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**Working Paper**

## Inconsistency in the Law : In Search of a Balanced Norm

Preprints of the Max Planck Institute for Research on Collective Goods, No. 2004/16

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*Suggested Citation:* Engel, Christoph (2004) : Inconsistency in the Law : In Search of a Balanced Norm, Preprints of the Max Planck Institute for Research on Collective Goods, No. 2004/16, Max Planck Institute for Research on Collective Goods, Bonn

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December 2004

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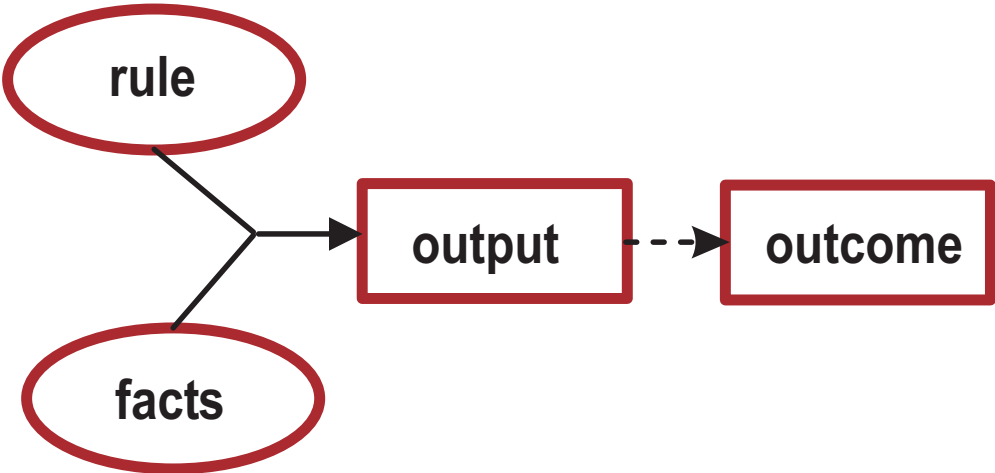
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\* I am grateful to Gerd Gigerenzer, Stefan Magen and Isabel Schnabel for their elucidating comments on an earlier version, to Lena Heuner for valuable research assistance, and to Darrell Arnold for the linguistic trimming of the paper.

**I. Introduction**

In court and on the high seas, we are in the hands of the Lord. This piece of legal folk wisdom can be taken as evidence for two points: the law is not always consistent, and the law’s subjects see this as a problem. Indeed, most legal literature that has the word consistency in its title complains about its absence in some area of law.<sup>1</sup> Yet, at closer sight, the case for consistency is not that obvious. Consistency serves a number of valuable purposes for the law internally, and for its role in society.<sup>2</sup> But consistency comes at a price. There are an impressive list of normative concerns that make it advisable to tolerate, if not generate, a good deal of inconsistency in the law.<sup>3</sup> In assessing the desirability of consistency, these competing goals must be balanced properly. Moreover, by the appropriate "design for inconsistency", the law is sometimes able to make the remaining inconsistency more digestible.<sup>4</sup> The appropriate response to the question of the desirability of consistency is thus the characteristic legal, "it depends".

This is why this paper drafts a taxonomy. Not all forms of inconsistency are the same. In a fairly stylised way, the definitional operation of the law can be sketched as follows:



**Figure 1**  
**Definitional Operation of the Law**

There are two separate inputs: rules and authoritatively determined facts. In a hermeneutical exercise, legal authorities rely on these two inputs to generate an output. Whether this output

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1 By way of illustration, see DIAMOND, SAKS and LANDSMAN in DePaul Law Review (1998); YOUNG in Iowa Law Review (1998); LOVEGROVE in International Journal of Law and Information Technology (1999); HERRING in Journal of Health Law (2000); MARTIN in Georgia State University Law Review (2000); PROCTOR in New York University Law Review (2000); SWANSTON in Fordham Environmental Law Review (2000); WAAGNER and EVANS in Public Contract Law Journal (2000); SAHARSKY in Minnesota Law Review (2001); SIMMONS in Rutgers Law Review (2003); VAN REESCH in Australian Law Journal (2003).

2 See below, II 3.

3 See below, II 4.

4 See below, II 7.

does indeed generate the outcome that the rules in question expressly aim at depends on the context, and, in particular, on the reaction of the law's addressees. Any of these four features can exhibit inconsistency.<sup>5</sup> The legal literature has mostly been interested in inconsistency between legal rules (discussed in section II below). But authoritative statements of fact may also be inconsistent (section III), as may be different outputs in which the law is authoritatively applied in court or in administrative agencies (section IV). Finally, it can be asked whether the application of law to several instances of social reality creates inconsistency, not necessarily in the law itself, but in its effect on the external world (section V).

## **II. Inconsistent Rules**

How is it that the legal order comes to contain inconsistent rules (this is discussed in section 1 below)? Only after getting a sense of the evidence can one understand the philosophical claim that consistency is so important for the law that no competing value is ever to be taken into account (section 2). This paper adheres to the opposing, consequentialist philosophical view. Consistency has value (section 4), but this value may be outweighed by the value of inconsistency (section 5). To decide which value is greater, one needs a finer understanding of what inconsistency means, and how much normative weight should be attached to one form of inconsistency or another (section 3). The overall normative goal resulting from this exercise can be called soft consistency (section 6). From this, implications for legal design are derived (section 7).

### **1. Institutional Openings for Inconsistency**

Inconsistency in the law does not fall from heaven. Even if inconsistency is not generated on purpose, some feature of institutional design has made it possible. These features can be found in two places: in the institutional framework for rule generation (section a below) and for rule application (section b).

#### *a. Rule Generation*

In countries with civil law, the prime source for new law is the legislator. But there is frequently more than one legislator who may have a say on an issue. This is obvious in federal states, captured by the metaphor of the U.S. states as 50 laboratories.<sup>6</sup> In transnational cases, (national) rules for dealing with the conflict among laws may make foreign laws applicable.<sup>7</sup> In federal countries, under certain circumstances the law of the federation prevails over competing rules from the legal orders of its regional members. The same holds for the relationship between the law of the European Community and the law of the member states. Many countries have given

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5 Cf. the taxonomy in DICKSON in Zalta (2001) sec.1.

6 BRILMAYER in Southern California Law Review (1986) 378.

7 For a standard reference, see DICEY, MORRIS and COLLINS Dicey and Morris on the conflict of laws (2000).

the municipalities limited jurisdiction to prescribe. Others acknowledge or protect some autonomy for private regulation,<sup>8</sup> or for hybrid regulatory activities jointly undertaken by government and private parties.<sup>9</sup> No borderline between the jurisdiction of two legislative bodies is watertight. Regardless of which technology is used to delineate the spheres of influence, there will be disputed cases.<sup>10</sup> Any such dispute creates inconsistency in the legal order at large.

In the common law countries, the generation of new law is mainly entrusted to the courts. In principle, the risk of incoherence should therefore be much more pronounced in these legal orders, since the number of legitimate rule-making authorities is much larger. Yet the rule of *stare decisis* is meant to protect the body of law from becoming utterly incoherent.<sup>11</sup> Ironically, the legal orders with a much greater natural risk of incoherence are thus much better prepared to contain it. Countries with civil law typically, at best, have a much weaker doctrine of the "integrity of the legal order".<sup>12</sup> Nonetheless, it is not always clear whether a new rule is excluded by *stare decisis*. Moreover, there is no pure common law system. To a smaller or larger extent, statutory law competes with judge-made law. At the borderline, this generates the same kind of inconsistencies that are familiar from the civil law countries.

Split jurisdiction is not the only reason for inconsistency in a legal order. The character of the accepted sources of law also plays itself out. Customary law is wide open for inconsistency. Anything legal addressees frequently do can be turned into a rule of law if only they are convinced that their custom has the force of law.<sup>13</sup> Statutory law is also a frequent source for inconsistency. In the legislator's own world, making new laws is an instance of regulatory politics. For the legislator, the way the new rules fit into the existing body of law is at best a secondary concern. He primarily aims at dissolving the political conflict that got the political machinery going.<sup>14</sup> The characteristic lack of orderliness in the political process<sup>15</sup> is likely to generate inconsistency in the legal order. The potential for inconsistency becomes even greater if the legislator embraces the (scientifically) popular concept of experimental legislation.<sup>16</sup>

More generally, by definition legal positivism contains a germ of inconsistency. For legal positivism means that the legal order is permanently in motion. It can only be understood as a process. The integrity of the law can at best be a regulative idea. This statement holds all the more, once one takes due account of the historicity of the law. During this history, doctrinal

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8 More from ENGEL in German Law Journal (2004b).

9 ENGEL in European Business Organisation Law Review (2001b).

10 A much researched example of the effects of convergence on the regulation of media and communication. Before the advent of the electronic media, in most countries different authorities were responsible for regulating the press as opposed to broadcasting, mass communications as opposed to individual communication, contents as opposed to transmission technology, culture as opposed to business. All of these have become almost indistinguishable in the meantime, more in ENGEL in Mestmäcker (1995).

11 For background, see KORNHAUSER in Chicago Kent Law Review (1989).

12 For a typical treatment, see FELIX Einheit (1998).

13 Practically speaking, customary law today plays the greatest role in public international law, see VILLIGER Customary Law (1997).

14 More from ENGEL in Engel and Hérítier (2003b).

15 This graphic term was coined by HÉRITIER in Politische Vierteljahresschrift (1993) 9.

16 For background, see LIEBMAN and SABEL in New York University Journal of Law and Social Change (2004).

concepts have been forged in a joint social endeavour, sometimes encompassing generations of lawyers.<sup>17</sup> This history makes the law path dependent.<sup>18</sup> New social demands or doctrinal innovations cannot directly find their way into law. They will start out in less developed areas of the law, and then gradually intrude into its more settled areas. This process generates inconsistency for the legal order at large and at the border between areas of law in particular.

Even without the luggage of history, borderline areas between subfields of the law are fraught with inconsistency. For good reason, not all subfields are governed by the same organising principles. In administrative law, effective governance is an issue; in criminal law, it should not be. Consequently, organising principles clash if disobedience to administrative obligations is criminalised, as in German environmental law.<sup>19</sup> More generally, the more an area of law differs from neighbouring areas, the more some inconsistency at the borderlines becomes likely. It is often exacerbated by interested legal addressees who try to exploit the entailing opportunities for arbitrage.

#### *b. Rule Application*

Once in force, a legal rule is not ironclad. Rule application is not a mechanical exercise. Rule application is, and ought to be, an activity with a fair degree of autonomy vis-à-vis rule generation. There are two methodological reasons for this. It is not disputed that general rules must flock out into much more specific, contextualised normative expectations before they are actually to govern behaviour.<sup>20</sup> To the extent that public authorities formally apply the law, this transformation is carried out by the legal order itself.

Some legal theorists and legal philosophers, however, dispute the second statement: i.e. that while being applied, the general rule itself may change. The opponents claim that there can only be one right answer to any legal question.<sup>21</sup> The individual judge or administrator may not have found it. But this constitutes error, and should be corrected. Yet applying a general, abstract rule to a more specific, contextualised case is a hermeneutical exercise. This method inevitably entails a personal decision by the authority entrusted with applying rules.<sup>22</sup> Therefore rule application can result in hermeneutical drift. By being applied, the contents of the rule gradually change. Consequently, only after being applied is the effective rule for the case determined. This insight is important here, since this effective rule can be at variance with what a neutral observer

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17 Not by chance, legal doctrine is thus also affected by the fundamental insight of KUHN *Scientific Revolutions* (1962).

18 The phrase was coined by DAVID in *American Economic Review* (1985).

19 More from FELIX Einheit (1998) 16-56 and 317-359.

20 More from ENGEL *Learning the Law* (2004d).

21 DWORKIN in Hacker and Raz (1977b).

22 KUTZ in *Yale Law Journal* (1994) 1017. For a critical perspective, see ALBERT *Rechtswissenschaft als Realwissenschaft* (1993). He suggests the law should give up hermeneutics and replace it with the falsificatory methods developed in the social sciences. On this point see also, more generally, MANTZAVINOS *Hermeneutische Irrwege und Auswege* (2004). So far, however, the legal community has been reluctant to swallow the medicine.



might have thought the contents of the law were in this particular context.<sup>23</sup> Also, for this reason, two authorities entrusted with applying the same rule in the books to similar cases can come up with different readings.<sup>24</sup> In continental law, this is all the more important, since there is no formal *stare decisis*.<sup>25</sup> Split jurisdiction thus not only matters in rule generation, but also in rule application.

