinguish the weight of opposing arguments, the preference for either party would itself be arbitrary. Put another way, in a dyadic conflict, where the solution to Case #1 is in equilibrium between the parties, either outcome would have been appropriate. The opinion is widely shared that a fair portion of appellate decisions consists of the resolution of such intellectual "ties." Historically, in such cases the judges have deemed it a canon of practical reason first to pick one winner arbitrarily and then to let stare decisis and a sophistic opinion deadlock obscure the real dilemma. If one takes that original judicial deadlock to have been real, it becomes tempting to declare an inconsistency among potential treatments in Case #1.

Nevertheless, even if they could be identified, these intellectual "ties" must be excluded. Once it is conceded that the rulemaker could have preferred either party, it is the nature of the hard case that neither of such holdings could be appropriate. For in adopting the winner-take-all form of outcome in these cases, the rulemaker has merely preferred one policy to the exclusion of the other for no reason beyond the need to decide; the fairest description of this event is that in Case #1 literally no correct treatment was discovered. The hard case seems to challenge the assertion that every rule comprises at least one correct treatment. Of course, winner-take-all may itself be a judicial fetish that in some instances should yield to apportionment between the parties. Indeed, apportionment might be the one appropriate treatment. Adopting such a solution, however, would eliminate the plurality required to make the case an example of inconsistency. Thus the hard case—which seemed to offer inconsistent options—must be abandoned as an example of anything but legal pathology.

Another strategy may be to identify instances where the remedy applied under a rule has changed over time. There are many obvious examples of this. Sometimes they involve the abandonment of a draconian form of treatment such as the death penalty or debtor's prison. The treatments imposed before and after the reform could truly be thought

38. Dworkin seems to approve the "all-or-nothing" outlook, but it is not clear that he has in mind the distinction between premise rules and remedy rules. R. DWORKIN, supra note 24, at 31-39, 69-71, 105-30.
39. I pretended to originality in such matters. Coons, Approaches to Court Imposed Compromise: The Uses of Doubt and Reason, 58 NW. U.L. REV. 750 (1964); Coons, Compromise as Precise Justice, 68 CALIF. L. REV. 250 (1980). Then I discovered David Daube's inaugural lecture at Aberdeen, Daube, The Scales of Justice, 43 JURID. REV. 109 (1951); one day it will be rediscovered by law reformers.
inconsistent with one another, for they are often explainable only as shifts in the ordering of competing moral principles. Logically, they are of interest here. Pure consistency accepted as "trumps" would entail a relentless stare decisis in the remedy. Nevertheless, I have chosen to limit the universe of inconsistencies to that of coeval treatment options; in order to count for purposes of this Essay, both outcomes must be available to the same judge and to his contemporaries. This choice to disregard historical inconsistency of treatment is not driven by overconfidence that current examples are plentiful, but by my experience of popular perception. Inconsistency seems important to people only as the behavior of decisionmakers who are contemporaries and who apply the same remedy rules.

One rule of thumb may be helpful in finding rules that allow inconsistent outcomes. Most of the examples discussed below incorporate into the decision about remedy an existing dissensus in social attitude and practice. The definition itself points in this direction. Thus, in evaluating particular injuries—say to reputation—individual jurors and juries are invited to disagree, as society disagrees, over what should be counted a loss. Similar conflicts may properly obtain among judges who are responsible for choosing between the death penalty and a prison sentence for capital crimes. There is no dominant moral outlook; still, the cases must be decided, and so the individual rule expands to make room for the potentially inconsistent values of deciders. In a pluralistic and democratic culture, there is nothing troublesome about this, so long as there is

40. The Supreme Court showed some tendency to think in these terms in Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29 (1983) ("The Seat Belt Case"). There, a Republican administration informally rescinded a regulation by a Democratic administration. The Court invalidated the rescission:

Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." Atkison, T & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-808 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance. . . .

. . . In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption—contrary to petitioners' views—is not against safety regulation, but against changes in current policy that are not justified by the rulemaking record.

Id. at 41-42 (emphasis in original). The opinion may be inapposite; the Court speaks only of rules. Not surprisingly, it does not distinguish between premise rules and remedy rules. In the world of agency regulation, this simplistic division of mine will be harder to apply.

41. The medical cases already noted share this pattern, adding a second factor, namely the impossibility or impropriety of submitting the choice to the person affected. If the patient were of age and conscious, no issue would arise.
no pressing need for predictability and no other important end is frustrated.

A. Inconsistency Among Jurors and Juries

If I cannot be wholly systematic in this quest, happily there is no difficulty in finding scattered instances of rules comprising treatments that are plural, appropriate, and inconsistent. It is possible to impose a useful if crude taxonomy for their analysis. Rules of optional inconsistent treatment differ among themselves according to the intellectual act required of the decider. In one kind of case he must quantify some remedy or sanction such as an unliquidated penalty, criminal sentence, or claim for damages; in the other he must consider treatments that are mutually inconsistent in form such as prison and capital punishment. I will consider these two modes of choice in order beginning with quantification and specifically with the rules governing jury awards; it is here that the complaint of inconsistency is most common. Jeffrey O'Connell calls the jury enterprise a lottery. For Stephen Sugarman, "the idiosyncracies of jury composition combine to hand similar victims altogether dissimilar results." The system of selection encourages the assembling of independent minded people whom it provides with varying degrees of discretion; juries can scarcely be expected to produce symmetry.

Note, however, that offending verdicts can be of at least two sorts, only one of which could fit the definition of inconsistency. There are, first, those awards which represent the familiar problem of "jury nullification"; here, jurors ignore their instructions and smuggle in their private preferences, thereby defeating the intent of legislative and judicial rules. They simply violate their oath to uphold the law. My interest, by contrast, is in the possibility of multiple conflicting verdicts rendered in successive like cases in accord with a common rule. Jurors in that event do not flout the legislative or judicial will. The conflicts are between decisionmakers in separate cases: By hypothesis, the juries' behavior is legitimated by a governing rule. No nullification of the majoritarian sov-

ereignty embodied in the rule corrupts this universe.\textsuperscript{45}

What kind of rules in the civil law invite the juror to introduce his own values into the task of quantification? The standard forms of jury instructions promulgated in various states embody characteristic sets of jury responsibilities; the California version is typical of the scope of discretion in damage assessment.\textsuperscript{46} The basic instruction on pain and suffering plainly states, "No definite standard [or method of calculation] is prescribed . . . . Nor is the opinion of any witness required . . . . Exercise your authority with calm and reasonable judgment."\textsuperscript{47} Among other things the juror is authorized to estimate the loss to the plaintiff’s "enjoyment of life."\textsuperscript{48}

In loss-of-consortium cases the California jurors are entitled to evaluate the worth of an injured spouse’s love, companionship, comfort, affection, society, solace, moral support, sexual performance, ability to have children, and physical assistance in the operation of the household.\textsuperscript{49} These categories can have profoundly conflicting meanings; some "losses," such as the termination of fertility, could even be accounted a benefit by an individual juror.\textsuperscript{50}

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\item \textsuperscript{45} This is not to say that inconsistency of treatment between like cases has no implications for democratic theory, but of this more later. See infra, Part VI.
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\item Inconsistencies of both the legitimate and ultra vires sorts were confirmed in a general way by Harry Kalven and Hans Zeisel in their empirical study of the American jury. \textit{H. Kalven \& H. Zeisel, The American Jury} (1966). The authors did not anticipate our need by specifying where mere inconsistency ended and nullification began, but they did determine that jurors were driven by their own values. With respect to jury creativity, Kalven adopted the expression "jury equity," which seems to straddle the line between the permissible and the forbidden. See \textit{Kalven, The Dignity of the Civil Jury}, \textit{50 Va. L. Rev.} 1055, 1070-72 (1964). Elsewhere he speaks of "the jury's polite war with the law." \textit{Kalven, The Jury, the Law, and the Personal Injury Damage Award,} \textit{19 Ohio St. L.J.} 158, 168 (1958). The research also distinguished conflict over issues of concrete fact from conflict over the standard to be applied to those facts. See, e.g., \textit{H. Kalven \& H. Zeisel, supra,} at 116 (Table 30. "Values and Facts as Causes of Disagreement"). Both forms of conflict were evident, with the latter being significant to the present discussion. The authors are at pains to show that "[n]o two juries and no two judges are alike." \textit{Id.} at 464-73. This jury study was designed for purposes very different from ours, and can at best set the scene for specific examples of rules that allowed inconsistency. Still, it is encouraging to find Kalven, concluding that "[t]he law intends the jury to legislate interstitially." \textit{Kalven, supra,} at 161.
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\item \textsuperscript{46} \textit{CALIFORNIA JURY INSTRUCTIONS: CIVIL} (7th ed. 1986) [hereinafter BAI]. These instructions are prepared by a standing committee of sitting judges (try to imagine this). Similar collections are \textit{ILLINOIS PATTERN JURY INSTRUCTIONS} (2d ed. 1971) and \textit{3 MODERN FEDERAL JURY INSTRUCTIONS, CIVIL} (1986) [hereinafter IPI and MFI respectively].
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\item \textsuperscript{47} BAI, \textit{supra} note 46, at § 14.13.
\item \textsuperscript{48} Huff \textit{v. Tracy}, 57 Cal. App. 3d 939, 943, 129 Cal. Rptr. 551, 553 (1970).
\item \textsuperscript{49} BAI, \textit{supra} note 46, at § 14.40.
\item \textsuperscript{50} \textit{Id.} at § 14.40, \textit{see also id.} at § 14.50, ("Measure of Damages—Death of Adult," which includes such considerations as "[w]hether deceased was kindly, affectionate or otherwise"). Given the disparate attitudes toward parental models, the death of a particular kind of parent could be considered a blessing by some jurors. The same might be said of the formula: "[a]ny other facts . . . indicating . . . benefits . . . reasonably . . . expected." \textit{Id.} The blessings of any particular regimen for children could be and are disputed. Of course, some jurors may try to adopt the victim's declared values in assessing the loss. Such empathy, however, is problematic for one committed to the role of
The California instructions on punitive damages also specifically repudiate any fixed standard, leaving “the amount to the jury’s sound discretion, exercised without passion or prejudice.” The jurors are to evaluate the “reprehensibility” of the conduct. The amount “must bear a reasonable relation to actual damages,” yet a verdict of $1,050 in actuals will support $200,000 in punitive damages.

California has adopted comparative negligence. The effect is to introduce into the calculation of awards all the discretion that lurks in the substantive standard for negligence itself. Under the older common law, the presence of contributory negligence defeated recovery, leaving no need for calculation. Today, by contrast, the court tells the juror, “You will . . . be required to evaluate the combined negligence . . . [of all including the plaintiff himself who] . . . contributed to plaintiffs’ injury.” Every juror’s personal yardstick for reasonableness of conduct becomes thereby a part of the damage calculation as well as the liability decision.

The California standard forms include the common warning instruction to the jury entitled “Chance or Quotient Verdict Prohibited.” This title might appear to forbid the averaging of juror’s individual assessments. The text, however, is limited to the injunction that “[you must not agree] in advance to determine an average.” The message is one of individualism. Each juror must arrive independently at a number to be averaged. Here is the mandate to follow personal conviction. It is reinforced by the indivisibility—hence invisibility—of the general elements of the verdict. The jury is forbidden to report itemized allocations showing how much it allowed for pain, lost affection, and so forth; the number must come whole from the black box. Thus, in outline and detail the rules themselves surrender considerable discretion to the jury over the standards of decision in a significant number of instances.

To this extent each juror brings to the task a private rule of damages that finds its place in the averaging process. For his separable portion of the jury’s responsibility he is master of the weight to be accorded the various interests; he may order priorities among them, and in some cases, he may even disregard or disvalue a particular element. That he “may”

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51. Id. at § 14.71; see also IPI, supra note 46, at § 35.01 and MFI, supra note 46, at § 77.01 (Instruction 77-5).
53. BAJI, supra note 46, at § 14.91.
54. Id. at § 15.33.
55. Id. at § 14.51.
do so sometimes becomes explicit. Instructions are expressed in contrasting forms: The jury "must," or it "shall," or it "may" consider particular elements. Taken literally, the auxiliary verb "may" legitimates conflict among jurors; each is free to value or not to value an element of loss. Of course, language directing the jury merely to "consider" particular elements can be subject to a similar permissive interpretation.

Still another peculiar feature of jury law that embraces inconsistency is the rule excluding all reference to previous awards even though the previous cases may be factually indistinguishable from the case on trial. Jurors who have served before are warned to disregard conclusions reached in such cases. Insofar as possible, the social memory of Case #1 is obliterated to protect the juror's autonomy in Case #2. It is hard to imagine stronger evidence of the system's tolerance—or even appetite—for inconsistency. By contrast, a judge in a bench trial sometimes has access to such information. Unlike the average juror, he may sit on many similar cases over time. His later awards (and sentences) presumably are influenced by his earlier decisions. In theory, this individual tendency toward uniformity could be reflected in a court or even an entire judicial system. The archetype of institutional memory of this sort is the British system of awards. In England, the jury has long been virtually abandoned in personal injury litigation. The judges have worked

56. See MFI, supra note 46, at 77.01 (Instruction 77-5, Comment).
57. It would be interesting to unpeel the history of these distinctive usages in the California jury instructions for general verdicts. The "Introductory" instruction on compensatory damages for personal injury or property damage uses the expression "must award" with respect to the general category of "damages." BAJI, supra note 46, at § 14.00. This usage extends to losses to minors and parents for minors' injuries (§ 14.30, 14.32). It is interspersed with "you will award" as the general rule for death of an adult (§ 14.50). The words "shall include" are found in § 14.00 as preliminary to instructions on expenses, loss of earnings, earning capacity and pain and suffering (§ 14.10-13), as well as property losses (§ 14.20-22), loss of consortium (§ 14.40) and certain specified claims of heirs of a deceased adult (§ 14.50). At least one use of "you should consider evidence" appears with respect to loss of earnings (§ 14.11). The "may" language commences with nine elements of damage to survivors of a deceased adult (§ 14.50). These include financial support plus eight disparate factors such as the deceased's kindliness and thrift which bear on lost "benefits" (which apparently are not limited to economic benefits). In § 14.52 (parents' loss upon death of a child) significant portions are controlled by "may," contrasting with "should" and "shall" with respect to other elements. The punitive damage instruction (§ 14.71) is the only one in which "may" specifically permits the jury to deny an award altogether. The jury has full discretion, even though it has found oppression, fraud, or malice, and even though it is required to consider the defendant's reprehensibility and the prospect of deterrence in "light of defendant's financial condition." The progression in the scheme of instructions from mandatory to permissive language may roughly parallel social hesitation regarding the inclusion of particular elements of injury.
58. See generally Annotation, Propriety and Prejudicial Effect of Reference by Counsel in Civil Case to Amount of Verdict in Similar Cases, 15 A.L.R.3d 1144 (1967).
59. But see infra notes 64-69 and accompanying text, for evidence to the contrary.
out schedules of damages for like injuries, the resulting system resembling workers' compensation. The English effort at uniformity highlights the inconsistency approved by the rules governing awards by the American jury.61

Practical advice of various sorts is available to help litigators pick individual jurors with the right constellation of values. Recently, professional selection of jurors in this manner has been publicized for its influence on issues of guilt or innocence in criminal cases.62 However, the same kind of information is relevant where the jury has responsibility to measure the sanction. The general effect of all this activity is to confirm the moral diversity of the human deciders and the compatibility of rules with that diversity. The skills of jury selection are marketable, in part because jurors are permitted to express individual attitudes in the selection of treatment.

B. Inconsistency Among Trial Judges and Other Decisionmakers

1. Variations in Quantification

The story of legitimate jury inconsistency in money awards could be elaborated across jurisdictions and in various dimensions. Enough has been said, however, to make the necessary empirical point and expose my definitions, data, and opinions to correction or refinement. I turn now to apply the definitions to judicial quantification of treatments. There is

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61. With regard to American jury awards, the legal profession pays tribute to the reality of systematic inconsistency in several ways. One is the purchase of statistical reports of the range and frequency of awards in similar cases. Various research organizations turn out their opinions of the limits of hope for plaintiffs and of exposure for defendants. These works are not intended as estimates of jury error in fact finding. They are marketed as the statistical traces of juror attitudes toward types of losses, forms of behavior, and characteristics of parties. For example, the multivolume set Personal Injury Valuation Handbooks reports awards for classes of injuries that are as detailed as fractures of both wrists. JURY VERDICT RESEARCH, INC., 1B PERSONAL INJURY VALUATION HANDBOOKS 793-95 (1986). Its most interesting volumes, for my purpose, are entitled Psychological Factors Affecting Verdicts. Id. at vols. 4, 5. Here, the authors have disaggregated and analyzed jury awards by factors ranging from the specific age group and profession of the plaintiff to such occupational groupings of defendants as military personnel, retail stores, doctors, and truck lines. Awards are reported separately for each category of injury (and amount of "specials"); the tables show a statistically predicted verdict, a mid-point verdict, a probability range, an overall range, and an average. Prima facie, the variations seem large. For my purpose the range of awards is the most significant information, and it varies greatly among the categories; child victims seem especially to polarize juror attitudes. Id. at vol. 5, Special Research Report V: Children Through 12 Years of Age as Plaintiffs.

reason to suppose that criminal sentencing as well as civil and criminal bench trials involve a similar inconsistency. Variation in length of sentences may in fact be the most cited example of the phenomenon. In the legislatures determinate sentencing is debated, and sometimes adopted, as the solution to what is perceived as the idiosyncratic choices of sentencing judges and parole boards. Experience seems to support this criticism. Indeed, despite the availability of serious empirical work, the commonsense observations of participants in the criminal process remain a credible source. At least where they have enjoyed extended tenure, judges do acquire individual reputations for rigor, leniency, unpredictability, and so forth. Of this, there is no evidence more eloquent than the anxiety with which an accused awaits the assignment of his judge. None of this would obtain in the same degree, if the rules did not invite it.

The importance of the personal factor is conceded—often with lamentation—by experienced trial judges such as Marvin E. Frankel who served on the Twentieth Century Fund's study of sentencing practices. In his critique, Judge Frankel insists that "the point is made in all its stark horror . . . that widely unequal sentences are imposed every day in great numbers for crimes and criminals not essentially distinguishable from each other." Judge Marvin Aspen takes disparity more in stride but acknowledges a similar reality: "Purely legal decision-making is essentially an applied-science exercise. . . . Sentencing, on the other hand is more akin to an art, and may allow for many 'right' answers."

There are many experiential confirmations of this reality, and this picture is supported to a degree by a body of social science. The research in this area has been well summarized, and only a general description


64. M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 8 (1972). See generally JUSTICE IN SENTENCING (L. Orland & H. Tyler eds. 1974) (arguing that the discretion of a sentencing judge lacks meaningful control or guidance, which often results in similarly situated defendants receiving widely divergent sentences for similar criminal behavior); SENTENCING (H. Gross & A. von Hirsch eds. 1981); Zenoff, Disparity, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1449 (S. Kadih ed. 1983) (overview of statutory and judicial sentencing disparity as well as disparity which occurs through prosecutorial discretion, jury sentencing, parole practices, and pardon decisions. Suggested "reforms" include limiting judicial discretion, sentence review, and reducing the nonjudicial sources of disparity). The opportunity for private judicial standards is greatly expanded by the frequent option to use consecutive sentences. "Firmly rooted in common law . . . [the choice] . . . rests with the discretion of the sentencing judge." A. CAMPBELL, LAW OF SENTENCING 246 (1978).

65. Aspen, Sentencing: Judicial Function, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE, supra note 64, at 1460. The language quoted could, of course, be understood as limited to instrumental differences in outcome.

66. ENCYCLOPEDIA OF CRIME AND JUSTICE, supra note 64, at 1431-85. The most enterprising
and a caution are necessary here: The earlier studies on sentencing and even much of the current research have focused upon sentence variations grounded in constitutionally forbidden categories. Race, of course, is the primary example; depending upon one's view of the Constitution, sex and other classifications could be added. Such pathological examples must be excluded, for they involve judicial nullification. What counts are Judge Aspen's "many right answers"—examples of judicial individualism exercised within the boundaries of the system. To be inconsistent, judges must be able to realize private values of their own under a rule, through disparate sentences that cannot be reversed on appeal. There are, of course, limits on sentencing discretion. Aside from the explicit boundaries set by statute and constitution, sentences face review by appellate judges for abuse of discretion. While this power is occasionally exercised, it does not seriously constrain the trial judge. At least this is the conclusion of much of the research which is liberally sprinkled with stories of disparity. Perhaps the most telling conflicts emerge from the experimental exposure of different judges to identical sentencing reports; the result is a very wide scattering of preferred outcomes.

A portion of this literature seems scientifically soft. The authors tend unconsciously to assume that inconsistency (which they fail to define) is bad per se. This in turn encourages carelessness about just what is meant by the word "disparity." Even friendly critics of this literature worry that, because of methodological and definitional difficulties, social science does not now give "a clear picture of what factors influence" these differences. These reservations, however, do not impugn the conclusion that—within a wide range—individual judges are entitled to and do implicitly make the sentencing rules. Judge Frankel is typical.

Theoretical treatment I know is that of Judge Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 322-30 (1983). His summary of sentencing law and practice is as follows:

> The judge may impose any sentence within the statutory range. He need not give a reason for his sentence, and its length is not subject to appellate scrutiny. If the judge does give a reason, almost any will be sustained unless it reflects an inveterate policy of giving the statutory maximum.

*Id.* at 323.

67. *See*, e.g., U.S. v. Daniels, 446 F.2d 967, 971-72 (6th Cir. 1971) (holding that the trial court, in imposing a five-year sentence for failure to report to the local selective service board, had defied Congress's implied legislative will to impose lesser sentences if appropriate); U.S. v. Wiley, 278 F.2d 500 (7th Cir. 1960) (setting aside a three-year sentence imposed on defendant minor accessory who pled not guilty, where the ringleader was given only a two-year sentence after pleading guilty).


69. *Id.* at 18. *See also* Kalven, *supra* note 45, at 1063-67.