Apart from this general source of inconsistency in rule application there are also issue-specific sources. The vaguer the applicable legal rule is, the more diverse its application will be.<sup>26</sup> There are many such rules, e.g. forbidding "harassment", or calling for "fair" treatment.<sup>27</sup> Another source of inconsistency is the methodological distinction between rules and principles. Rules have an if-then structure, whereas principles ask the rule-application authority to strike the appropriate balance between competing normative concerns.<sup>28</sup> It is obvious that the latter methodology makes rule application much less predictable and, hence, that it entails a greater risk for inconsistency when applying one and the same rule across different instances.<sup>29</sup>

In legal practice, if the issue is sufficiently complex, rule application authorities have nearly the same degree of freedom under if-then rules. For the legal order is best compared to a dense network of individual rules. The greater the complexity of the case, the greater the number of rules that can legitimately be used to solve it. However, in such cases, exploiting the full freedom inherent in the legal system will require an astute lawyer.

Finally, there are even situations where doctrine has deliberately encapsulated a rule that is patently at variance with value judgments in other parts of the legal order. For quite a while, the German Criminal Code has offered an example. Traditionally, poisoning was regarded as a particularly perfidious way of killing a person, which, due to poor detection technology, often went unnoticed. This explains why the legislator stipulated a very high minimal sanction for poisoning. Over several decades, German doctrine has gradually reduced criminal sanctions, also for manslaughter. This would not have been possible, had the courts compared their sentences with the law's requirements in poisoning cases. Consequently, the act of poisoning was defined as narrowly as possible.<sup>30</sup>

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23 Of course, the same method can also be used by the rule application authorities in their attempts to restore the consistency of the legal order after legislative intervention.

24 FELIX *Einheit* (1998) 265 speaks of "an assessment of legality that is not uniform across legal authorities" ("*die innerhalb der Rechtsordnung gespaltene Rechtmäßigkeitsbeurteilung*"); see also 233-290.

25 There is, of course, the hierarchy of courts. If a lower court disagrees with a superior court, the losing party may appeal. But the different view of the lower court is not illegal, let alone void.

26 KUTZ in *Yale Law Journal* (1994) 1007.

27 Examples are taken from *Ibid.* in 1004 f.

28 This distinction has been fleshed out by ALEXY *Theorie der Grundrechte* (1985), building on a not fully identical distinction proposed by DWORKIN *Taking Rights Seriously* (1977a) 22 ff. and 71 ff.

29 ALEXY in Jickeli, Kreutz and Reuter (2003) has offered an ingenious methodology for avoiding this result. But it is utterly impractical. More importantly, it abolishes the autonomy of rule application vis-à-vis rule generation.

30 SCHULZ in Künzel, Ipsen, Kambas and Trapp (1999) 204 f.

## 2. Deontological or Consequentialist Norm?

The topic of this paper ties into a deep philosophical debate: should consistency be judged from a deontological or from a consequentialist perspective?<sup>31</sup> From a deontological perspective, consistency "is an end in itself",<sup>32</sup> not just an instrument, which it is in consequentialist perspective. Consistency is seen as a first principle,<sup>33</sup> which has intrinsic value.<sup>34</sup> It is seen as constitutive for law. The law is defined by being consistent. In order to qualify as law, sentences must be part of a coherent body of rules. Consequently, consistency cannot be weighed against competing values. It is not open to normative argument. It can never be a cost that is too high, given competing goals of the legal order.

Those holding a deontological view of the law usually go even further. They insist that mere logical consistency among propositions is not enough.<sup>35</sup> Some enrich it in the sense of equality.<sup>36</sup> Others prefer coherence<sup>37</sup> or, mostly, integrity.<sup>38</sup>

The deontological view can rest on moral and on epistemic grounds.<sup>39</sup> These should be kept separate. The moral justification is prominent in Ronald Dworkin's work.

Law as integrity asks a judge deciding a common-law case [...] to think of himself as an author in the chain of common law. He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue according to his own judgment of how to make the developing story as good as it can be.<sup>40</sup>

The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single

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31 An (incomplete) list of voices in this debate comprises DWORKIN *Taking Rights Seriously* (1977a); KRESS in *California Law Review* (1984); LEVENBOOK in *Law and Philosophy* (1984); MACCORMICK in Peczenik (1984); DWORKIN *Law's Empire* (1986); ALEXY and PECZENIK in *Ratio Juris* (1990); MARMOR in *Law and Philosophy* (1991); RAZ in *Boston University Law Review* (1992); PECZENIK in *Ratio Juris* (1994); HAGE in *Information and Communication Technology Law* (2000a); HAGE in *Law and Philosophy* (2000b); RODRIGUEZ-BLANCO in *Ratio Juris* (2001); SCHIAVELLO in *Ratio Juris* (2001); MORAL SORIANO in *Ratio Juris* (2003); HAGE in *Ratio Juris* (2004).

32 PETERS in *Yale Law Journal* (1995) 2037; see also COONS in *California Law Review* (1987) 98-107.

33 COONS in *California Law Review* (1987) 99; see also 60 note 2 with refs.; PETERS in *Yale Law Journal* (1995) 2041.

34 Cf. PETERS in *Yale Law Journal* (1995) 2041: from a deontological perspective, consistency has "inherent normative weight".

35 KRESS in *California Law Review* (1984) 370; DICKSON in Zalta (2001) sec. 3.1; SCHIAVELLO in *Ratio Juris* (2001) 236.

36 More from PETERS in *Yale Law Journal* (1995) 2055-2073.

37 More from MACCORMICK in Peczenik (1984); DICKSON in Zalta (2001) sec 3 before 3.1; SCHIAVELLO in *Ratio Juris* (2001) 242; see also the fairly complex test proposed by ALEXY and PECZENIK in *Ratio Juris* (1990).

38 This is, of course, the position of DWORKIN *Law's Empire* (1986) 225, 238 f., 250-252 and passim; see also PETERS in *Yale Law Journal* (1995) 2073-2112; DICKSON in Zalta (2001) sec. 3.1; SCHIAVELLO in *Ratio Juris* (2001) 242.

39 Cf. COONS in *California Law Review* (1987) 100.

40 DWORKIN *Law's Empire* (1986) 238 f.

author—the community personified—expressing a coherent conception of justice and fairness.<sup>41</sup>

According to law as integrity, propositions about law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.<sup>42</sup>

All these concerns should indeed figure prominently in law. But none of them can legitimately claim to be an absolute value. On the contrary. The task description for the judge inherent in these quotations is openly anti-democratic,<sup>43</sup> and it papers over fundamental normative relativity.<sup>44</sup> There is no theoretically consistent way of bridging competing normative starting points, and the accompanying assumptions about reality.<sup>45</sup> There are many normative currencies, like allocative efficiency, distributional justice, relative fairness, historically contingent happiness, uncontrolled liberty or the dissolution of conflict, to name only a few.<sup>46</sup> These currencies are not convertible. Ultimately, subjective political decision is inescapable.<sup>47</sup> To the extent that the legislator has not provided the legal system with concrete exercises in balancing competing concerns, these decisions have to be taken by the individual persons whom the legal system has entrusted with an office.

Finally, living up to the normative goal of complete consistency is just impossible in any somewhat realistic setting. For even the weakest standard, logical consistency is out of reach once more than a trifling number of legal rules are taken into consideration. Logical consistency means that each rule must be interpreted in a way that is consistent with any other (relevant) rule. A simple mathematical exercise demonstrates what this means. Each element of the relevant set of rules must be separately paired with each other rule from the set. If the set has  $n$  elements, every interpretive move must therefore go through  $n!$  checks. For it cannot be precluded that a change in rule 1 will have repercussions on the interplay between rules 2 and 3. Now  $10!$  is already 3,628,800, and  $20!$  is  $2.43290 \cdot 10^{18}$ . Combinatorial explosion thus makes it impossible to live up to even the weakest standard of full consistency.<sup>48</sup>

The alternative justification of the deontological view is epistemic.<sup>49</sup> It goes back to the philosophical debate about competing concepts of truth. Defining truth becomes demanding if one is a strong constructivist.<sup>50</sup> From this angle, truth cannot be defined by the goodness of fit between a statement and reality.<sup>51</sup> A conceptually sound way out consists in shifting to internal

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41 Ibid. Law's Empire 225.

42 Ibid. Law's Empire.

43 RAZ in Boston University Law Review (1992) 310.

44 MORAL SORIANO in Ratio Juris (2003) 297.

45 KERSTING in Kersting (1997) ; for a stimulating conceptual treatment of the ensuing plurality; see THOMPSON, ELLIS and WILDAVSKY Cultural Theory (1990).

46 More from ENGEL in Rechtstheorie (2001c).

47 Albeit not so rarely, there are clever ways to evade the need for it, Ibid.

48 Gerd Gigerenzer pointed me to this argument.

49 DICKSON in Zalta (2001) sec. 3 before 3.1.

50 On constructivism, see BERGER and LUCKMANN Construction (1967).

51 KRESS in California Law Review (1984) 369.

coherence among a set of statements as the criterion for truth.<sup>52</sup> Along with this, coherence theories also are a response to philosophical scepticism.<sup>53</sup> They do not need to rely on unquestioned axioms,<sup>54</sup> and thereby they can reject philosophical foundationalism.<sup>55</sup> Thereby "sceptical doubts are compatible with the possibility of rational argument".<sup>56</sup>

The law should indeed take seriously the challenges of fundamental normative relativity and of constructivism. But there is no reason to throw out the baby with the bathwater. The law, in action, may at times not have an unobstructed view of the social reality that it governs. In some cases, the solution may hinge entirely upon the disputed choice between normative starting points. But quite often the parties to a case are not only willing to agree to most of the facts. The agreed facts also coincide with what most members of the community think to be true. Likewise, even if they come from different normative starting points, the parties are often willing to agree on the appropriateness of a solution.<sup>57</sup> Again, often enough such results are not disputed in the community at large either. Put differently, a deontological coherence theory can only be justified on epistemic grounds if one starts from radical assumptions. Instead of taking on all the presumptions of such a straw man, the law should rather adopt a pragmatic view of the epistemic challenges. They generate considerable uncertainty, both on factual and on normative grounds. But the law is better off if it entrusts the handling of these uncertainties to procedural rules, i.e. to the principles of democracy and the rule of law.

Finally, adopting a deontological view does not automatically result in attaching absolute value to coherence. It all depends on how law is defined. The unwillingness to trade some coherence for other values follows from the deontological starting point only if one adopts a rationalistic, Western view of the law. Historically, in most countries the law has started differently, as an emanation of the Divine will. Why should it be presumed that God is consistent? Islamic law is still not rule based. The underlying idea is holistic. In the light of the case before him, the Islamic judge is asked to find a just solution. Certainly, Western societies would find neither of these approaches acceptable. But this is no longer a philosophical argument; it is a cultural one. And one would be hard pressed to claim that Western culture insists on the absolute consistency of the law, no matter what the cost.

This paper therefore adopts the opposing, consequentialist view.<sup>58</sup> It does not treat consistency as an end, but as a means.<sup>59</sup> In this view, inconsistency is a mere argument,<sup>60</sup> a normative problem,<sup>61</sup> a feature of the legal order that needs justification.<sup>62</sup> But it is not strictly forbidden. If

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52 RODRIGUEZ-BLANCO in *Ratio Juris* (2001) 214 f.; see also HAGE in *Ratio Juris* (2004) 88 f.

53 RODRIGUEZ-BLANCO in *Ratio Juris* (2001) 218.

54 *Ibid.* in *SOMETHING MISSING*.

55 RAZ in *Boston University Law Review* (1992) 274.

56 KUTZ in *Yale Law Journal* (1994) 998.

57 SUNSTEIN in *Harvard Law Review* (1995) coined the phrase of an "incompletely theorized argument" for this; this and other possibilities are sketched out in ENGEL in *Rechtstheorie* (2001c).

58 It thereby follows PETERS in *Yale Law Journal* (1995) 2037.

59 COONS in *California Law Review* (1987) 60 f.

60 BRILMAYER in *Southern California Law Review* (1986) 373; see also DICKSON in Zalta (2001) sec. 3.3.

61 PETERS in *Yale Law Journal* (1995) 2040.

62 Cf. THOMPSON in *Southern California Law Review* (1986).

an interpreter pinpoints inconsistency in the law, this voids neither rules nor proposed interpretations. It only increases the need for justification.