70. That is, they are purists. A notable exception is Chapter 5 of N. Morris, *Madness and the Criminal Law* (1982). Entitled "Anisonomy, or Treating Like Cases Unalike," it suggests that sentencing inconsistency for instrumental purposes can be justified against claims of unfairness. *Id.* at 179-209.

71. Zenoff, *supra* note 64, at 1451.
in the passion with which he describes this essentially private power: "[T]he evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes." 72 Commentators on sentencing disparities have sometimes correctly attributed part of this phenomenon to "[d]ifferent opinions about the sanction needed to achieve an objective." 73 Such variations do not represent inconsistency in our sense, being merely instrumental differences. 74 Granting that some variation is explainable in this fashion, still no one seems to doubt that the judge himself is a wild card within the sense of our vernacular definition. Some scholars believe that the decision is driven by "varying personality characteristics" of the judge; others credit "differing judicial views concerning the primary objective of sanctions." 75 Whether or not there is a real distinction between these two qualities, both implicate ends that are specific to the individual criminal judge, and thus fall within our definition of inconsistency.

This general picture holds for three other agencies affecting criminal sentencing. One is the prosecutor who chooses the criminal charge, if any, with ample freedom to satisfy his own notions of the good. 76 Another is the jury which is still empowered to sentence in some states. 77 The third is the parole board. 78 The disparity studies indict all three for use of privately held values to choose the appropriate period of imprison-

72. M. Frankel, supra note 64, at 21.
73. Zenoff, supra note 64, at 1451.
74. See supra notes 4-6, 22 and accompanying text.
75. Zenoff, supra note 64, at 1451.
76. Abrams, Prosectorial Discretion, in 3 Encyclopedia of Crime and Justice, supra note 64, at 1272.
77. Tonry, Jury Sentencing in 4 Encyclopedia of Crime and Justice, supra note 64, at 1465.
78. Regarding the board's "unfettered discretion," see Connecticut Board v. Dumschat, 452 U.S. 458, 466 (1981). See generally M. Gottfredson and D. Gottfredson, Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion (1980) (Parole authorities' subjective estimates of the risks posed by offenders are notoriously unreliable and have questionable validity. This reliability and validity can be improved by using actuarial prediction tables for estimating the probability of success); D. Gottfredson, Release and Revocation, in 3 Encyclopedia of Crime and Justice, supra note 64, at 1247 (general discussion of the origin, aims, and decisionmaking processes in probation and parole). I would be remiss if I failed to record at least a scrap of Kenneth Davis's pungent description of the old United States Board of Parole:

The board's system is the same for easy cases as for hard cases, the same for application of old ideas as for development of new ideas. Each member votes in his own office without discussing the decision with his colleagues. Troublesome problems are never made the subject of board meetings. Board members never deliberate together. They do not write memoranda discussing pros and cons. They think separately. They vote separately. No board member knows the reasons for his colleagues' votes. . . . How could a board member have less incentive to avoid prejudice or undue haste than by a system in which his decision can never be reviewed and in which no one, not even his colleagues, can
ment. Intuitively, these indictments have the ring of truth; nevertheless, I doubt that such disparities risk judicial invalidation.

The literature on disparity among judges’ awards in civil damage cases is not so rich. The dominant sources here are the attorneys who know the local courts. If there is no science of judge shopping, there is clearly an art, and although the choice of judge may be beyond the litigants’ reach, the style and content of argument is not. The appeal to the values of individual judges is a reality of advocacy at every level of litigation. What little research has been done in the United States confirms this folk wisdom of the profession. From studies of awards in similar civil bench trials, it appears that disparity among judges is significantly greater than that among juries. This is plausible, because the trial judge is not subject to the “checking” influence of peers that is experienced by every juror.

Before leaving the quantification examples, I note again the theoretical possibility that all these differences in both civil and criminal outcomes could be instrumental only, and thus consistent under our definition. Individual deciders are given an impossible task when asked to monetize human suffering or to quantify criminal guilt; remedial choices would differ greatly, even if all shared the same values. Nonetheless, it would be unrealistic to suppose that what the law invites never becomes reality, or does so only in trivial degree. While not empirically proved, inconsistency must be accepted as a fact of life under these rules of quantification.

2. Variation in the Forms of Treatment

This conviction becomes true almost by definition when we turn from decisions that quantify treatment to decisions that require choices between treatments that are inconsistent in their basic form. A life sentence is distinct in form from the death penalty, and can easily be inconsistent in the sense that in like cases this choice entails conflict among the private values of different deciders. In these cases the act of decision involves none of the sheer groping experienced by the decider who struggles to assess dollars or years. The option between life in prison and death stands in bold relief. A few such specimens of rules allowing treatment inconsistent in form exist within criminal and family law. As was ever know why he voted as he did? Even complete irrationality of a vote can never be discovered.

K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 127-29 (1969). Of course, it is a serious question whether such decisions are being made “under a rule.” Davis believed the Board to be in violation of law. Id. at 130-33. I would concede the point.

79. See Final Report, supra note 68, at 18. But cf. Kalven, supra note 45, at 1065, for the empirical observation that there is an “equality of pro-plaintiff response between judge and jury in civil cases.”
true of quantification, these choices between forms of treatment tend to track moral dissensus in the larger society.

Capital sentencing provides the dramatic and relatively simple example. Whatever may be the complexities of the governing rules, in death penalty cases the judge and jury both have the authority to block or permit execution. Since Gregg v. Georgia, the United States Supreme Court has required that the sentencing jury in a capital case be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." In Gregg, the Court upheld a challenged state procedure that called for a separate sentencing trial in which the jury was directed to consider aggravating and mitigating circumstances. Since Gregg, many states have adopted the bifurcated trial with special sentencing instructions given to the jury. California, which seems typical, has required that the trier of fact in the conviction stage find "special circumstances" of aggravation in the commission of the homicide such as financial motive, use of explosives, killing a law officer, or similar elements. The presence of these factors qualifies the same jury in the second hearing to decide between life without parole, and death. In the sentencing hearing, the trier of fact "shall take into account" still another set of factors, including the circumstances of the crime, prior convictions, age, intoxication, the defendant's belief in a moral justification for the act and several other factors presumably bearing on the decision. The trier of fact "shall impose a sentence of death if [he] concludes that the aggravating circumstances outweigh the mitigating circumstances." Such devices may focus the jury's attention and are important as exhortations to seriousness. In the end, however, the standard remains very broad and does not exclude private moral objectives. Most commentators—on both sides of the substantive issue—seem to feel that the Court in Gregg authorized a virtual return to the days before Furman v. Georgia, and to a regime in which the jury has unfettered discretion to elect death. Jan Gorecki sees the new statutory guidelines as "just win-

80. A few states still preserve a peculiar rule that allows inconsistency both of quantification and form. This is the rule giving the jury discretion concerning length of a prison term as well as the possibility of capital punishment.
83. See, e.g., Cal. Penal Code § 190.2 (West 1985).
84. Id.
85. 408 U.S. 238 (1972). Many took the opinions in Furman to presage the end of the death penalty.
dow dressing." Charles Black says that the new standards "do not effectively restrict the discretion of the juries . . . . They never will." Even justices with conflicting views concede that the control exercised by the guidelines is essentially illusory. This seems a fair assessment, and the significance of it all is plain. The range of relevant moral positions that a juror may adopt in these cases is enormous. This is true not merely with regard to the particular elements identified in the guidelines but also with respect to the death penalty itself. Even jurors who approve capital punishment can and will have various reservations about it. They may assign different weights to the consequences of prison and death, or they may give them a different lexical ordering, or they may do both. A similar dissensus on the issue holds among judges, as many of them publicly avow. The death penalty cases remain an important example of inconsistency-by-rule.90

But perhaps the most insistent and perspicuous examples of choice among inconsistent forms come from the law respecting children.91 Here, as a continuing matter, deciders apply rules that assimilate value conflicts of two sorts. Sometimes they must choose among very specific treatments for the child's body, as in the case of a necessary surgical procedure. More frequently, however, as in custody cases, deciders must recognize and empower an adult regime (usually one parent) that will thereafter make the full range of decisions concerning the child including judgments about life's ultimate purposes.

The medical neglect case discussed earlier is an example of the first type, and it should not be regarded as unique.92 If the brain tumor hypothetical seemed too special, a fairly routine medical example is at hand in the case of newborns afflicted to a serious degree with Down's syndrome. Such children are born with severely limited intellectual potential. However, even if the parents reject the child, there are institutions and foster homes in which the child can receive care, training, and perhaps love.

87. J. GORECKI, supra note 86, at 24.
90. A related rule plainly indifferent to inconsistency is that declaring the executive authority to commute. On November 26, 1986, it was exercised dramatically by Governor Toney Anaya of New Mexico to commute five pending sentences of death, a result expressly driven by personal values and designed to frustrate the declared intention of his impending successor. New Mexico, Office of the Governor, Exec. Orders 86-37 through 86-41. "My personal beliefs do not allow me to permit the execution of an individual in the name of the State." Statement by Gov. Anaya 5 (Nov. 26, 1985) (unpublished).
91. Many of the childhood examples could be extended to the other worlds of what is called "dependency." Guardianship, conservatorship and the other protections imposed upon adults all operate under broad rules inviting judges to do their best according to their own lights.
92. See supra text at pp. 74-75.
Most such infants would be capable of learning some elementary tasks and of recognizing affection. Whether the individual child would be capable of moral decision is often indeterminate.

At birth, the immediate problem for many Down's babies is a blockage of the digestive tract. The child cannot take food unless a simple operation is performed. Suppose the parents refuse consent. The medical—and now the legal—professions divide over the correct answer under the neglect statutes and the "best interest" rule. The judge is presented with the option of life (the operation) or death (no operation). The issue has been decided both ways with conflict evident between a

93. The concept of the "best interest of the child" is broadly considered in J. Goldstein, A. Freud, A. Solnit & S. Goldstein, In the Best Interests of the Child (1986). In many respects the problem respecting children has been the one considered in this Essay: Where we disagree regarding the desirability of possible outcomes, how shall society locate the power to choose? In general the political solution has been to enact a standard broad enough to legitimate a plurality of morally conflicting answers in difficult cases. California's recently enacted neglect and custody statutes are fairly typical of modern legislation. Cal. Civ. Code §§ 4600, 4608 (West Supp. 1987) (divorce custody); id. § 232 (neglect). See generally Mookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs. 226 (1975).

94. Most activity occurs at the hospital or trial level. Some cases are reported in the journals without citation, as is the earliest from Johns Hopkins Hospital described in Brown & Truitt, Euthanasia and the Right to Die, 3 Ohio N.U.L. Rev. 615, 634-35 (1976). See also Shapiro & Barthel, Infant Care Review Committees: An Effective Approach to the Baby Doe Dilemma?, 37 Hast. L.J. 827, 834-36 (1986); Smith, Disabled Newborns and the Federal Child Abuse Amendments: Tenuous Protection, 37 Hast. L.J. 765, 789-90 (1986). In one instance of Down's syndrome with duodenal atresia the medical staff recommended the operation and the child's parents refused. Apparently, in the end the court was not implicated and the child was allowed to die. Meyer, Protecting the Best Interests of the Child: Is the State the Necessary Blunt Instrument?, 1984 Ariz. St. L.J. 627, 628. These examples may be taken to suggest the related point that the rule may be conceived to empower authorities other than judges to decide according to their values. That is, the rule may be simply: Parents decide. Cf. Parham v. J.R., 442 U.S. 584, 598-603 (1979). The court may shape such a rule either explicitly or by implication. A similar recent Indiana case might be so interpreted. In re Infant Doe, No. 6U 8204-004A. (Cir. Ct. Monroe County, Ind., April 12, 1982), aff'd sub nom. State ex rel. Infant Doe by Guardian, Nos. 482 S 139 and S 140 (Ind. Sup. Ct. May 27, 1983), cert. denied sub nom. Infant Doe v. Bloomington Hosp., 464 U.S. 961 (1983). The Indiana court opinions are not reported. A respectable piece of detective work on the case is Note, Withholding Treatment from Defective Infants: 'Infant Doe' Postmortem, 59 Notre Dame L. Rev. 224, 234-36 (1983).