### 3. Defining Inconsistency

Definitions are not just out there waiting to be found. They are tailored to a research question. This paper adopts a consequentialist perspective. Inconsistency must therefore be defined in a way that allows us to assess the gravity of the normative problem it entails. In line with this, the following sections are inspired by the principle of proportionality. It is prominent in the German and European doctrine of fundamental rights and freedoms.<sup>63</sup> Inconsistency is treated as an intrusion into the values enshrined in consistency. The intrusion can in principle be justified by competing values. The set of values to prevail hinges upon the relative weight placed on maintaining consistency rather than sacrificing it. This comparison is not made in the abstract, but with respect to concrete instances of alleged inconsistency.<sup>64</sup> Actually, the German constitutional court has occasionally explicitly used this methodology to deal with inconsistency claims.<sup>65</sup> If one does, one needs a pertinent taxonomy of the many possible forms of inconsistency.

There is an alternative conceptual strategy. Its proponents contend that, since there are so many ways of defining consistency, one might as well only define it as what is normatively unacceptable, given the concrete balance between values on both sides. This is actually how the German *Bundesverfassungsgericht* long proceeded when applying the constitutional guarantee of equality.<sup>66</sup> But this alternative conception is not conducive to intellectual clarity, and has therefore been abandoned.

However, before one can ask whether something is of value, one must have an understanding of the object of inquiry. Actually, definitions of consistency do therefore serve two purposes, one qualitative and one (quasi-) quantitative. The qualitative dimension must precede any consideration of proportionality. It defines whether there is an object worthy of protection. In principle, the quantitative assessment could wait until the competing values are lined up. In the case of consistency, however, it is next to impossible to disentangle both dimensions. This is why this section treats both questions upfront.

In order to define inconsistency, this section relies on (very simple) tools from mathematics, and from statistics specifically. This part of the paper is confined to one object of consistency: legal rules. In the following, two situations are distinguished. In the first situation, emanations of the

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63 A good introduction is PIEROTH and SCHLINK *Grundrechte*. Staatsrecht II (2002).

64 For a lucid, albeit ultimately too rigid, view, see ALEXY in Jickeli, Kreutz and Reuter (2003).

65 *Bundesverfassungsgericht* 10/10/2001, *Zeitschrift für Vermögens- und Immobilienrecht* 2002, 85, 87: "Systemwidrigkeit einer Regelung führt zwar allein noch nicht zur Annahme eines Verstoßes gegen den allgemeinen Gleichheitssatz. Die Systemwidrigkeit ist aber Indiz für einen solchen Verstoß. Entscheidend kommt es darauf an, ob die Abweichung vom System sachlich hinreichend gerechtfertigt ist".

66 For a summary record, see PIEROTH and SCHLINK *Grundrechte*. Staatsrecht II (2002) R 438-445.

legal system are arguably inconsistent since they interpret one and the same rule in the books in different ways (section a below). In the second situation, the inconsistency claim is directed against the way two different legal rules treat situations that arguably are similar in a normatively relevant way (section b).

#### a. *One Rule*

Claims of inconsistency with respect to one and the same rule rest on the autonomy of rule application vis-à-vis rule generation. The term “autonomy” should not be misunderstood. It does not mean that the authorities entrusted with formally applying the law enjoy any liberty or freedom. Their action is attributed to one and the same legal person, as are the activities of rule generation: namely, the state. But the constitution has split up sovereign power.<sup>67</sup> In continental states, it has even generated different organisations for the purpose. Parliament makes law; the courts and the administrative authorities apply it. In common law countries, the<sup>68</sup> constitution has created a subtler divide. It is one of attribution. By way of *stare decisis*, the two activities – i.e. of making new law and of applying old law – are separated.

In order to assess inconsistency in rule application, it is crucial to recall that the effective rule is only determined after the rule application authority has made its decision. Conceptually, there are two ways of modelling the consistency problem. The first is purely horizontal. Two instances of applying the same rule in the books generate two different effective rules. Inconsistency consists of the fact that applying the rule to these two cases should have resulted in one and the same effective rule.

In the alternative conceptualisation, there is a vertical element. In this view, the rule in the books is not just text. It is more than a mere input into the process of generating an effective rule. There is a constructed “ideal rule”. Inconsistency consists of a normatively unacceptable difference between the effective rule and the ideal rule. This second conceptualisation broadens the scope for inconsistency claims. There is no longer a need to compare one effective rule to another. Rather, the effective rule can be compared to the ideal rule. Note that, in this view, the ideal rule is not just the abstract rule in the books. It is a construct that exists for no other purpose than to make the inconsistency claim. The ideal rule is as concrete and contextualised as the criticised effective rule. As a matter of fact, in this view inconsistency means that the rule application authority has interpreted the rule in the books in a normatively unacceptable way. This view of inconsistency thus implies what has been refuted above: the idea that there is one, and only one, right answer to any legal question.<sup>69</sup> Consequently, the following considerations are confined to the first conceptualisation, i.e. the comparison between several effective rules.

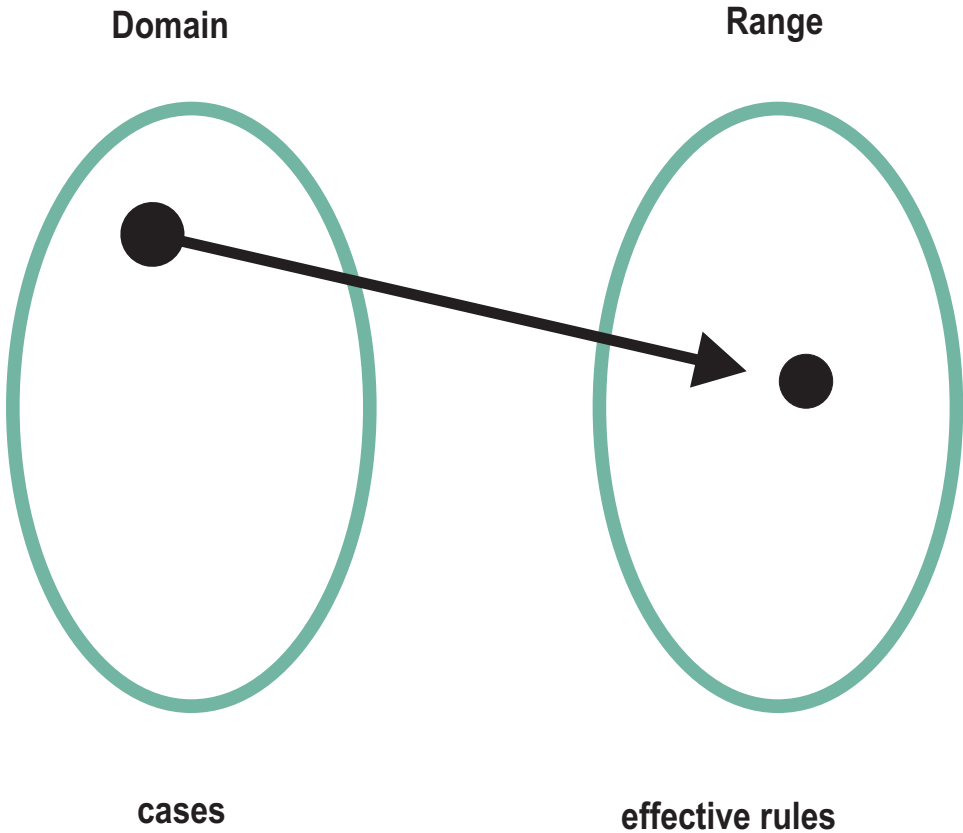
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67 More on the distinction between freedom and autonomy is available from ENGEL in Merten and Papier (2004a).

68 In the British case: implicit.

69 See above 1 b.

At first sight, modelling this relationship seems to be a demanding endeavour. In line with the description of the definitional operation of the law outlined in Figure 1, there seem to be three related elements to be modelled: the rule in the books, the facts of the case, and the effective rule resulting from applying the rule in the books to these facts. At closer sight, however, the concept of an effective rule allows us to simplify the model. The basic idea is taken from mathematical set theory. It formalises the relation between elements from two (or more) sets.<sup>70</sup> In the concrete case, it suffices to map a set of the facts in the domain to the effective rule in the range. In order to further simplify the operation, all the facts of one case can be lumped together to one point in the domain. Given these assumptions, the base model is like the one in Figure 2.

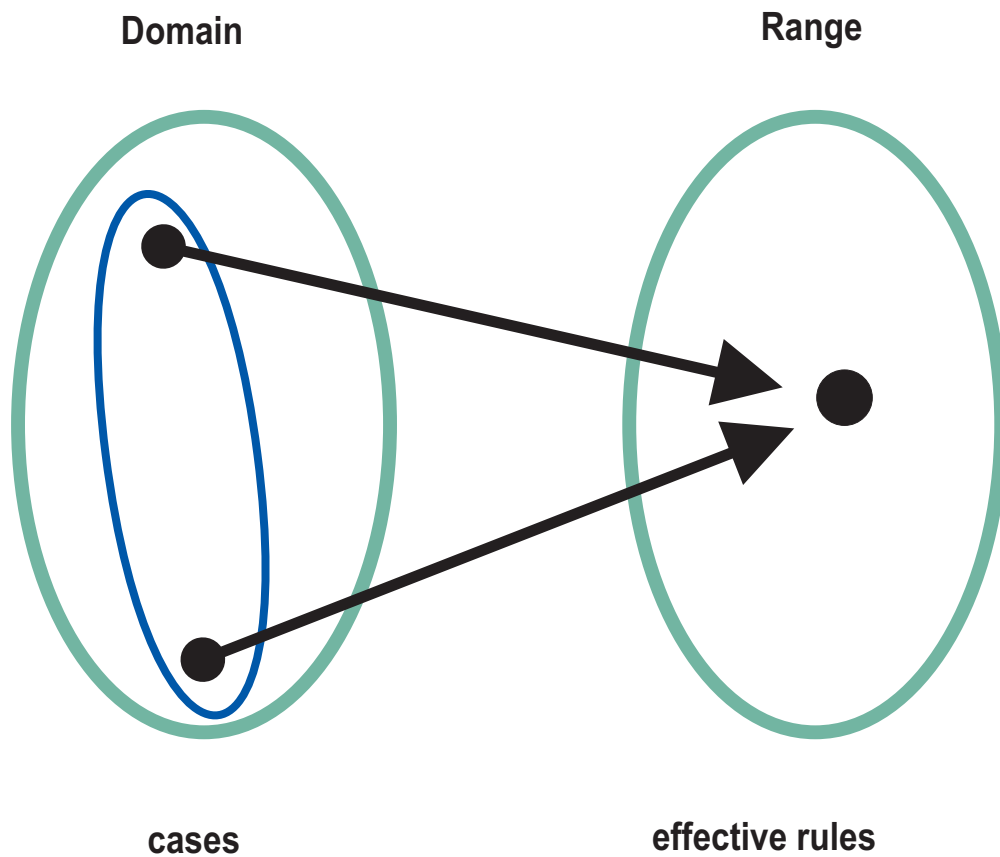


**Figure 2**  
**Base Model**

Based on this model, inconsistency claims can be defined. The claim is that two cases are similar enough to result in one and the same effective rule.<sup>71</sup> Graphically, this looks like the following diagram:

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70 For an easily accessible introduction, see HAYS Statistics (1994) Appendix E.  
 71 Note that, in mathematics, traditional set theory has come under attack. Its competitor goes by the name fuzzy set theory; for a standard reference see KLIR, ST. CLAIR and YUAN Fuzzy Set Theory (1997). This



**Figure 3**  
**Consistency as Equal Treatment**

Mathematically, consistency is thus defined with reference to the concept of a function. In principle, each element from the domain could be paired with each element from the range. Mathematicians call this the Cartesian product. Functions are narrower. They are defined as follows: each element from the domain is coupled with one, and only one, element from the range. Note that this definition allows several elements from the domain to be coupled with one and the same element from the range, but not vice versa. Actually, this degree of freedom inherent in the definition of functions is crucial for the definition of consistency offered here. If the definition were mathematically even more demanding, it would become useless for the present purposes. Mathematicians speak of a relation between the domain and the range being one-to-one, or bijective, if the relationship is fully determined both ways. Each element from the domain only maps to one element from the range. And each element from the range only maps to one element from the domain. In that case, investigating consistency would no longer be meaningful. The only – trivial – statement one could make is: each relation is consistent with itself.

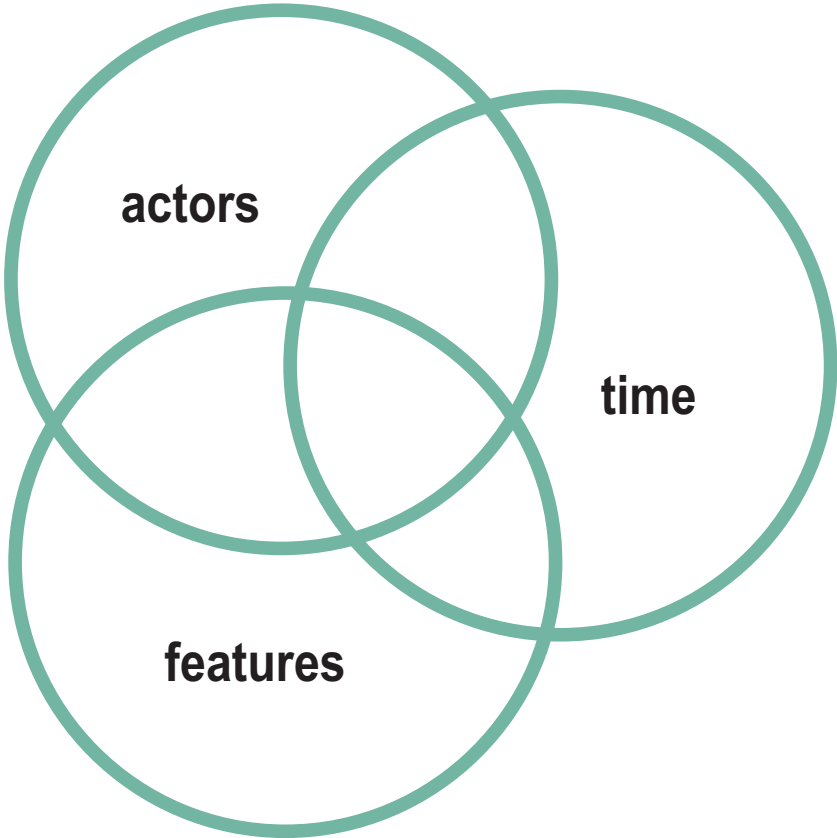
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competing approach insists that sets do not have strict boundaries. In a way, this may seem to fit better to the ideas expressed here. However, for the present purposes, the traditional concepts suffice.



Figure 3 makes the crucial implication visible. If consistency means that both cases must result in the same effective rule, these two cases must be members of a single subset of cases. This subset is defined by the very fact that it should result in the same effective rule. In a formal way, this is what lawyers mean when they speak of a right to equal treatment.<sup>72</sup>

Visibly, this definition is still an empty vessel. In the second conceptual step, defining consistency hinges upon the delineation of the subset. This delineation can rest on both qualitative and quantitative considerations. Qualitatively, there are three basic dimensions in respect to which cases can be seen as equal or not: the actors, i.e. the authority entrusted with deciding the case and the parties; the moment in time when the cases are decided; and the substantive features of the cases compared. Again, a very basic tool from mathematical set theory, a Venn Diagram, helps to clarify the options.



**Figure 4**  
**Dimensions of Equality**

Actually, the core of the diagram is empty. This would reflect the following situation: one and the same legal authority, or two different legal authorities for that matter, decide one and the same case of one and the same parties at one and the same point in time in two different ways.

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<sup>72</sup> Note that, due to the functional character of the relation, the opposite need not be inconsistent. It thus is possible that a case outside the subset relevant for rule 1 nonetheless yields the same effective rule.

Procedural rules make this impossible. Once the case is formally heard, it cannot be brought before that court again. But all other combinations exist. Is it inconsistent if one and the same authority decides one and the same case of one and the same parties differently at two points in time? To the extent that the respective procedural code sets *res iudicata* aside, it is not. In German law, this is, for instance, the case if the original decision covers an issue that is protracted in time. What if only the parties change? In common law, this situation is covered by *stare decisis*. A continental court would typically not be bound. Nor would it if both the parties and the deciding authority changed.

While, in a formal way, actors, time and the features of the case can all be modelled the same way, it is typically the features that pose the problem. At first sight, it seems to be a quantitative problem. Time is linear and well-defined. Admittedly, there is a judicial hierarchy, and there are class actions. But typically there are not many actors to be taken into account. Case features are, however, manifold. At closer sight, the difference has even deeper roots. It is the task of courts and administrative authorities to apply the rules in the books to real life cases. These cases exhibit potentially unlimited contextuality. If one spends enough time, it is easy to demonstrate the many dimensions in which any one case is bound to differ from the next. Two cases can only be said to be the same at the level of stylised facts. Put differently, claiming that two cases are equal is an exercise in constructing reality. It can only be done hermeneutically. Which similarities count is a normative question. In actual fact, it is thus impossible to mathematically map a case from the domain to an effective rule from the range. The composition of the domain is known only after mapping.<sup>73</sup> Effectively, set theory can therefore only be a pedagogical tool, pointing lawyers to options and to how they are tied to each other.

A related mathematical tool does, however, render the law a real service. Often, the inconsistency claim is quantitative, rather than qualitative.<sup>74</sup> All lawyers concerned with the matter agree that there are no normatively relevant qualitative differences between two cases. But they disagree with respect to quantity. Is the difference of degree between two cases sufficient to justify the difference in legal treatment? Sentencing practice in criminal cases is a classic case in point.

In order to remain within the mathematical model used so far, this question would have to be inverted: Is one and the same sentence, say a year in prison, imposed in cases that seem unacceptably different? Has the subset of cases treated the same way thus been delineated in an unacceptably broad way?

This procedure could be repeated for every possible sentence. If the relationship between case features and sentences is truly functional, in the mathematical sense of the word, this should be a straightforward exercise. Recall that, in a function, every point from the domain must be mapped

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73 Cf. HAYS Statistics (1994) 974: "it is important to note that in the definition of the set the qualification 'well-defined' occurs. This means that it must be possible, at least in principle, to specify the set so that one can decide whether any given object does or does not belong".

74 Cf. COONS in California Law Review (1987) 83-92.

to one and only one point in the range. In terms of sentencing, this implies: once the case features are fully determined, by way of the ex ante specifications of the function, the sentence is determined as well. Put differently, there is only freedom in the classification of cases, not in the relation between a class of cases and the sentence.

Taken together, this makes for the following refinement of the model: cases from gravity 0 to gravity  $g_1$ , by way of the function, yield outcome  $o_1$ . Cases marginally graver than  $g_1$ , up to gravity  $g_2$ , yield outcome  $o_2$ , and so forth until the maximum sentence is reached. In this model, the subsets in the domain are thus intervals on a linear scale.

Of course, one might narrow intervals further and further down, until they are just points. This makes sense if what one is really interested in is not the size of the intervals, but the rule by which they are mapped to points in the range. In the case of quantitative differences, this seems to be an easier way to capture the legal intuition. It is used for the rest of the section.

Statisticians have developed a very precise way of characterising differences in these rules. They call it scale measures.

| Name                             | Definition      | Example  |
|----------------------------------|-----------------|--|
| ordinal                          | $y > x$         | gold medal / silver medal                        |
| more complex functional relation | $y = a(x)$      | recollection today / tomorrow                    |
| interval                         | $y = a * x + b$ | Celsius / Fahrenheit                             |
| proportional                     | $y = a * x$     | Centimetre / Inch                                |
| absolute                         | $y = x$         | measurement by the same unit in different places |

**Figure 5**  
**Scale Measures<sup>75</sup>**

If the scale measure is absolute, a point from the domain is mapped to the identical point in the range. In legal history, this idea has played a prominent role. It is the biblical: “An eye for an eye, a tooth for a tooth“. Modern criminal law did away with this principle of talion law long ago. Punishment is no longer in kind. Before one can apply the idea of scale measures, either case features or punishments must therefore be normalised. After normalisation, there must be two linear scales, using the same measurement rod, say gravity. In this representation, an absolute scale measure would imply that each case is treated by the exactly corresponding punishment. Cases of gravity  $g_1$  would yield outcome  $o_1$ , cases of gravity  $g_2$  would yield outcome  $o_2$ , and so forth. Under this strict definition, any other rule for mapping the gravity of cases to the gravity of outcomes would imply inconsistency.

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75 This table is a grossly simplified adaptation of a table developed by Martin Beckenkamp; the possibility of a more complex functional relationship is added.

A more lenient definition of consistency would be open to a proportional rule. Gravity of cases  $g$  would be mapped by scalar  $a$  to the gravity of outcome  $o$ . The rule would thus be allowed to read  $o = a * g$ . If  $a > 1$ , punishment would be proportionally more severe, the severer the case. If  $a < 1$ , punishment would be proportionally more lenient. Both can be found in criminal law practice. Sanctions for small infractions are usually more than linearly smaller than for graver offences. However, the punishment for killing two persons is usually not twice as severe as that for killing one person. If a proportional rule is accepted at all, the normative environment must determine which scalar  $a$  is still deemed acceptable.

The difference in the treatment of cases becomes even more pronounced if an interval scale is accepted. Such a scale means that the proportional transformation starts at different points. Again, criminal law provides a good illustration. Modern industrial societies typically use two kinds of punishment: fines and imprisonment. Within the confines of the model, these forms of punishment may not be treated as qualitatively different. The difference must be translated into a quantitative one, namely one of gravity. For typical offenders, this does not seem out of place. The very act of being sent to prison, even if it is for a short period only, is seen as a grave intrusion. Within the model, this is factor  $b$ . However, a very high fine could be even graver than a short prison sentence, despite the initial burden of becoming a detainee. Provided one ranks all punishable acts on a linear scale of gravity, those open to punishment by imprisonment are treated differently in two possible respects: the more severe punishment applies, and their gravity might also be mapped by a different scalar  $a$ : i.e. time in prison might be meted out in ways that differ from the amount of fines. Does the very fact that an interval scale is used constitute inconsistency? Probably not, as the example demonstrates. But normative analysis must determine how large factors  $a$  and  $b$  may become. Specifically, the normative attention should not be directed to these factors in isolation so much as to the way they interact to produce punishments of different gravity.

Of course, the way one case compares to others can follow a more complicated pattern. It can, for instance, be exponential or logarithmic.<sup>76</sup> The sentencing of recidivistic defendants is one legal illustration. If a defendant has been sentenced for committing the same crime in the past, later sentences are typically disproportionately harsh. In principle, this will not be seen as unconstitutional in most legal orders. But there may be some strictures: would it still be acceptable, for instance, to triple the sentence between the third and fourth case?

Finally, the relationship between the treatment of two cases can be undetermined, apart from the fact that the second ranks higher than the first on the applicable normative scale. For instance, dealing a kilogram of cocaine should, all other things being equal, lead to a higher sentence than just dealing a gram. In such comparisons, inconsistency is hard to determine. Only the following can be said: if the second case is treated more leniently than the first, the scale is not respected. Lawyers are trained to be open for unusual context. They might therefore have a natural

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76 The latter is the case with forgetting; on the “power law of forgetting”, see ANDERSON Learning (2000) 227-239.

tendency to put many cases into this last category, i.e. to view them as existing in a mere ordinal relationship. Knowing that this makes a consistency test almost mute should, however, motivate them to estimate a more precisely defined scale.

So far, this judicial system has used scale measures to model the treatment of case features. Implicitly, this system has been modelled as a unitary actor, treating all cases at the same point in time. Often, the legal analyst, or the legal policymaker for that matter, is interested in a different comparison. Do different legal authorities treat similar cases in different ways? In systematically answering this question, the same conceptual tools can be used. This time, case features are standardised. Moreover, the sentencing practice of one court is used to gauge the conceptual tool.

This model allows us to ask questions of normative acceptability in a very precise way. If a second court precisely follows the practice used by the first one for gauging, this is expressed in the absolute scale  $o = g$ . This evidently precludes any problem of equal treatment. If the sentencing practice of the second court were stricter, this would become visible because the scale would become proportional:  $o = a * g$ , with  $a > 1$ . Likewise, if the second court were more lenient,  $a < 1$  would hold. This formalism allows legal policy-makers to ask questions like: is it still acceptable if criminal sentences in one court are on average 10% harsher than in the remaining courts of a jurisdiction? The answer is probably yes. But what about 50%? This was the kind of consideration behind the introduction of sentencing guidelines in the United States.<sup>77</sup>

The normative tension increases if the practice of two courts differs, as in an interval scale. The following provides an illustration: the conditions of imprisonment are harder in one jurisdiction than in the other. For instance, due to scarcity of prison space, many more detainees are put into one cell. Also, sentence time in prison in this second court, in an otherwise identical case, is 30% longer. Is this a case of unconstitutional inconsistency?