More interventionist judges have sometimes had their way. See, e.g., In re Phillip B., NO6103 (Super. Ct., Santa Clara Co., Cal., April 27, 1978). In Main Medical Center v. Houle, No. 74-145 (Super. Ct., Cumberland Co., Me. filed Dec. 14, 1979), the court overruled parental refusal for surgery for an infant with massive disfigurement and brain damage. The court gave a rationale explicitly rejecting the "quality of life" point of view:

[A]t the moment of live birth there does exist a human being entitled to the fullest protection of the law. The most basic right enjoyed by every human being is the right to life itself. . . . The issue before the court is not the prospective quality of the life to be preserved, but the medical feasibility of the proposed treatment compared with the almost certain risk of death should treatment be withheld. Being satisfied that corrective surgery is medically necessary and medically feasible, the court finds that the defendants herein have no right to withhold such treatment and that to do so constitutes neglect in the legal sense.

This case was not merely a "like" case; the child was more profoundly disabled than most Down's babies, making the decision a fortiori for our thesis. The decision seems not to have been
near absolute commitment to life and an emphasis upon the "quality" of the life that is predicted for the particular child. Of course, it cannot be said categorically that the trial judge is always the decisive factor, nor that the cases are identical; serious appellate review is rare. The generous scope of the trial court's discretion, however, is obvious.

The more common issue for courts in this area is who shall have custody of a child. This problem arises most often in connection with divorce. The disposition phase of the proceeding can become a free-for-all among competing values in which the judge may weigh everything from cleanliness to godliness. Sobriety, obesity, chastity, wealth, and the maintenance of a bohemian or traditional lifestyle may all be thrown in—or out.

With regard to divorce proceedings generally, it is tempting to make much of the disparity in judicial orders since the advent of no-fault. "Equality of treatment" held unpleasant surprises for women, as we learn now from Lenore Weitzman. She makes plain the rich and inconsistent assortment of remedial choices open to the court; a great deal depends upon the particular judge's vision of the good life. I will not, however, emphasize this example because of the novelty of these rules. They are not yet a well-settled structure; and it is conceivable that univocal rules of treatment will emerge. For the time being, however, the pattern of remedies reported by social science appears heterogeneous and plainly inconsistent.

appealed. Of course, even given a "quality of life" standard, the relevant elements of quality will be disputed. See Destro, Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent, 2 J. CONTEMP. HEALTH L. & POL'Y 71 (1986) (making the application to both children and incompetent adults).

95. The fate of the Indiana cases cited in the preceding footnote is probably typical. This noninterventionist strategy is common appellate practice in cases involving the "best interest" standard. See generally Mnookin, supra note 93.

96. It is common enough, however, in child neglect and other contexts. Perhaps the best known of these conflicts is Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966), in which grandparents successfully resisted return of a child to its natural father on various arguments respecting the child's best interest, including the risk that the child would "go wrong if he [was] returned to his father." Roughly the same problem is presented in nonmedical abuse and neglect cases, and it is a common criticism that "[s]uch value judgments...[are] left to the individual tastes of hundreds of non-accountable decisionmakers." STANDARDS RELATING TO ABUSE AND NEGLECT §§ 1.3.A, 2.1 commentary at 41 (1981).

97. The germinal essay is Mnookin, supra note 93. As Mnookin shows, the judge's opportunity to introduce his own values is enhanced by the unlikelihood of being reviewed. Id. at 253-54.


100. Inconsistency-by-rule could be broadly illustrated within the rather different arena of
In sum, through these various examples I have shown that consistency of treatment under a rule is far from a universal fact of legal life. Under the vernacular definition here proposed, it is plain at the level of individual decision that inconsistent treatments can be available under a rule in its first application; sometimes these options survive for consideration in like cases. The maxim appears false if taken as a description.

Recognition of systemic inconsistency could have consequences for jurisprudence. Favorite theories of rule and of right might need recasting. The convention that every rule entails consistent treatment has been a parsimonious one; it is so widely employed in the various theories of rights that the contrary possibility has been silently defined out of the game. Alas, intellectual efficiency of this sort comes at a cost to realism. In this regard, I am unaware of any serious attempt at a jurisprudence of inconsistency except within the downtrodden American tradition of "Realism." And there the recognition of disparity in treatment has too often come in a spirit of debunking or—in the current argot—demythologizing. It would be refreshing to watch an authentic legal philosopher approach in a neutral spirit the challenge of conflict within the world of legal remedies. Finally, as the academic litany goes, there is ample room here for empirical research. The sample of inconsistencies presented above may prove to be only a splinter. And, of course, there may be other and better definitions than my own.

IV
PRIVATE CONSISTENCY AND THE SANITY OF SYSTEMS

The maxim of like treatment may govern more than law and courts. I have limited the focus of this Essay to the law because this seemed to pose the harder case. If inconsistency appears in the rationalistic atmosphere of courts, it is likely to obtain in private relationships. Still, I could be deceived. Rules of private morality are difficult to locate and specify.

"distributive justice." I will draw one example specifically from existing systems for allotting places in professional schools—systems of which I have some personal knowledge. Many of these institutions distribute the valuable places in the first year class by a process of selection that is in varying degrees committed to the value preferences of individual faculty or administrators. Having admitted a portion of the class by some more or less mechanical formula of excellence, batches of other applications meeting some minimum standard are typically assigned to individuals for decision. Each is directed to choose from his batch a designated number for admission. Individual deciders' attitudes toward particular work experience, undergraduate major, social involvement, and life plan of the applicant are implicitly or explicitly relevant and are manifested in the choices made. Conflicts among these individual standards may be most marked within an affirmative action segment of admissions where perceptions of virtue and professional promise take a wide range and where one professor's ideal is another's bête noir. Such polycentric systems of decision are defended specifically in terms of pluralism and variety. Whatever side one takes on the issue, the process is one that authorizes inconsistency as here defined. Such systems for distributing honors, benefits, and life roles are not unusual in our society.
and it may be impossible to identify inconsistency here. I will suggest private analogies to legal inconsistency, but I concede that each analogy offends the common assumption that moral consistency is an element of individual sanity. Recognition of this assumption, however, may at least suggest why consistency is so readily mistaken as a public value.

The proper form for the question about private consistency is unclear. The definitions of rule and inconsistency used here to structure the debate over legal phenomena do not easily fit the richer realities of private decisionmaking. Nor does any other framework. This is not necessarily because the choices of individuals are unruly; social life seems regular enough. It is more because the Western imagination tends to treat purely moral rules as restraints that are self-imposed under a regime of individual autonomy and not as immutable decrees of God or Nature. The liberal model of private decision lacks external source; the only proxy for the sovereign rulemaker is the sovereign ego. This vision of a wholly subjective dominion cannot fit the legal image of an authoritative superior announcing the rules. Of course the individual may himself be pictured as a rulemaker; he may legislate for himself, but then what? If later he changes course, shall we interpret this as an inconsistency or merely as a change of rule? The observer cannot distinguish. With no external authority to identify them, the role of decider collapses into the role of rulemaker, and the possibility of inconsistency is no longer testable among the phenomena of private decision.

This analysis, however, may seem a bit precious in a culture infused with psychoanalytic imagery. In our time individual autonomy has itself been subjected to a yoke of consistency; for sanity itself has come to mean the "integration" of choices made by the person. This, in effect, is a regime externally imposed—one that the individual may not unmake. To the eye of the alienist, those who oscillate too frequently among conflicting ends are presumptively ill. Common opinion agrees; one way for a man to qualify as crazy is to waver too often in his basic purposes. Such a judgment on private individuals, however, still resists approximation to images of the legal order. Granted, the subjective forum of the individual can be analogized to an external system of decisionmaking; each of us can allegorically become a court enforcing rules upon himself. Unhappily the metaphor founders on the indivisibility of personal identity. This unshakable premise of unity forbids decomposition of the self into a chorus of decisionmakers merrily conflicting with one another. Unlike the judicial system, there can be only one me that decides in the internal forum; if there is inconsistency here, it is within my personality itself. Moral pluralism becomes psychopathology, and the analogy to the
The analogy would more nearly fit those individual moral deciders who consciously submit to rules derived externally—from revelation, Nature, or custom. Such persons sometimes play a role much like that of judges and jurors when assigned to make separate applications of a rule that permits inconsistency. Two fathers, for example, might accept the same natural or customary duty to provide moral education for their children. Nonetheless, they could make choices that are inconsistent. I send mine to church school; you send yours to a school that rejects religion as a superstition. I try to make my child believe that competition is evil; you wean yours on Adam Smith. These are inconsistent treatments imposed under what we both agree is the same rule; each individual decisionmaker is entitled to make choices that from the other’s point of view are moral errors.

It would be interesting to identify rules recognized within particular social communities and to estimate the dimensions of private inconsistency in treatment. In a pluralistic society such rules may be common. The legal analogy remains awkward, since the deciders of particular “cases” are the “parties” themselves, deciding for themselves. In other respects, however, the structure and function of accepted private rules can roughly parallel those of the decisional institutions of the law in a pluralistic order. If, for example, I get drunk and ugly at your party, both of us may recognize that a customary rule of reparation governs the case. However, like judges who differ over criminal sentencing or compensation for pain and suffering, you and I may perceive the elements and extent of the injury in very different moral terms. The rule allows us to differ as to whether the protected interest is your feelings only or also your reputation. Thus we may dispute whether the injury lay in your seeing me drunk, hearing my particular expressions, and observing the reaction of others, or in your loss of status. Each of us has individual armories of affective values; our moral metrics for the same rule violation may be different to the point of serious conflict. The same rule will thus produce a very wide range of voluntary reparatory behaviors from individual decisionmakers, including, perhaps, none at all.

101. Unless, of course, pluralism is conceived as a parallel moral defect in the legal order. The “pure” view of consistency might be quite compatible with this analogy of sick mind to sick legal system. Greenawalt’s view of the psychological metaphor would be interesting. See supra note 2 and accompanying text.