Even sentencing differences that make for an exponential rule are not far-fetched. A well-known illustration is California's application of the principle: three strikes and you are out.<sup>78</sup> To show this, let us assume that in the state used for gauging the scale, punishment is exactly proportional to the gravity of the offence. Mapping the three strikes practice to this measurement rod would make for the following rule:

$$o = g, \text{ for the first and second offences,}$$

$$o = g^a, \text{ for all later offences.}$$

Of course, in reality it will often be difficult to determine the exact rule by which the sentencing practice in one court or jurisdiction differs from the practise used for gauging. The analyst may therefore be forced to once again find an ordinal relationship. If so, all he can say is that the practice in one jurisdiction is consistently harsher than in another.

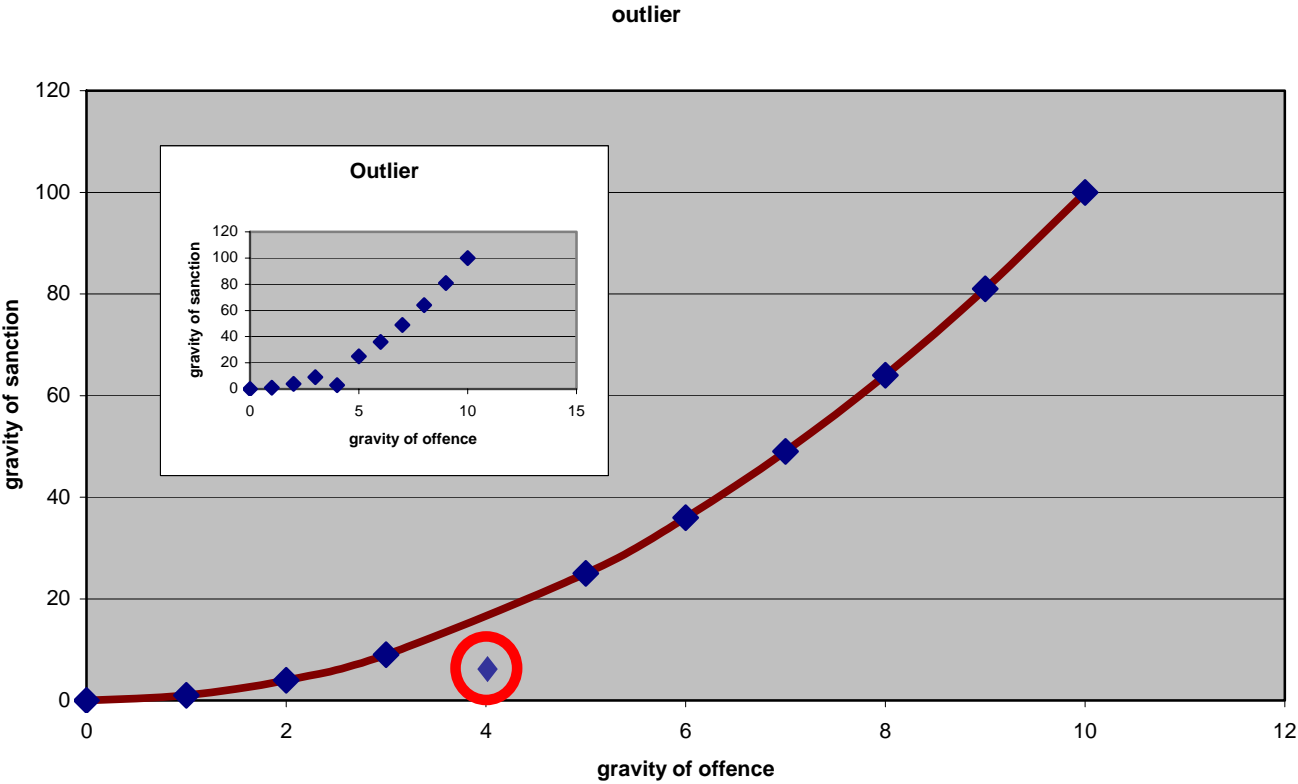
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77 For background, see KAGAN in UCLA Law Review (1993); SYMPOSIUM in University of Colorado Law Review (1993).

78 For a recent overview of the literature, see VITIELLO in University of California at Davis Law Review (2004).

In the foregoing it has implicitly been assumed that the analyst is able to translate his observations into a deterministic rule. If the case is more severe, it is also treated in a predictably severer manner. If the case is tried in one court rather than another, this results in predictably different treatment. Often, such precision is beyond reach. All the analyst can do is collect the evidence and rank it, according to gravity in the first case, and according to jurisdiction in the second. In such instances, basic tools from descriptive statistics may help the analyst define inconsistency.

Let us start with one court, and offences of varying severity. The analyst can collect a sample of gravity-of-the-offence/gravity-of-sanction pairs. He can plot these pairs into a diagram of the kind represented in the interior part of Figure 6.



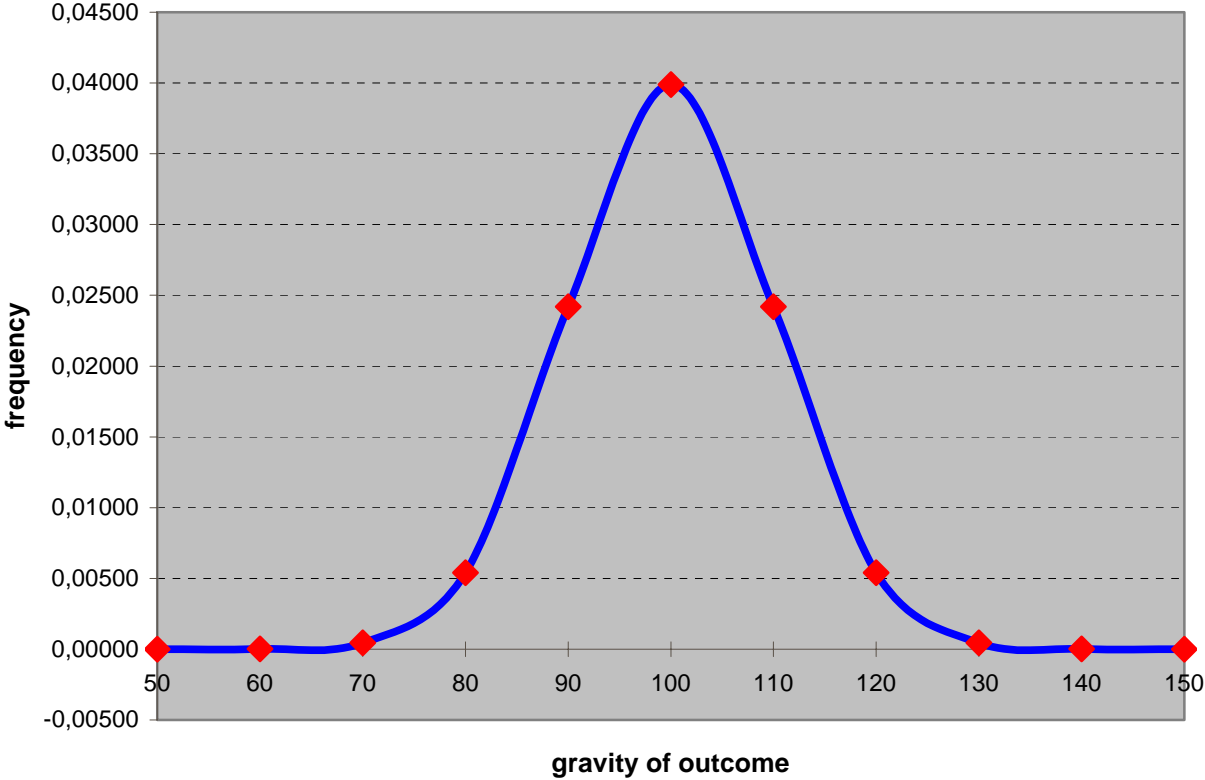
**Figure 6**  
**Inconsistency as Outlier**

The treatment of one case can be said to be inconsistent if all other points can be combined by one cognisable line,<sup>79</sup> whereas the first case appears to be an outlier.<sup>80</sup>

79 A well-known statistical method looks for a linear "regression line". But in principle, the relationship can be described by any precise function. In the example, the relationship is quadratic for all values other than 4. For example, the underlying equation is  $o = g^2$ .

80 Technically, the same statement could also be made in a deterministic world. This is exactly what has been done in the previous footnote. The exponential function holds for all  $g$ , except  $g = 4$ . Inconsistency is then

Statistical tools also permit us to bring multidimensionality back in. This is possible in the following situation. The observer collects evidence about the treatment of an entire sample of cases by one and the same court. These cases are identical with respect to one normative concern. Say they are all cases of shoplifting. But outcomes exhibit variance. Variance in outcomes alone is usually not a normative concern. Courts have been given some discretion in sentencing, since cases may vary in secondary dimensions. The defendant may, for instance, have acted in ruthless ways, or he may have just stolen a trifle. The larger the sample, however, the more the distribution of outcomes should cluster around the most typical outcome for cases of this kind.<sup>81</sup> Technically, the distribution of outcomes should continually approach the normal form. It should thus look like the model depicted in Figure 7.



**Figure 7**  
**Normal Distribution of Outcomes**

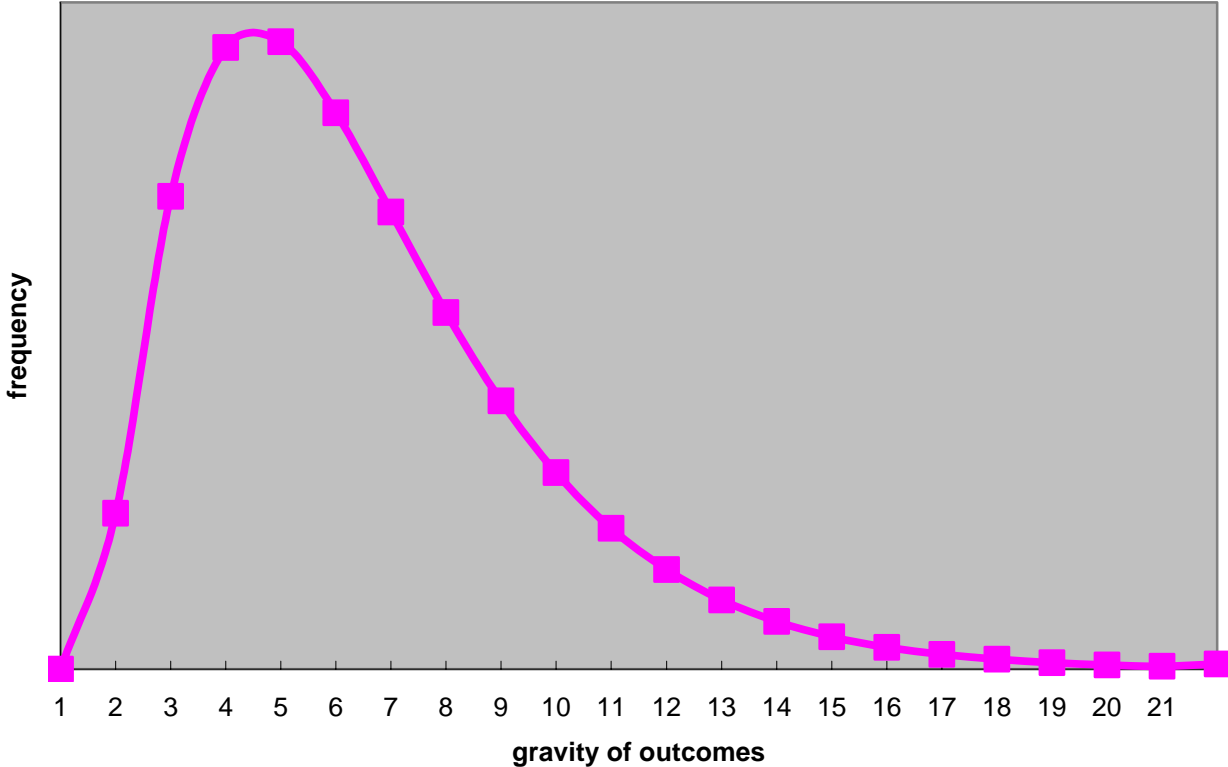
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defined by the fact that the function does not hold for some  $g$ . But the practically more important insight is the possibility to approximate an unknown function by regression analysis.