102. Note that this regime can also be interpreted as a rule of positive law with considerable relevance to our theme. That is, the legal hegemony of parents is a rule like any other discussed in the previous Part; it is merely so pervasive we tend to overlook its juridical status. “Parents decide” is a rule of law (in many respects, of constitutional law) that shelters a potential infinity of inconsistent treatments. The classic citation is Pierce v. Society of Sisters, 268 U.S. 510 (1925). See Coons, Law and the Sovereigns of Childhood, PHI DELTA KAPPAN, Sept. 1976, at 19.
Such issues of private consistency hold empirical and perhaps theoretical interest, but here I am content to have raised the question. I will not claim that my conclusions about legal systems are exportable to the private sector. These scraps of pop psychology are relevant, nonetheless, for a more immediate objective. The question becomes whether these mental habits of our private worlds subtly translate into a popular vision of consistency in the law. It would not be surprising if the classic metaphors of science and culture concerning unification of experience had come to bound our vision of rational legal order. Indeed, it was John Austin’s fortune to catch the whole of this Western feeling within an allegory in which the sovereign mind represented the image of consistency.  

What the lawgiver permits under a rule is consistent, because he permits it. Austin thereby exposed us to the normative power of the formal; over time his invention became both a source of and a vessel for the popular ideal of unification.

In our culture this parable may have become authoritative to the point of second nature. At this remove, the profile of Austin’s sovereign is fuzzy and diffuse, especially in a society both republican and bureaucratic. Nevertheless, that allegorical gentleman still makes his claims upon the imagination. The process of lawmaking has become impersonal and fragmented; yet he remains a lively phantasm of individual intelligence and will. By the authority of that image the corpus juris still can be transmuted fantastically into a unity that is akin to human personality.

This habit of perception resists all patchwork interpretations of law. Specifically, where a plurality of treatments satisfies one rule, the allegory demands their harmonization; inconsistency in the mind of the maker is as threatening in law as in theology. Where empirical conflict cannot be blinked, one or the other of the contending outcomes must be reassigned to a different rule—or to no rule. Else the sovereign mind is a house divided against itself.

103. J. AUSTIN, LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW, (3d ed. 1869). In defining law as the command of a recognized sovereign, Austin, of course, was retouching Hobbes’s personalized portrait of the absolute monarch.

104. Today Dworkin, though no Austinitian, would be most representative of this point of view. See infra notes 114-21 and accompanying text.

105. And human personality can reflexively be translated into the corresponding abstraction, "Mr. Justice."

106. This centripetal instinct has ancient roots. Before Aristotle a major tradition of Greek philosophy employed the language of unity to describe not only the nature of being but of human rectitude. (The classic expressions are Plato's Parmenides and The Philebus.) "The one" not only is, it is good exactly insofar as it is one. In this tradition, perceptions of nonuniformity have been deemed problematic, suggestive of imperfection, or even a species of nonbeing. The attitude resurfaces prominently in Arabian philosophy, again among the scholastics and later in Leibniz as part of an endless debate over the distinction between God and his creatures—the one and the many. E. GILSON, HISTORY OF CHRISTIAN PHILOSOPHY IN THE MIDDLE AGES 173-74, 182, 238, 542 (1955). See generally Bochner, Continuity and Discontinuity in Nature and Knowledge, in 1
This impulse manifests itself in a specific misperception of legal institutions. Reconsider an example of identically injured plaintiffs. Suppose an award of $5,000 in the first court followed by an award of $200,000 in the second. Faced with this anomaly, our three schools of interpretation might pronounce separate judgments. The formalist would deny inconsistency and explain that the rule had simply not been followed in one or the other case; the purist would complain about the injustice of the inconsistency; and I would trot out the vernacular definition and argue the case for inconsistency as a useful instrument in a pluralistic culture. All this would be genteel and sober. But now, change the facts of the example slightly. Let us suppose that the two awards come from the same judge. Does the world now rock a bit? Is it not where successive like cases are decided by the same person that the centripetal instinct makes its most compelling claim? Even within a system that permitted inconsistency, we would expect individuals to be constant; a man should not change his principles every time he changes his shirt. As earlier suggested, a degree of consistency is a condition of sanity. A hanging judge may be a curiosity; a judge who hangs on Tuesdays and spares on Wednesdays is a lunatic. This is so though a dozen judges producing exactly this pattern of penalties would be quite unremarkable.

This premise about integrity of personality may help explain the popular passion for unity of treatment by the central institutions of society. Within the Western tradition this criterion of sanity for the individual can be mistaken as a condition of rationality for any decisionmaking system. This is an error but one that is easy to overlook, in part because the need for consistency holds for the individual even while he plays an official role within the decisional system. That is, a judge should, for his own sanity's sake, follow his private principles wherever the external rule gives him discretion to do so. If he can simultaneously be true to himself and the law, it is better that he serve both. Obviously, nothing in this canon of individual behavior forbids other deciders with very different private principles from satisfying them, so long as the legal rule permits it. Nevertheless, there may be a tendency to personify the legal system as one common mind. Unconsciously we demand that it act as if it were a single judge (or juror). Once this mental mistake has occurred, the demand for consistency is understandable, if unjustified.107

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107. It is plausible that a considerable slice of our jurisprudence is a projection of an image of personal rationality upon the legal system as a whole. This apotheosis of the state has been a temptation since the 16th century, and anyone who loves analogy might yield to it. To do so gives the state better than it deserves. This was Dworkin's sin in giving birth to Hercules, his juridical
In any case, were this monistic outlook accepted, it could accommodate inconsistency. Nothing in the nature of law requires that we define “rule” so as to require unitary treatment. Nothing in the logic of the rulemaker’s perspective requires him to forbid moral conflict among decisionmakers who invoke his authority. The rulemaker, for reasons that would be neither tyrannical nor capricious, could be content with disparate outcomes.

One sufficient reason would be the politics of pluralism. Consider its relevance to the rules of damage for defamation. A heterogeneous society may lack agreement about what the reputation of a good man is worth—or even who he is. Depending upon which juror or judge is asked, this plaintiff’s virtues will seem another’s vanities. Likewise, a criminal’s savagery may be, for many, a justification for the death penalty but, for others, an index of his incapacity. And stiff discipline by a parent moves one good citizen to rescue but the next to applause. Legislating for such a multiplex moral environment may well induce the rulemaker to shelter in an ambiguity where diverse outcomes can be charged to the institutions that apply his commands. Rules allowing inconsistency of treatment can be instruments to such a purpose.

The rulemaker also may have reasons for inconsistency that are peculiar to particular institutions of decision—the jury, the judge, equity, arbitration, and administrative agencies. These institutions may have a historic place and momentum that politically forbid their disenfranchisement. The jury is a primary example. It has assimilated and domesticated the contradictory images of political equalizer and scourge of local minorities. It is at once the hope of the powerless victims of industrialization and a primary object of complaint for those who would reform the tort damage system. But it is, in any case, politically unassailable in this society. Imagine the consequences of proposing an end to jury trial; imagine the strange bedfellows who would appear in the jury’s defense.

Sometimes the rulemaker himself will stand in equilibrium regarding inconsistent treatments. As between the death penalty and mandatory life imprisonment, for example, he is in perfect equipoise. In that event, he can escape choice, providing for their coexistence under a

\[\text{SUPRA note 24, at 105-30. To be sure, we need to seek the light; what we do not need is some rational One to provide it. God save us from Hercules. Dworkin’s new work, LAW’S EMPIRE (1986), goes even further, repeatedly endorsing personification as “indispensable” and “a necessary step” to the proper analysis of the responsibility of collectives and their members. Id. at 167-75. He supposes the positive description of duties and rights to be advanced by this pleasant fiction. A venial sin of this same sort is represented in Greenawalt’s well-told story of parental concern for consistency among children and its supposed application to the universe of positive law. Greenawalt, supra note 2, at 1172-73. Such morality tales translate into justice in the legal order only by endowing mere mechanism with benevolence.} \]
rule which his own indifference justifies. A rule must be adopted, but the rulemaker is neutral between various appropriate treatments imposed in particular cases by deciders who themselves would adjudge these treatments inconsistent. Likewise, in the area of race relations, a rulemaker may be equally content with either a world of pure racial neutrality or one of affirmative action. He can arm those who must apply the rule with what may seem to them instruments of moral contradiction.108

Finally, if we insist upon the rulemaker’s point of view, we must respect his commands. At least where unambiguous, the structure he has bestowed upon individual rules must be taken as decisive. But, as we have seen, rulemakers sometimes make rules that plainly allow inconsistent treatment. In such instances, by what warrant could we dispute the intention that this option be exercised by decisionmakers through conflicting judgments? In the positive order, what other authority is there to recognize? Once the sovereign has chosen the possibility of inconsistency as policy, conceptualistic objections not only elevate form over substance but form even over form.

This political portrait may offend deep cultural preferences for a single-minded sovereign. It is offered nonetheless, because it is real. Unless candor risks some public calamity, it should be recognized that rulemakers sometimes provide the instruments of inconsistent treatment and that these are employed by agent decisionmakers. In the final Part, I will ask whether such a choice by the rulemaker can be justified on the more appealing grounds of fairness, free expression, and simple truth. First, I will say a word about consistency as an ideal.

V

CONSISTENCY AS THE GOOD

The vernacular definition of inconsistent treatment entails two propositions unsettling to a formalist. One is the possibility of an empirical inconsistency. The other—and now our focus—is the moral potency of the maxim; for, if like cases can be treated inconsistently, it is not empty to say that they should be treated alike. Seeing this might even suggest that the empirical displays were irrelevant. Aristotle himself might have thought so; he did not claim that likes were treated alike but only that they should be. The analysis thus far has deemphasized the distinction between description and prescription, and perhaps this was a mistake.

108. A classic instance is the legitimation of “goals” and the simultaneous objection to “quotas” uttered in Bakke v. Regents of the University of California, 438 U.S. 265, 315-24 (1978) (opinion of Powell, J.). This example could mislead, however. Justice Powell chose ambiguity as the medium of inconsistency, but a candid bestowal of discretion would be the same thing for our purpose. See supra notes 26-27 and accompanying text.
To the extent that consistency is a pure value it is immune to empirics and demands a separate accounting.

Many thoughtful minds perceive consistency exactly this way. For them it is an important and independent value that would put discordant outcomes to the sword. Insofar as pure consistency informs our practice, the maxim is vindicated as one of the culture's normative sources. When we treat like cases alike, we do so not because some arbitrary definition of a rule gives us no choice—and not merely for fairness or efficiency's sake—but, quite independently, because we think it is the right thing to do. Thus our various inconsistencies of practice stand in need of justification. Maybe this is the general drift of the culture; perhaps people really feel that Aristotle got it right.

What could be said of such a normative proposition in terms of its nature and effects? If a person or a system values consistency of treatment for its own sake—so what? In candor I would fear the popularity of any such aspiration to sameness. My concerns overlap those of Westen and the "emptiness" school but come from precisely the opposite point of the moral compass. They would devalue the maxim for its emptiness. By contrast I concede that it could operate as an independent imperative in moral and legal decisionmaking. My objection is not that the maxim is empty, but that it is too full of itself.

What is the structure of this moral idea? The aspiration to consistency for its own sake appears to be a first principle of decision, deontological in character and impervious to analysis. Resting upon no antecedent, justifying ideal, it is an urge without an explanation. Some would have it self-evident, and our history and culture conspire to make it so; but this claim seems wrong, perhaps even in a self-evident way. Once utilitarian and other separate justifications for uniformity of outcome are stripped away, there remains no inferential link between the treatments in Case #1 and Case #2. If choosing the first treatment in itself entails choosing the second, it is by magic.