81 Statisticians call this the central limit theorem, see in greater detail HAYS Statistics (1994) 250-254.

The actual distribution of outcomes can now be compared to this expectation.<sup>82</sup> If it looks like the depiction in Figure 8, this could be taken as evidence that the court is biased. Statisticians call such a distribution skewed. Of course, the sentencing practice of a given court may be predictably skewed. But predictability is not what matters in this context. Rather, skewedness is used as a way of defining the degree of deviation from the normative expectation that accompanies the sentencing discretion. This is how this statistical concept may be used for defining inconsistency.

**Skewed Distribution**



**Figure 8**  
**Skewed Distribution**

Another statistical tool that might be used to define inconsistency is variance. Unskewed distributions may take any of the forms depicted in Figure 9.

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82 Actually, the full statistical apparatus of testing hypotheses could be applied. It would, however, be impossible to present the necessary conceptual tools within the confines of this article. More from *Ibid.* Statistics 267-310.



### Normal Form Different Variance

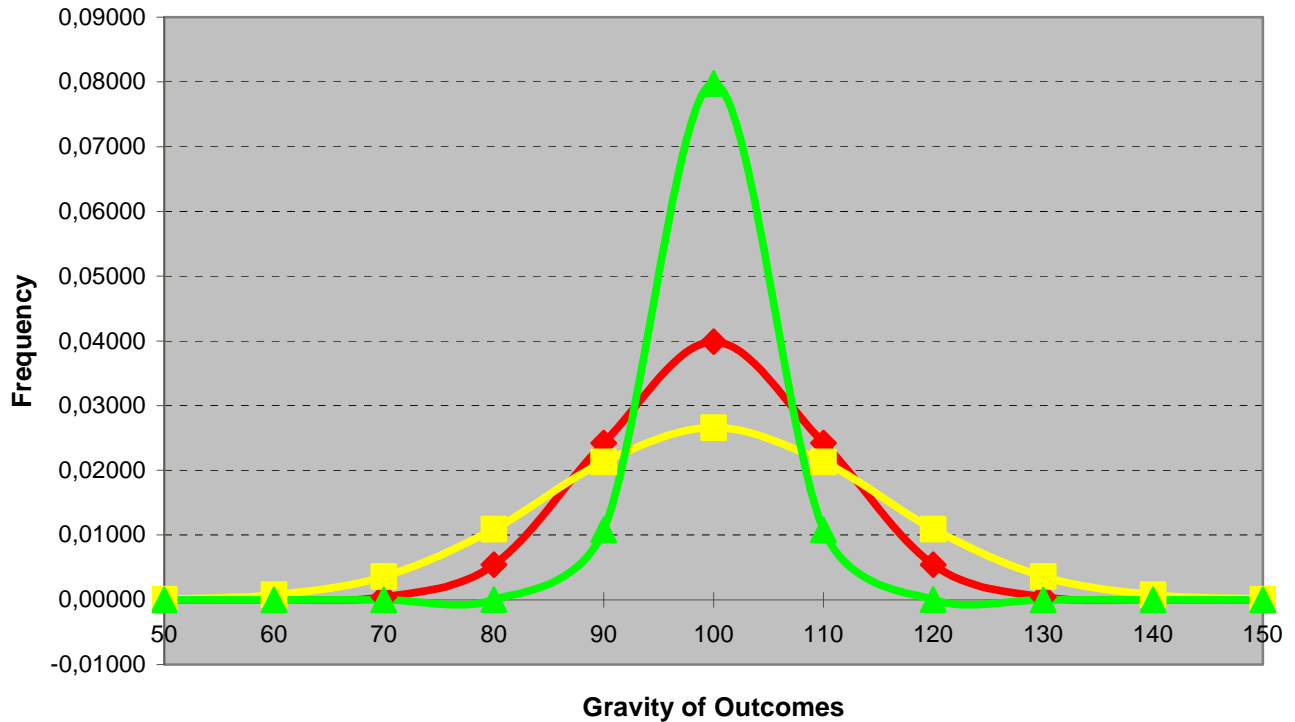


Figure 9  
Different Variance

The flatter the line, the greater the variance. The observer may define any degree of variance in the sentencing practice of one court as inconsistent.<sup>83</sup>

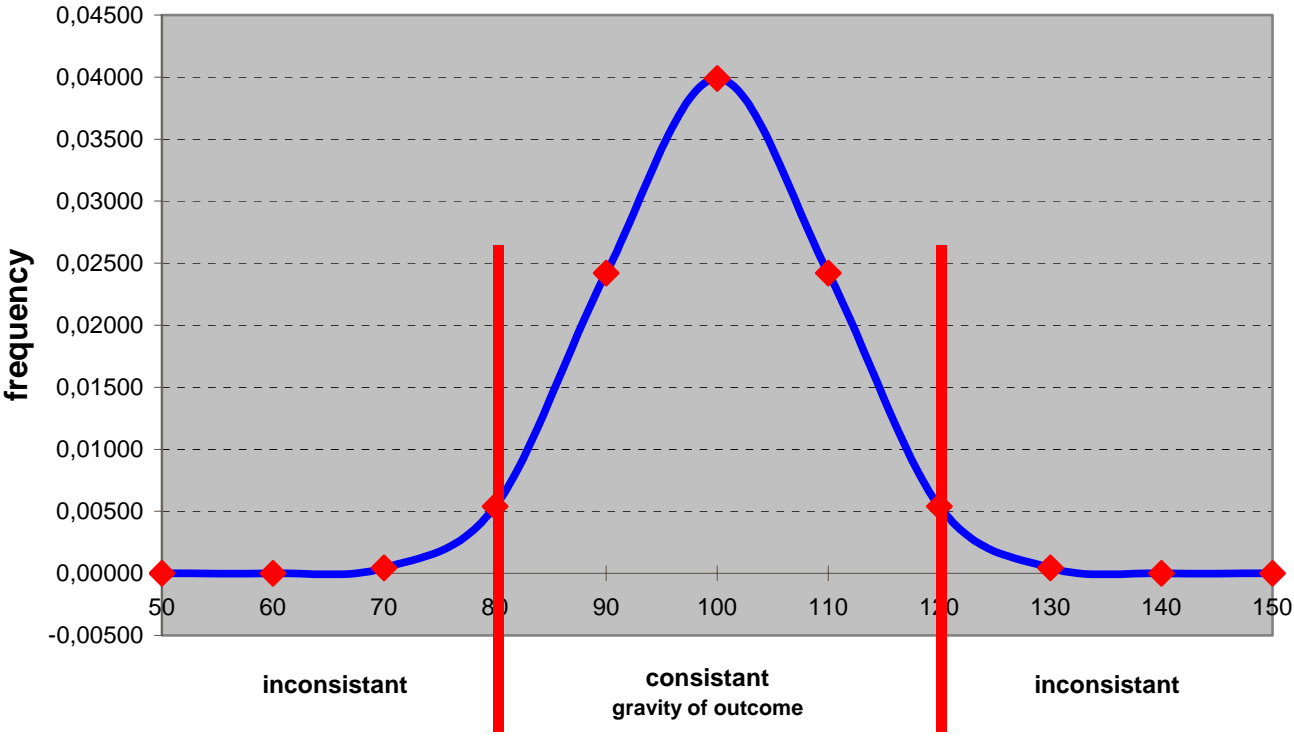
The aforementioned statistical tools can also be used to compare the sentencing practice of one court to the practice of other courts. The main advantage of this method lies in the gauging process. In the deterministic model used above, this gauging process was somewhat arbitrary. The analyst, or the legal policymaker, just picked one court and compared what others did to the practice of this first court. But other options are available. For instance, the analyst could collect data from a larger sample of courts. He could use this sample to generate a benchmark distribution. Inconsistency could then be defined by the degree of deviation from this benchmark. Again, variance and skewedness would matter.

It would then even be possible to define inconsistency in a contrasting manner. If the benchmark distribution exhibited pronounced skewedness, and the practice of one court did not, this court could be seen as inconsistent. Likewise, a court could be inconsistent with a benchmark if variance were smaller. This is not a theoretical case. Lower courts sometimes do not exploit the

83 The larger the sample, the smaller, all others being equal, the variance. In order to generate a useful test, the observer should thus define a relation between sample size and variance.

evidence before them, and simply decide based on an unacceptably small set of facts.<sup>84</sup> A low variance in outcomes might bring this to light.

Once descriptive statistics have been used to generate a benchmark distribution, this benchmark can also be used to assess individual cases, not entire case lines. Figure 10 illustrates this procedure.



**Figure 10**  
**Comparing Individual Decisions to a Benchmark Distribution of Outcomes**

Of course, statistics says nothing about where to draw the line.<sup>85</sup> But statistics teaches legal policy-makers where to look. If the entire area under the curve is normalised to 1, one ought to define the area to the left or to the right of the lines by a percentage that still seems acceptable, say 0.05 on each side. This conceptual tool can be used in two different ways to define inconsistency. One possibility consists of comparing outcomes within one and the same jurisdiction. If one does this, outcomes that are extreme are inconsistent in accord with this definition. A second possibility consists of comparing the decision of individual cases to the benchmark distribution, covering a larger sample of jurisdictions. Normatively, the latter will normally be more appropriate. Decisions are taken to be inconsistent if they fall within the global

84 For evidence, again see DHAMI and AYTUN in *Journal of Behavioral Decision Making* (2001).  
 85 Although statisticians use a similar, and similarly arbitrary, method for defining significance in the testing of hypotheses; more from HAYS *Statistics* (1994) 311-342.

extremes, even if this is not locally extreme, i.e. compared to the ordinary practice of this one court.

So far, the treatment of multidimensionality has been confined to a situation where one normative concern clearly dominates the competing ones. In legal practice, this is often not the case. Several concerns have equal abstract weight. To give only one example: how should one properly translate better deterrence of a serious crime into a smaller or larger likelihood of reintegrating the culprit into society? In a formal way, such situations can be described as follows. In each case, the outcome  $o$  is a function of how the case ranks on the two normative dimensions  $a_i \in A$  and  $b_i \in B$ . Hence

$$o_i = f(a_i, b_i).$$

Sometimes, defining inconsistency is nonetheless straightforward. If  $o_j > o_i$ ,  $a_j > a_i$ , and  $b_i$  is held constant, then it is inconsistent to treat case  $a_j b_i$  such that the outcome is smaller than in case  $a_i b_i$ . Under the following conditions, the criterion can even be extended to cases where both values vary. Let the normative relation between both parameters and the outcome be unidirectional. Thus a larger value of  $a$  and of  $b$  should, all other things being equal, yield a larger  $o$ .<sup>86</sup> If so, the other value need no longer be held constant. It is also inconsistent if  $o_2 < o_1$ , although  $a_2 > a_1$  and  $b_2 > b_1$ .

Going back to the example, one sees, however, why the assessment of inconsistency in cases of multidimensionality tends to be demanding. For often, a second dimension or further normative dimensions are brought into play precisely in the interest of counteracting an inconsistency claim. Typically, the normative concerns are thus not unidirectional. If the court wants to treat the second defendant more severely than the first in an otherwise similar case, it will for instance point to the better prognosis for the reintegration of the first defendant into society. In such situations, the only way out consists of changing the object being evaluated for consistency. One no longer compares outcomes to case features. Rather, one compares different trade-offs between the two competing normative dimensions. In a formal way, this can be done in a plot diagram similar to Figure 6. On the x-axis the relationship  $\frac{a}{b}$  is plotted, on the y-axis, outcome  $o$ . Outliers are likely to be inconsistent: that is, there is a need for additional arguments in a third normative dimension to justify what appears to be an outlier in the two-dimensional perspective.