This occult pedigree helps explain the irresolute treatment of the
maxim by some of its friends. They are driven to a hard choice. To justify consistency they must either act on sheer moral faith, or they must resort to separate values. Taking the latter course leaves the maxim redundant; the former involves a rationalist scandal. Not surprisingly, there is ambivalence. Reasons of utility and equity may be given in support, but there linger vaporous afterthoughts of something like a *jus gentium* requiring consistency simply as such. Karl Llewellyn, having noted six pragmatic justifications for treating likes alike resorts to what sounds like a form of natural law: “The force of precedent in the law is heightened by an additional factor: that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances.”

The cautious H.L.A. Hart is more difficult to corner on the issue. Considering the maxim and the duty of impartiality he observes as follows:

[They] are thought of as requirements of justice, and in England and America are often referred to as principles of Natural Justice. This is so because they are guarantees of impartiality or objectivity, designed to secure that the law is applied to all those and only to those who are alike in the relevant respect marked out by the law itself.

The connection between this aspect of justice and the very notion of proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice. This close connection between justice in the administration of the law and the very notion of a rule has tempted some famous thinkers to identify justice with conformity to law.

Hart himself avoids this “temptation” in a manner not here relevant. But where he leaves us on the issue of the autonomy of the maxim is obscure. Does he concede something to the naturalness of the proposition?

An arresting example of ambivalence comes from Ronald Dworkin:

The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike. A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way in the future. . . . If the government of a community has forced the manufacturer of defective motor cars to pay damages to a woman who was injured because of the

defect, then that historical fact must offer some reason, at least, why the same government should require a contractor who has caused economic damage through the defective work of his employees to make good that loss. We may test the weight of that reason, not by asking whether the language of the earlier decision, suitably interpreted, requires the contractor to pay damages, but by asking the different question whether it is fair for the government, having intervened in the way it did in the first case, to refuse its aid in the second.

Hercules will conclude that this doctrine of fairness offers the only adequate account of the full practice of precedent.\(^{114}\)

Consider first the following phrase from the italicized portion: "[A]s a piece of political history." These six words may carry some independent explanatory weight, but I have not discovered it.\(^{115}\) If these words are baggage, then for Dworkin it is "the very fact" of the original decision that does all the moral work and which requires repetition in the next similar case. Does Dworkin then hold for pure consistency? The oblique references to fairness suggest otherwise. Referring to these passages in a later article, he says parenthetically that "fairness requires consistency," apparently reducing consistency to the role of an instrument in support of a discrete objective of fairness.\(^{116}\) On the other hand, his most recent work reintroduces strong suggestions of value purity, as when he speaks of "consistency in principle, and not merely in strategy."\(^{117}\) However, this again is merged with considerations of fairness and other values for which consistency seems to stand only as means.\(^{118}\)

In the end, Dworkin leaves the point opaque. Like all these authorities, however, Dworkin is operating on assumptions different from my own.\(^{119}\) That is, he has not separated premise rules from treatment

\(^{114}\) R. DWORKIN, supra note 24, at 113 (emphasis added).

\(^{115}\) Dworkin asks us to imagine adjudication as a historical-narrative activity in which the individual judge serves as one author pro hac vice of a serial novel that is the unending story of our legal culture. R. DWORKIN, LAW'S EMPIRE 228-37 (1986). The relevant principles of decision are those to be discovered in the history of law and politics. This is unobjectionable, useful, and entertaining. It is hard to believe, however, that every particular piece of political history could provide precedential value. The six words appear functionless.


\(^{117}\) R. DWORKIN, supra note 115, at 135.

\(^{118}\) \textit{Id.} at 404-06.

\(^{119}\) Given Dworkin's broad commitment to an ideal of coherent and univocal rules, his recent book, Law's Empire, is a puzzler. His special view of law as integrity allows for particularistic judicial philosophies almost to the point of contradiction. As Frank Michelman observes:

\[ \text{[T]here is integrity, but it comes encased within each separate act of adjudication. Good judges may have integrity. Good decisions may have integrity. As to the law, integrity seems neither here nor there . . . . In the end, Dworkin does not appear to explain how it can be that a judge 'confirm[s] . . . the principled character of our association' by striving each 'to reach his own opinion.'} \]

In any case, when we try to imagine how such a view of the maxim would project upon the separable issue of treatments, all this becomes even more puzzling. If treating likes alike rests upon some independent justification called “fairness,” this fairness factor should presumably be specified; but, so far as appears in the passages quoted, the sufficient triggering event for Dworkin is the temporal sequence of cases. That is, since one case follows the other, we should in fairness treat them alike.

Mere sequence, however, generates no issue of fairness. Suppose in a simple set of successive criminal convictions in like cases that it is Convict #2 who gets off easier. According to Dworkin’s sequential principle, Convict #1’s complaint is newly born with the pronouncement of sentence in Case #2; had this second event not occurred, the result in Case #1 would have remained quite fair. Further, even given Case #2, Convict #1’s objection regarding inconsistency would be satisfied by an increase of the penalty borne by Convict #2. The rationale, then, cannot be that either decision was unfair in itself. Yet these two fair decisions are now transmogrified into one fair and one unfair, this being accomplished without a clue as to which is which; it is only the critic’s subsequent (and arbitrary) selection of one decision for rejection that will settle that question. The form of this objection leaves the complaining convict oddly indifferent as to whether the law alters its course to help him or, instead, to hurt the other convict. The rationale for intervention thus reduces to the impulse of envy. This would be a curious medium in which to introduce fairness as the real object of the maxim. I suppose our understanding of all this must await Dworkin’s decision to examine the treatment problem through the prism offered here.

Meanwhile, if anyone were looking for a “deeper” (ontological) base for the maxim, one could be postulated without absurdity. Human nature could be said to include some structured and irreducible lust for encore. This natural element would have to be pictured as more than a reasoned volitional repetition of Treatment #1 in successive cases—as more than a conscious practice justified by the efficiencies of uniform response. No natural theory worthy of the name could rest merely upon habits acquired and rationalized. The idea must instead be that, whatever humans decide in Case #1, they must be moved by the struc-

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120. See supra text at p. 62. This sense of Professor Dworkin’s assumptions was reinforced by exchanges between him and the author following their presentations on “Does Equality Have Content,” at the University of San Francisco. (March 23, 1987).

121. Dworkin has given a somewhat systematic definition of fairness in LAW’S EMPIRE, supra note 115, at 404-07. It involves considerations distinct from consistency. For another well-known conception of fairness see J. RAWLS, A THEORY OF JUSTICE 342-43 (1971).
ture of the self to do again, and for no reason other than this predisposition to repeat.

Unlike the maxim, such a quality would be descriptive only. We are this sort of being with this sort of urge. To convert such an ontological element into the normative state enjoyed by the maxim would require an inference from is to ought. That, however, would not be the only problem. Even if such an inference were to be accepted, it would remain an "explanation" as mysterious as the maxim it was called forth to justify. To hold that we should treat likes alike because that is the way humans are is not a clarifying notion.  

It is quaint that the maxim, a centerpiece of rationalist ethics, may rest in the end upon a mystical or instinctual impulse. To be sure, this is often the way with first principles, and in this respect the maxim stands in good company. But we are forewarned not to entrust it with more weight than its consequences can justify. If its observance jeopardizes other objectives, society must reckon the cost of satisfying this elemental and unexplained passion for repetition. Whether in fact this aspiration to consistent treatment has practical consequence will be the next inquiry. At first it would seem that this must be so, simply because the instinct is epidemic—even in the oddest places. Anyone who knows the academy, for example, will affirm that consistency is the hobgoblin of big minds.  

Practicing rationalists believe that repetition is good in itself, or they think they believe so, which could amount to the same thing at decision time.

The impact of this belief upon the decision process, however, is as elusive as its origins. The logic of the principle is obvious, but, as earlier noted, I doubt our ability to disentangle the influence of the pure urge to consistency from other causes sufficient to explain stare decisis in the remedy. We can hope that someone will learn how to factor the ele-

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122. Another naturalistic interpretation might see this property of acquiring habits as having survival value for the species: Decisionmaking can entail greater cost wherever plural treatment options must be considered in successive instances. Fixing upon $T_i$ as the only answer under a rule may be the adaptive solution, at least at some stage of evolution; that is, it is worth the loss in variety, experimentation, and other possible values. So far as I can see, however, the opposite conclusion would be equally plausible.

123. John Rodman has it about right:

Consistency of some sort is usually thought to be an essential part of what we mean by acting morally or being moral. When a philosopher feels he has no other ground to stand on, he can always take some platitude and explore the implications that would follow from being consistent about it.


124. *See supra* text at p. 65.

125. There is a forest of cases and articles using the term inconsistency as a pejorative. It would be prodigal to cite these sources, because at most they allow and do not require the meaning here suggested. I think this is principally because they do not perceive the possibility of inconsistent treatments under a rule and because they do not separate premise rules from treatment rules.
ments, but until this is done, it will remain a temptation to suppose that in practical terms the maxim is empty after all, and that the adoption of consistent treatment, where it occurs, can always be explained on some other ground. At present, however, we cannot say even that.

In fact, I would suggest the opposite. If the commitment to pure consistency eludes proof, I am willing, with Professor Greenawalt, to believe that it represents the conviction of a great many individuals, including judges. It would be too surprising if all the complaints about disproportionality—particularly in the death cases—were pragmatically driven. The same holds for the torts system. The most disinterested observers shake their heads at the variations in damage awards, apparently regretting the affront to even-handedness quite apart from anticipated social effects. The distinction between pure and instrumental interpretations of consistency probably never occurs to them. In any case, whether consciously held, the aspiration to pure consistency may represent a consensus.

This consensus is a practical concern because of the role of consistency in egalitarian social ethics. This role is too complex to be exhausted here, but too central to ignore altogether. Like Aristotle, many moderns take the maxim as the broadest expression of normative equality and, in turn, of justice itself. Treating likes alike is made the cornerstone of any decent social order. This is seriously intended, but it turns out that equality means thoroughly conflicting things. It is an endlessly elastic framework into which every specific notion of the good has been insinuated. As Hart observes, the maxim is unconcerned with the actual content of any policy whether it pursues equal outcomes, equal opportunity, social minimums, or merely equality before the law:

[I]t is by itself incomplete and, until supplemented, cannot afford any determinate guide to conduct. ... [U]ntil it is established what resemblance and differences are relevant, ‘Treat like cases alike’ must remain an empty form. ... Without this further supplement we cannot proceed to criticize laws or other social arrangements as unjust.

Without using the word Joseph Raz may come the closest to the position proposed here, but even his choice of concepts does not really put us at issue: “He [the judge] has discretion when the law requires him to act on reasons which he thinks are correct, instead of imposing its own standards. ... When discretion is allowed, each judge is entitled to follow different reasons but he must believe that they are the best.” Raz, Legal Principles and the Limits of Law, 81 YALE L.J. 823, 847-48 (1972). Still we are not told (1) whether this applies to treatment rules, (2) whether it holds between successive like cases, and (3) whether the differences allowed include inconsistency as here defined.

126. See supra note 2.

127. Curiously, the legal system itself bears testimony to the ubiquity of this outlook among the lay public. Lord Denning sees this common attitude as a practical reason for keeping personal injury awards consistent: “[O]therwise there will be great dissatisfaction in the community and much criticism of the administration of justice.” Ward v. James, [1965] 1 All E.R. 563, 574 (C.A.).

128. H.L.A. HART, supra note 16, at 155. Hart does not, however, seem to say that it is
Social aims that are as polar as uniform incomes and the watchman state, with every arrangement between, could be accommodated in egalitarian terms. Equality is a great harmonizing concept. We can travel under its banner whether to classify by poverty, intelligence, strength, height, experience, age, grades, maleness—or their opposites. All policy is its province; what the particular program would homogenize and for whom is incidental.

If equality will promote (or oppose) anything at all, does it follow that it is of no consequence? Being good for everything, is it after all good for nothing and merely a “confusion”? By no means, for pure consistency is the exception to equality’s otherwise universal adaptability; it does not share the fickleness of the rest of egalitarian theory. Up to the time that a rule is chosen, equality can serve as anyone’s confederate. Once a rule is fixed, however, the maxim reigns steadfast and intolerant; it represents a nonnegotiable demand for the repetition of both the decision and the specific treatment chosen in Case #1. The idea then is neither idle nor limited to issues of treatment. Given its moral halo, consistency tends in practice to become an independent support for every precedent social choice. If we did it once, we should do it again. Following a kind of Gresham’s law, the hard arguments about substance give place to the paper currency of discrimination.

The more salient concern, however, is not that policies of whimsical sameness are encouraged; it is that the relatively innocuous ideal of consistency encourages purposes of a darker sort. The danger suggests itself to anyone with young children, the outspoken champions of the ancient school of jurisprudence known as “me too.” In truth, however, this temptation besets every age in forms familiar from the old catechisms. It is a practical office of consistency to encourage greed. Few of us invoke it to our disadvantage; we apprehend its moral force as we

“empty” in Westen’s sense, but would allow that, once an identified interest (for example, marital privacy) is protected, the maxim may be consequential; that is, for like cases involving that interest the maxim may (somehow) be an independent source of a right to consistency. Westen, by contrast, goes all the way. For him, the “emptiness” of the maxim is a denial that the prescription of like treatment has meaning even after it is established what resemblances and differences are relevant. The maxim is always superfluous to the rule of the case and has no effect on outcomes. See Westen, supra note 3, at 547:

To say that people who are morally alike in a certain respect ‘should be treated alike’ means that they should be treated in accord with the moral rule by which they are determined to be alike. Hence ‘likes should be treated alike’ means that people for whom a certain treatment is prescribed by a standard should all be given the treatment prescribed by the standard. Or, more simply, people who by a rule should be treated alike should by the rule be treated alike.... Equality is an empty vessel with no substantive moral content of its own.

129. See Westen, supra note 3, at 577-92.

130. Where, of the deadly seven, the relevant sins are labeled respectively “covetousness” (number 2) and “envy” (number 6). The Baltimore Catechism. Perhaps the reader will here trust my memory.
observe the better fortune of another at the hands of some provider or other. If consistency is also a value in the mind of the targeted provider, my case represents (for him and me) a problem of justice. Seizing a beachhead in discrimination, I enhance the pedigree of my claim. The related sin of envy is a second and more malignant corruption of the ideal of consistency. It is the willingness to drag another down—to deprive where we cannot share. Perhaps it is rare, but one encounters envy within the discourse of equality, and it would be romantic to discount its capacity to shelter within an otherwise innocent ideal.

Consistency is a handy cloak for such unvirtuous states of mind; it provides the innocent medium in which unworthy motives can run to ground to reemerge as high-minded aspiration. What goes in greed comes out neutrality; what goes in envy comes out a theory of justice. The maxim is not alone among our aphorisms in its capacity to camouflage the worst in our motivations. Liberty has generated its share of hypocrisy. However, pure consistency has shown an extraordinary power to sustain a benevolent image. It is congenial to the popular mind; what is more laudable than being even-handed? It animates the professionals, the academics and the bureaucracy; we chisel it in our books as in our buildings. If an air of self-righteousness sometimes attaches to egalitarian argumentation, this settled rectitude of consistency helps explain it.

Does all this amount to another ill-tempered assault on equality? Possibly. I confess to bias in the matter. Egalitarian theory has for me all the attractions of taxidermy: it is ostentatious, it is generally expensive, and it feigns vitality. I can appreciate an appeal to symmetry, but whatever one's tastes, aesthetics is not here the issue. For my part, noth-

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131. It is distressingly prominent in the otherwise admirable essay of Professor Greenawalt, supra note 2, at 1172-73, wherein he offers the circular proposition that the moral force of the maxim may rest in part upon the resentment caused by not observing it:

Parental experience with the demands of children to be afforded privileges given to siblings demonstrates how deeply engrained in the human psyche is the feeling that one should not get worse treatment than someone else deemed equal. How precisely the resentment felt by people who think their equals are getting better treatment relates to the ethical sense underlying the formal principle of equality is beyond the scope of this Essay, but the principle may well reflect, in part, the perceived impropriety of generating such resentment.

This moral precept—that we should avoid stirring resentment—is confirmed and underscored by Greenawalt's allowing variant treatment respecting "humans who cannot yet perceive . . . [p]erhaps the adoption agency can comfortably place new-born identical twins in unequal homes." Id. at 1173, n. 28. He buttresses the point with a supposed analogy to the psychology of animals. Id. With Rawls, I concede that envy comes in distinct and graduated forms of wickedness. J. RAWLs, supra note 121, at 530-41; see also R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974) 239-46 and the classic of M. SCHELER, RESSENTIMENT (Wm. W. Holdheim trans. 1960). It may also be that envy should be distinguished from just resentment, though I do not apprehend the injustice in the sheer good fortune of another similarly situated. The concepts all deserve more serious analytical attention.
ing justifies imposing sameness for its own sake, nor certainly, for envy's sake.

Obviously my complaint has nothing to do with the wisdom of uniformity among successive treatments whenever this is justified by a need for prediction, by reasonable reliance on the original treatment, or by the absence of a competing and just alternative treatment. Nor does it imply any position on special issues such as economic redistribution. A distaste for egalitarian modes of analysis is harmonious with minimums, maximums, quotas, goals, and judicial scrutinies of the closer sorts. The only messages intended here are the common warning that egalitarian argument is a feeble last resort, and the less familiar one that dogmatic attachment to consistency of treatment is hazardous both to good argument and good character.132

VI
THE USES OF INCONSISTENCY

The common man may or may not have swallowed the Austinian metaphor. Whatever the case, it is easy to see how consistency could come to be accepted as intrinsically good. There is no contradiction in the proposition, and the culture reinforces it with a profusion of positive images. Our practical experience rarely challenges the moral abstraction; if a course of action works well enough the first time, it usually works again. Soon it is a habit, and our satisfaction settles comfortably upon unremembered premises such as predictability, fairness, risk aversion, sloth, and the like. We assent to pure consistency, all unconscious of separate and sensible reasons for repetition that require no act of faith or

132. The pursuit of equality as an aspiration may be even more corrupting in its tendency to divert society from the contemplation of equality as a fact. It is important to criticize egalitarianism; it is even more important to coopt the humane aspirations that equality champions so ineffectively. The quest for a descriptive equality might serve this end. Egalitarian premises emphasize that men are different from one another and deserve (somehow) to be treated (or even rendered) the same. The competing descriptive account would urge that men already are unalterably equal and deserve, for many interesting reasons, to be distinguished without forfeiting that equality. This latter view stands, if at all, upon some premise of a discrete and unchanging human element that could, within our linguistic tradition, deserve the name "equality." To avoid "emptiness" such a descriptive premise would have to be more than our sharing of reason and will. To call all rational choosers "equal" is by itself but a redundancy. The idea "man" must include perception of a something that is "there"—a something else that is there beside will and reason. Equality must enjoy independent ontological status. Such a view may or may not be tenable. Remaining within the liberal tradition of moral autonomy, equality of this sort is elusive except perhaps as a relation of mutual isolation of a Hobbesian sort. And whether an equality of greater warmth and community could be discovered within Western religion may be a question about which of the competing traditions is to control. The theological premise would be worth developing if only to flout the house rules of the Academy; but there is the added inducement of an external validation of our common dignity. Without this it may be difficult to speak seriously of a descriptive equality.
submission to self-evidence. And so the halo of an absolute is established.

When lie considers the common good, the prudent rulemaker will disregard this aura of the ideal. The legal system should value neither consistency nor inconsistency of treatment for its own sake. Each is but a neutral instrument of the good—of the good measured in other coin. Consistency, for its part, serves so many practical offices in so many contexts as to deserve a presumption in its favor when the governing rules of treatment are shaped. Nevertheless, the frequent examples of innocent and functional inconsistency should keep this presumption surmountable. We have already noted inconsistency's role in support of experimentalism and its part in sustaining peculiar institutions such as the jury. In this final Part I will note briefly its capacity to enhance citizen participation and to enrich social dialogue; I will also claim that inconsistency-by-rule can support the value of truth in the legal order. En route I will attend to the common objection that inconsistency of treatment under a rule is intrinsically unfair, though a sufficient and simple answer would be that this objection assumes consistency to be a pure value. Unfairness then follows by definition; argument is futile, for the issue is settled in the premise. Real argument can begin only when consistency is recognized as one possible instrument of fairness and not as an end in itself.

Obviously in particular cases there can be arguments for consistency deriving from fairness, just as there can be those deriving from other ends such as efficiency. A common major premise of fairness arguments, for example, is that reasonable social expectations generate moral entitlements. This can be linked to a minor premise that, given our political experience, consistent treatment by the law is in fact a reasonable expectation. Representing the empirical normality, consistency thus becomes an entitlement. What one reasonably expects becomes his due.

The major premise of such arguments is fragile. It is not obvious that a reasonable social expectation should itself entitle one to anything. It is easy enough to see the unfairness in cases of detrimental reliance. Expectation, however, is not in itself reliance, even where it would be a reasonable basis for reliance. It is at most a perception of probabilities inductively derived. Furthermore, quite unlike the valued expectations generated by promise and contract, the expectation generated by treatment in prior cases is in itself strictly neutral. By this I mean that consistency as such may be a blessing or a bane; if inconsistency is allowed, the sentence imposed upon me may prove either lighter or heavier than that meted out in Case #1. There is no intrinsic benefit in an expectation of consistent treatment.

133. "[I]t is commonly allowed that if normal expectations are disappointed, there ought to be compensation." Benn, Justice, in 4 THE ENCYCLOPEDIA OF PHILOSOPHY 298, 300 (1967).
Such claims from fairness thus take a form different from what first appeared. Fairness turns out to be a guarantee of treatment that is at least as good as that given to the corresponding party in a previous like case. Rights can only accumulate and never diminish. This is a claim not for consistency but for a peculiar form of minimum.