### *b. Two Rules*

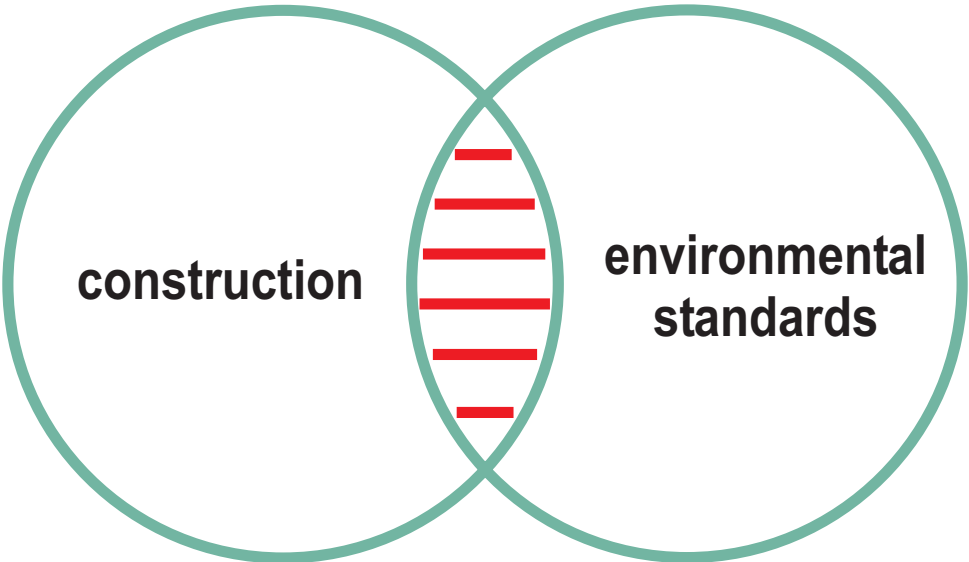
The conceptual tool of the effective rule has helped treat different applications of one and the same rule in the books as if it were two different rules. Therefore, the conceptual machinery for assessing alleged inconsistency between several rules in the books remains the same. The difference lies in how this machinery is put to work.

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86 Formally, the norm wants  $o(a_j b_j) > o(a_j b_i)$ .

The clearest case of inconsistency in the legal order is the following: rule 1 wants the addressee to do some activity, whereas rule 2 wants him to engage in the opposite activity.<sup>87</sup> Occasionally, the legal order does indeed come close to that situation. For instance, under corporate law, a manager must be loyal to the firm. However, under criminal procedure, when under oath, the manager must tell the truth, even if this is to the detriment of the firm.<sup>88</sup> Obviously, the manager cannot fulfil both obligations. In such cases, legal methodology avoids the impasse by searching for *lex specialis*.<sup>89</sup> Actually, this is an exercise in construction. The criminal code is read as follows: managers are obliged to be disloyal to their firm if telling the truth under oath in court requires it. By this reading, the general obligation of loyalty is put aside for one special case. Logically, however, this works the other way round as well. In that perspective, the criminal code would have the following general rule: he who testifies under oath in court must tell the truth. Corporate law would have the following special rule: managers are not allowed to tell the truth in court if this means that they must be disloyal to their firm. Actually, identifying *lex specialis* is thus a methodological tool for saying: in this context the value pursued by *lex specialis* should prevail over the value pursued by *lex generalis*.

An apparently similar situation is much more frequent. Rule 1 allows the addressee to do something. Rule 2 forbids him to do this. German administrative law is rife with examples. The case frequently studied by law students is the following: a firm has received a construction permit for a new factory. But the environmental authority does not allow the plant to be built because it violates some environmental standard. Set theory depicts how this case differs from the previous one.

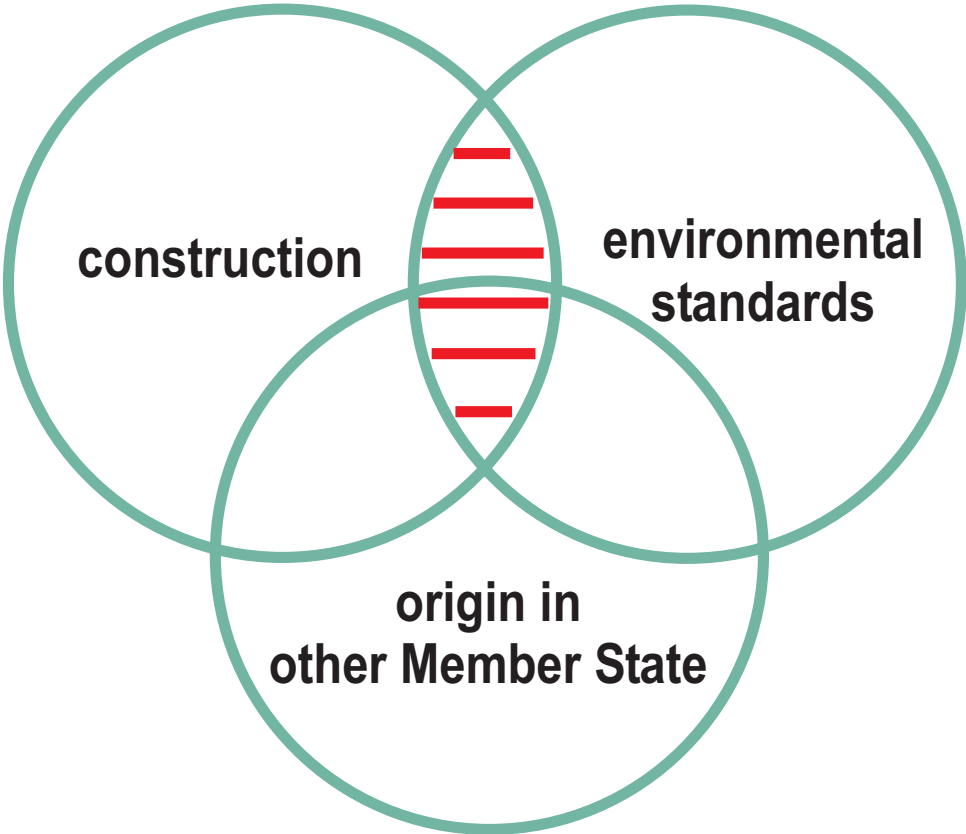


**Figure 11**  
**Cumulative Standards**

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87 Logicians would write these commands as  $p$  and  $\neg p$ .  
 88 Technically speaking, managers do not have a right to refuse testimony.  
 89 Alternatively, one may also search for *lex posterior*.

Here, the law simply applies two standards cumulatively. A somewhat more complicated example demonstrates the metaphorical value of set theory for assessing alleged inconsistency in the law. Under European Community law, member states must in principle allow products originating in other member states access to their markets if they abide by the standards of the country of origin. Products from the member state itself, however, must be in line with both its product standards and its standards for production processes. National producers often complain that this leads to "reverse discrimination".<sup>90</sup>



**Figure 12**  
**Reverse Discrimination**

This could only be called inconsistent if consistency were confined to the shaded area in the middle of the Venn diagram. Again, the inconsistency claim turns out to be normative in the sense that those who bring it forward call for another, narrower norm.<sup>91</sup>

90 For doctrinal background, see e.g. CANNIZZARO in Yearbook of European Law (1997).  
 91 In the technical language of set theory, they claim that the correct norm is  $A \cap B$ , where  $A$  denotes all products that conform with national product standards, and  $B$  all products that have been produced in line with national production standards. European Community law, however, has the rule  $(A \cap B) \cup C$ , where  $C$  contains all products legally produced in another member state.

#### 4. Value in Consistency

In the consequentialist perspective adopted here, consistency is no value *a priori*. The previous section has served two purposes. It has added to the doubts about the absolute value of consistency by demonstrating the plurality of definitional possibilities and the inherently normative character of any consistency claim. The previous section has also showcased the many possible objects for assessing the value and the cost of legal consistency. This section will have a look at the values.

Judges and administrators hold public offices. If looked at from the angle of rational choice theory, they are thus the agents of government, or of the people, for that matter. Principal-agent models want to understand the distortions resulting from an asymmetric distribution of information. The agent knows what the principal would want to know, e.g. how much effort the agent actually displays.<sup>92</sup> The better the principal is able to control the agent, the smaller the distortions. This is why the principal<sup>93</sup> is not only interested in full information, but also in informative signals. A signal is correlated with the information sought, but the correlation is not perfect.<sup>94</sup> Inconsistency can be such a signal.<sup>95</sup> It alerts the principal that the agent might have been biased,<sup>96</sup> careless<sup>97</sup> or incompletely informed.<sup>98</sup>

Signal quality matters, however. The inconsistency taxonomy developed in the previous section helps us understand the contexts in which the signal is more likely to be noisy. It will be more informative if two decisions differ in time, but the deciding authority is held constant. The informational value will be greater if the concrete instance can be compared to the distribution of an entire series of previous cases, rather than to a single second instance. It will be even better if two lines of decisions can be compared to each other. Signal quality increases along these lines since the inevitable variability of the individual context of any one given case becomes less and less important.<sup>99</sup> If controlling judicial agents is a relevant concern, the law should therefore allow for the collection of statistical evidence, and there should be ways to make it legally relevant.<sup>100</sup> The more the type of cases can be standardised, the better this will work. In sentencing criminals for standard crimes, or in landlord and tenant disputes and other similar areas, this might be within reach.

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92 More from SCHWEIZER Vertragstheorie (1999).

93 And if both parties are fully rational, also the agent, since the principal anticipates the future information problem and pays a smaller wage.

94 Formally, the correlation is somewhere in the interval [-1,1], and it is smaller, the closer it is to 0.

95 THOMPSON in Southern California Law Review (1986) 426 and 432.

96 Ibid. in 429; COONS in California Law Review (1987) 61; know that the term bias is used here in a colloquial way. It may, but need not result from what, in the psychological literature, is called a bias; on this, see KAHNEMAN, SLOVIC and TVERSKY Judgement under Uncertainty (1982); a similar point is made by *Bundesverfassungsgericht (Kammer)* 7.11.2001, Neue Juristische Wochenschrift 2002, 2091, 2092.

97 THOMPSON in Southern California Law Review (1986) 430.

98 Ibid. in 431.

99 Statistician speak of a large numbers effect, and relate it back to the central limit theorem; see again note 81.

100 An illustrative, albeit frightening, example is provided by DHAMI and AYTUN in Journal of Behavioral Decision Making (2001).

The control argument can also be made in terms of democracy.<sup>101</sup> The less predictable the interpretation of a statutory provision by the authorities entrusted with its application, the less state authority is backed by the will of the electorate. Legitimacy must rest on the acceptability of the output to the addressees. The demands on output legitimacy increase, because input legitimacy is weakened.<sup>102</sup> Actually, however, it is not the inconsistency that creates the legitimacy problem. Rather, the problem results from the gap between the rule in the books and the effective rule. The problem would be the same if all authorities responsible for applying a statutory rule were fully consistent in their applications, but clearly at variance with what the legislator had in mind. Also, from the outset, both the control and the democracy argument can only be applied to rule application, not to rule generation. This does not preclude them from being applied where there is allegedly inconsistency between two rules in the books. But the inconsistency must then result from the way these two rules are interpreted, i.e. from how they are translated into effective rules.

Consistency can make the law more technically efficient. This is trivially so if one and the same effective rule is applied to a line of sufficiently similar cases. For then decision cost is confined to that of assessing the degree of similarity. It does not decide each case from scratch.<sup>103</sup> Actually, this effect is derived from the fact that a consistent effective rule is also simpler than an inconsistent one.<sup>104</sup> By extension, the argument can also be applied if the cases can be ranked with respect to one well-defined normative criterion. If so, decision cost can be minimised so long as the difference in degree translates in a predictable way to a difference in outcome.<sup>105</sup>

Technical efficiency can also be used to argue in favour of consistency in a more elaborate way. The lower the consistency of the law in a given area, the less its addressees are able to predict its effect.<sup>106</sup> The lower the predictability, the less the addressees are able to anticipate later legal interventions, and to prevent them by changing their behaviour in the first place.<sup>107</sup> The deterrence value of criminal sanctions illustrates this.<sup>108</sup> In a rational choice perspective, the uncertainty implies that addressees must replace the knowledge lacking about future effective rules with subjective expectations.<sup>109</sup> This has two disadvantages for the law. Subjective expectations may simply be wrong. But even if they are basically right, rational individuals will

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101 Cf. BRILMAYER in *Southern California Law Review* (1986) 374; PETERS in *Yale Law Journal* (1995) 2039; see also FELIX *Einheit* (1998) 177 “Die Einheit der Rechtsordnung als Konsequenz der Bindung aller staatlichen Gewalt an die Verfassung”.