Limited to instances of reliance, claims that fairness requires consistent treatment would be more obvious. Problems would remain, including the difficulty of establishing the fact of reliance upon treatment of previous like cases. Nevertheless, the theory is plain enough, and real argument can proceed over the sub-issues regarding, for example, which presumptions should control. Can reliance be inferred even from a line of conduct that is uniform before and after Case #1? What minimal knowledge of prior cases is necessary to support reliance? And is Case #1 sufficient in itself, or must the detrimental behavior await a consistency already embodied in a plurality of prior cases? If so, how many? This is the stuff of authentic dialogue in which competing considerations abound and clear resolutions are relatively rare.134

There is also much about the way society practices inconsistency that could bear upon our perceptions of fairness. Given a rule that embraces inconsistent treatments, some technique must be adopted for selection of the outcome in each case. Now, as we have seen, rules of this sort generally emerge from some political (or judicial) impasse. Contending social views about virtue and the good life are in deadlock, and the rule institutionalizes this dissensus by legitimating conflicting treatments. If there is a right answer, it is one available to philosophy or religion and not to democratic politics.135 On such issues there is and can be no mind of the state. Unless he is willing and able to impose his

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134. An argument of this prudential sort appears in Easterbrook, supra note 66, at 302-04. Judge Easterbrook would convert the fairness question into one of the criminal's capacity to value his chances. By assuming this sort of calculation to be possible, one can imagine that all criminals in fact receive “equal treatment” in an actuarial sense of that term:

There is no reason to spend resources to obtain ex post equality when the equality does not influence behavior. The costs of obtaining equity are borne by society; the benefits (if any) are collected by criminals, who have no special claim to such expensive favors.

This may be perceived as a call for substantial inequality, which may be characterized as unfair. Why should not all robbers pay the same price for their crime? In fact they do pay the same price. They pay the expected value of their punishments. Most crimes involve intentional wrongdoing. A person committing a crime takes his chances. All chances have the same value; later on people realize different returns. The ex ante equality, coupled with the ability of criminals to avoid the risk by obeying the law, makes the ex post inequity perfectly fair.

Id. at 304.

135. Even if divine ordinance or the authority of philosophers were invoked to fix the law for these cases, most examples of inconsistency-by-rule would remain unchallenged. Disagreement is not a characteristic unique to the secular politics of rules; most of these cases, so hard for statesmen, would generate a similar dissensus among moral theologians. If I am correct on this, we lack a unitary answer at any level of analysis; hence, again, there seems nothing substantive to resent in the regimes of limited inconsistency established by the unsurprising rules here identified.
private views, the question for the secular rulemaker, then, cannot be what is correct. Rather, the intelligible inquiry is this: Where there are outcomes with substantial support in the community, who shall decide among them in particular cases? To frame deadlocked social questions in this form is not to answer them, but it has the signal virtue of identifying the real issue.

Clarification, however, comes at a price. The reality of inconsistency can be an unsettling perception. Various rules of law stand revealed as systems of bounded randomness; and the element of chance is seen to be inserted decisively at a particular stage in the process, namely in the assignment of the decider. Encountering this pari-mutuel element in the system, runaway rationalism suggests the easy answer to the “who decides” question: Human deciders are unnecessary. In damage calculation, for example, a mechanical servant could randomly pluck an award of dollars from the range allowed by the governing rule. The decision regarding the death penalty could be similarly managed; it is a binary function for which a coin would suffice. So far as the actual outcomes of cases are concerned, no new problem would be introduced by such devices. And note that mechanical selection would never involve inconsistency. For inconsistency requires that treatment be chosen according to the moral principles of some rational decider. Thus, a lottery system for selective service would not produce “inconsistent” but only random outcomes.

Except in rare instances, as in the military draft, such candid institutionalizing of the statistical reality would appeal to very few. People resist having their noses rubbed in the randomness of the system. Whatever in the process suggests coin-flipping is objectionable as such. This taboo implies a rationale for the present locus of decisional authority in cases of inconsistency-by-rule. Randomness may be inevitable, but it must express itself indirectly and even covertly at that point in the process where the human decider is selected. It should not simply replace him. For, one would say, elimination of the intervening human mind would terminate the possibility of argument on the treatment issue. The opportunity to persuade a rational arbiter within the compass of permitted treatments could seem for the affected individual an elemental aspect of fairness. In our legal culture it is hard to think otherwise. It is true that the objective of argument under such a rule is only to influence the decider’s own standard for choosing among the permitted outcomes. The issue is not which outcome the law requires; by definition the law is indifferent. Still, the stifling of discourse would be hard to accept. Out of a particular notion of fairness, therefore, we commit ourselves to human deciders to administer inconsistency-by-rule.

Inconsistency can, of course, be unjust or merely absurd; it is but a
mechanism, and rules that allow it can represent cowardly political compromise or inadequate analysis by rulemakers. Prudently employed, however, inconsistency-by-rule is not only fair but can support basic democratic values. One is participation. Decentralization of the choice of standards maximizes the number of players: judges, jurors, bureaucrats, lawyers, parties, and their critics and supporters on the local scene. It resists the tendency for debate and decision regarding divisive social issues to be monopolized by the central government, the academy, and the media. The remoteness of such elite forums is often disheartening to the individual citizen left mute in the public dialogue. Inconsistency-by-rule may to a degree temper alienation and harness citizen energy and intelligence. At the same time such rules increase the number of ideas that have practical impact within the legal order. By avoiding official rebuke to plausible positions, the polity encourages debate; it confirms the dignity of partisans and broadens the intellectual franchise. It expands the ideological marketplace.

This does not imply a tight relation between inconsistency-by-rule and the political ethic of pluralism. The latter doctrine I take to be one that encourages public support of the liberty of individuals to form or adopt communities of ethnicity, religion, culture, or political ideology. Despite its tendency to enhance diversity in outcomes, inconsistency in treatment of like cases would seem ill-suited to foster such an objective. An earlier example will illustrate the asymmetry. In the case of the Down’s baby needing surgery to survive, the judge deciding the issue will have his own views, and they will dominate. His colleague assigned to the next similar case may represent the opposite view. The consequence may be a variety of outcomes, but, in order for this to pass as propluralistic, the governing rule must aim to support private choice. In the medical neglect cases, as elsewhere, inconsistency-by-rule achieves this only adventitiously, if at all. These rules aim to empower not the parties but the decider, and pluralism as an ethic does not value the private moralities of public officials. Inconsistency’s contribution to pluralism thus is the limited (if considerable) one of promoting diversity of ideas and broad participation in the social dialogue. It does not directly enhance individual or group autonomy.

To the contrary, inconsistency-by-rule entails a limited subordination to the will of individual strangers. It empowers a regime of petit sovereigns who are under no constraint to achieve moral correspondence among outcomes in like cases. Are these regimes then to be regarded as obscene remnants of patriarchy? Doubtless they are patriarchal in an important sense, but I think that the important question is to what extent

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136. This is an extension of Kalven’s point that jury service is “a major and moving experience in the life of the citizen-juror.” Kalven, supra note 45, at 1062.
do they encourage a kind of moral oligopoly? To a degree they must have this effect. In each such case the judge or juror receives authority to select from the portfolio provided by the rule; precisely to the extent of that moral repertoire, we have a government of men, and the traditional arguments against arbitrariness are relevant. Furthermore, judges are hard to remove, even in states where they are elected. And, in some settings individual judges gain influence over elements of the docket. Still, at least in this society, no judge gets full control over any significant set of cases. The like cases are too few; the opportunities for authority are too unpredictable and fleeting. In the application of a rule, no one outcome is likely to drive other authorized outcomes from the field; there will be a different judge in the next case, one who will give the probation or who will remove the child.

The moral sovereignty of the jury is even less threatening. If the juror is patriarchal, he is but Patriarch for a Day. His power could seem oppressive only to one committed to imposing a determinate formula for treatment even where no such formula can win ascendancy in the ordinary political processes. But, whether the decider is judge or juror, the regimes of inconsistency here examined represent but the limited authority of countless deciders; their moral diversity has been preferred to uniform outcomes imposed by rulemaking elites. The result is mildly patriarchal, but it is simultaneously the most democratic of the available solutions.

For my part, inconsistency's most compelling claim for recognition may lie in its potential service to truth. Rules of this sort tend to express social reality and the outer limits of ethics. The issue of capital punishment illustrates both aspects. Not only is there enduring dissensus, but it is reasonable to doubt that any intellectually coercive argument will ever

137. Systems of case assignment are, of course, relevant to the possibility of unfairness. The German practice is to assign cases alphabetically by the initial letter of the defendant's last name; an individual judge, for example, will get all defendants whose last names begin with "H". Thus large companies (hence similar cases) tend to encounter the same judge, leading in at least one publicized example to an unprecedented accusation of systematic bias in the application of rules bestowing broad discretion. Some of the details of this controversy appear in ZRP 84, 4 ff. (Zeitschrift für Rechtspolitik). The text of the final decision on the bias issue is published in KJ 83, 69 ff. (Kritische Justiz). It would be worth hunting parallels in the American experience.

138. For a contrasting view see Kotler, supra note 44.

139. The clearest and most common example of this point is the authority of the family. It is in form the quintessential matri/patriarchy in its relation to its unemancipated children, being empowered to make an enormous range of crucial and inconsistent decisions. Nor can it be doubted that most of these decisions have the force of positive law. Parents are autocrats, and the Constitution ratifies their inconsistencies. In relation to its children the family is, nevertheless, democratic in the fullest possible sense. Children (at least younger children) by definition will be decided for. The only issue is by whom and with what attention to and respect for the child's own preferences. The dispersion of power to the family level is (for most cases) the efficient means to introduce the child's voice into the decisionmaking process. The argument appears at length in Coons, supra note 102.
emerge for or against the death penalty. Where such perplexity is invincible and is mirrored in society, it may be prudent to stay our impulse to unification. The passion for symmetry can become imperialistic. Long ago Bacon saw it as a fundamental threat to science.

The human understanding is of its own nature prone to suppose the existence of more order and regularity in the world than it finds. And though there be many things in nature which are singular and unmatched, yet it devises for them parallels and conjugates and relatives which do not exist.  

Science seems gradually to be liberating itself from this ancient prejudice. Nature may prove to be either more or less uniform than we imagine; but its surprises become less threatening. The fundamental particles resist universal order, and for the sake of intelligibility we are sometimes driven to statistical proxies. But as the scientist becomes reconciled to a degree of discontinuity, the lawyer and philosopher seem to maintain an undiminished appetite for setting justice straight. As Hart observes, there is an “itch for uniformity in jurisprudence.”

This is a matter for wonder and, to a point, for praise. Unlike nature, positive law could in fact be set straight, for it is ours to make, the only issue being whether we have sufficient reason to make it all cohere. Ardent reformers seem to think so, but their own visions of unity are in mutual conflict, often serving only to multiply the disorder. Perhaps we should wonder whether this impulse to hammer it all flat—or square, or round—is really more than an aesthetic quirk that has come to dominate our emotions. There is something obsessive about a jurisprudence that would make all things fit; it lacks sufficient patience with vulgar but real disorder.

In a democracy, jurisprudence should be more humble, if only out of a respect for the diversity of common opinion. Consensus or its absence is a fact which, in its relation to justice, resembles that of nature to science. Granted, the public mind can be a gaudy thing, and unruly; doubtless on occasion it must be overthrown in the name of some transcendent principle. But we should worry where the substitute good that is offered is nothing more than making things fit. Some things may never fit, and it is an offense against truth to pretend more order than this world allows.