102 The distinction between input and output legitimacy has been developed by EASTON *Systems Analysis* (1965); see also SCHARPF *Governing in Europe* (1999).

103 COONS in *California Law Review* (1987) 61; PETERS in *Yale Law Journal* (1995) 2039.

104 On the virtue of simplicity in law, see EPSTEIN *Simple Rules* (1995) chapter 1.

105 For an exposition of the basic conceptual tools, see 3a above on statistical scale measures.

106 COONS in *California Law Review* (1987) 61; PETERS in *Yale Law Journal* (1995) 2039. Actually, this effect again results from the fact that a more consistent effective rule is also simpler, this time for the addressees.

107 On predictability see ENGEL *Predictability* (2005).

108 COONS in *California Law Review* (1987) 61.

109 For a basic treatment on this, see SAVAGE *Foundations* (1954). The more knowledge they are able to uncover over time, the more they will update these priors in a Bayesian way; see BAYES in *Philosophical Transactions of the Royal Society* (1738).

discount the estimate of future sanctions by an uncertainty factor.<sup>110</sup> They will therefore give more weight to other determinants of their behaviour. In a behaviourally informed perspective, the likely effect of uncertainty about later legal decisions is even stronger. For individuals, when faced with uncertainty, tend to rely on fairly simple decision rules.<sup>111</sup> Risks that are hard to assess tend to be ignored altogether.<sup>112</sup>

Predictability can also be regarded as an independent value of law. The less predictable the effect of a legal rule is, the more its addressees will feel they have been handled arbitrarily if it is applied. There is thus a link between predictability and the rule of law.<sup>113</sup> Specifically, addressees may feel that their legitimate expectations are violated if the law is applied inconsistently.<sup>114</sup> There is also behavioural evidence of a strong desire for clarity.<sup>115</sup> Inconsistent law is regarded as unfair<sup>116</sup> and hence illegitimate.<sup>117</sup> It makes reactance among addressees likely.<sup>118</sup>

Uncertainty cannot only be generated by inconsistency in the law. Often, a legal rule is itself a response to an uncertain environment. It is meant to create artificial certainty where there was no certainty in the first place. Public registers of land provide one illustration of this. Where they exist, there is no need for the buyer to insure against the risk that the seller might not be the owner.<sup>119</sup> Since the law allows the buyer to hold the entry in the register against the true owner, it suffices to check whether the seller is registered. Thereby, buying land becomes cheaper. All other things being equal, sellers may ask for a higher price. In such situations, the socially beneficial effect of the law hinges on the consistency in its application. Specifically, the law must be considerably more predictable than the environment if it is to be effective.

Again, from a behavioural perspective, the perceived difference in uncertainty must be even stronger. There is even a piece of field evidence in favour of this claim. Probabilistic insurance is almost impossible to sell.<sup>120</sup> Such insurance does not make the insured whole, regardless of what happens. Rather he pays a price for replacing the original lottery with a more favourable one. Rational actors should be willing to pay for this offer whenever the expected value of the new lottery is larger than the expected value of the original lottery, plus the premium. Were using the

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110 Technically speaking: a rational individual not only estimates the most likely effective rule. Rather he estimates the distribution function of governmental decisions, and maximises utility, given this estimated distribution. In statistical terms: the individual does not only take the estimated median into account.

111 For a basic treatment, see GIGERENZER, TODD and ABC RESEARCH GROUP Simple Heuristics (1999).

112 Details are complicated and beyond the scope of this paper. For a summary reference, see TVERSKY and KAHNEMAN in Science (1974).

113 FELIX Einheit (1998) 192.

114 The point is made by *Bundesverfassungsgericht (Kammer)* 7.11.2001, Neue Juristische Wochenschrift 2002, 2091, 2092.

115 More from SCHLICHT Custom (1998).

116 From the abundant fairness research, see only FEHR and SCHMIDT Fairness and Reciprocity (2000).

117 COONS in California Law Review (1987) 61; PETERS in Yale Law Journal (1995) 2039 and 2041.

118 Basic BREHM Reactance (1966); BREHM and BREHM Psychological Reactance (1981); see also DONNELL, THOMAS and BUBOLTZ in Journal of Social Psychology (2001).

119 This is, for instance, common in England.

120 NOLL and KRIER in Sunstein (2000) 335.



public register a costly offer, not an obligation, the parallel to probabilistic insurance would be perfect.

The uncertainty of environments is an ontological feature of them. Complexity is not. If the individual had unlimited time and resources, in principle, he could sort things out before taking action.<sup>121</sup> In practice, however, this is often not the case. Moreover, complexity quickly becomes intractable for untrained individuals. They are overwhelmed by the cognitive demands. Chess is a good illustration. Any possible move is determined *ex ante*. Nonetheless, neither chess masters nor chess computers compute all the possibilities.<sup>122</sup> Rather, they rely on different forms of pattern recognition.<sup>123</sup> For similar reasons, the simplifying force of law also matters in complex environments. In such environments, consistency of the law therefore has the same value as in uncertain environments. The *numerus clausus* in corporate law is one illustration. Traditionally, the freedom to write corporate charters was severely limited. The founders of the corporation were allowed to choose only a few parameters, like non-voting versus voting shares. This rigidity was meant to make it easy for trading partners to assess the risks inherent in the type of corporate charter.<sup>124</sup>

Finally, there are reasons internal to the law that call for consistency. Permanently striving for greater consistency in the body of law is a prime force in the evolution of law. Specifically, this allows the law to develop even in the absence of new experiences. What has been understood with respect to one type of case can be extended to another class of cases. Testing how far a new argument carries is a way of progressing by thought experiment. Only if the law is thought to be a corpus does doctrine have an autonomous task. The striving for consistency allows for internal rationalisation, as opposed to mere attempts to capture and match the rationality of the environment.

## 5. Value in Accepting Inconsistency

Inconsistency in the law is of no value as such.<sup>125</sup> Otherwise, the legislator would have to replace the courts and the administrative authorities with computers that treat people at random. But being open to some inconsistency might be preferable to strictly seeing to consistency. There are a fairly impressive list of reasons for this.

A first set of reasons have to do with good governance. Sometimes, the law can match reality better if it allows for some doctrinal inconsistency. This is obvious if reality itself is inconsistent. There is reason to think that even nature is not fully consistent.<sup>126</sup> The double nature of light, as a

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121 This is, however, no longer true, if complexity leads to the emergence of new phenomena at a higher level. In that case, there is also ontological uncertainty.

122 In statistical jargon, the chess problem is NP-hard.

123 For an impressive account for individuals, see GROOT Chess (1965).

124 Meanwhile, the right to choose the jurisdiction in which to register has become firmly established. This has considerably increased the risk for trading partners.

125 THOMPSON in Southern California Law Review (1986) 425.

126 More from CARTWRIGHT in Daston and Engel (2005).

corpuscule and as a wave, is one well-known illustration. More important for the law is the nature of social reality. For whatever the law achieves, it must achieve it by having an impact on behaviour. Even if the ultimate aim is to solve a problem originating in nature, the only remedy is to change behaviour. For instance, the law cannot directly change the frequent flooding of a region. But it may ask local authorities to build dams, or people to settle in safer places.

Strong constructivism has been refuted in an earlier section of this paper.<sup>127</sup> But it is hard to deny that social reality has some constructivist components. Society is not just out there. What society is and what people do within it largely depend on what they think society is. In assessing the reality of society, it is impossible to fully disentangle the ontological and the epistemic. Now, not everybody thinks the same way. There are methodological individualists and methodological holists. There are those who mainly see society as a continuous communication between its members. There are others who basically see society as a well-ordered organisation. And there are those who see society as nothing but the emergent effect of individuals exercising their freedom.<sup>128</sup> Any abstract legal rule therefore targets a phenomenon that is several inconsistent things at one time. If the legal rule is applied in a fully consistent way, it will inevitably overlook important aspects of its inconsistent object. By implication, the law can legitimately try to capture the inconsistency of reality by a set of rules, each of which is only consistent with one aspect of this reality.

Sometimes, no policy is best policy. If a stupid legal rule fails, society is better off. But often, there is indeed a need for central intervention. Take the protection of the environment. Here, even liberal-minded economists agree that markets fail, and that government intervention may be good for society. But also in such situations, only effective interventions are worthwhile. The risk that the best legal intentions for social betterment will fail is to be taken seriously. One reason for failure is an excessive desire for consistency.

The common law principle of *stare decisis* may serve as an illustration. In principle, if courts can make new law, it is not advisable to permit every court to do so at any given point. But in the common law system there is no institutionalised waiting period. If a court has to decide a case that is truly new, it cannot send the parties home until the legal order has acquired enough experience with this type of problem. The first case may, however, not be typical for a class of cases. Also, the first court may be misled by the desire to help a party, although the rule it generates for the purpose is inappropriate for average cases. Hard cases make bad law, as Oliver Wendell Holmes put it. If later experience reveals that the original rule is inappropriate in most other cases, there should be ways to make new law for these cases, even if this creates inconsistency. Actually, this is what common lawyers achieve by distinguishing. By way of construction, they add so many additional factors to the original rule that it becomes inapplicable in ordinary cases.

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127 See 2 above.

128 The already mentioned cultural theory has much richer schemas for these three views of the world. It dubs them egalitarian, hierarchical and individualistic respectively; see again THOMPSON, ELLIS and WILDAVSKY Cultural Theory (1990).

The Catholic church holds to the following rule: preach the demands of the Bible from the pulpit unswervingly, but practice forgivingness in the confessional. The law is often in the same situation. It wants to buttress public commitment to a legal norm. But it has to deal with the weaknesses of some of its addressees. Using the full sanctioning apparatus against occasional deviations may seem unduly harsh. It can even be counter-productive if the general willingness of these addressees to abide by the law erodes in consequence.<sup>129</sup>

More generally, some inconsistency in the application of an abstract rule can allow the heterogeneity of addressees to be coped with. It is a truism: men are not all equal. In a stylised way, legal rules typically meet with three classes of addressees: one (normally large) group that follows the rules unswervingly, without ever becoming the target of the sanctioning apparatus; a second (hopefully small) group that breaks the law, irrespective of any monitoring or sanctioning; and a third group, the behaviour of which is sensitive to the activities of the legal apparatus.<sup>130</sup> From a governance perspective, the law would want to concentrate all enforcement effort on this last group. In practice, this will not always be feasible since the first group may not be stable at the margin. But the better the legal apparatus is at keeping the choice of targets confidential, the more selective enforcement will save enforcement cost. This, however, can be seen as inconsistent.

Sometimes, heterogeneity presents the law with an even graver problem. Blood donations are an illustration. In most countries, this is done free of charge by volunteers. Often, hospitals have less blood than they desire. A natural solution seems to consist of attracting more blood donors by offering payment. Yet the result can be devastating. Payment does indeed attract persons who never gave blood before. But many of those who originally were willing to provide blood as a service to society see it as unfair if others now are paid for doing the same thing. Worse still, quite a few are not willing to continue donating blood, even if they are now paid. They are outraged by the idea of selling bodily products.<sup>131</sup> This phenomenon has been dubbed crowding out:<sup>132</sup> the initial willingness to ignore one's immediate benefit is eroded by interventions that change incentives.<sup>133</sup> Policies that deliberately treat some addressees differently than others can be a way out. This works even better if the law has recourse to subterfuge,<sup>134</sup> i.e. if the differential treatment goes unnoticed by most addressees. One possible way of doing this consists of using talk, decision and action as three separate action parameters.<sup>135</sup>

Heterogeneity is not confined to addressees. It can also originate in different classes of cases. Cases heard by the German constitutional court provide an illustration. The German constitution protects the right of employees to organise in unions, and the right of unions to represent their

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129 Not all lawyers feel comfortable with this policy, however. For a critical voice, see HERMES and WIELAND Duldung (1988).

130 KRÜGER, in Hof and Lübke-Wolff (1999), illustrates the point with data on drunk driving.

131 FREY Not for Money (1997) 82-85; TITMUSS Gift Relationship (1970).

132 FREY Not for Money (1997) 82-85.

133 This is the central theme of Ibid. ; see also FREY and JEGEN in Journal of Economic Surveys (2001).

134 More from HÉRITIER Deadlock (1999).

135 BRUNSSON Hypocrisy (1989).

members vis-à-vis their employers. The provision is meant to give employees a stronger negotiation position with employers.<sup>136</sup> As a result, labour is more costly in Germany than in most other states of the world. In shipping, the cost differential became so pronounced that by 1990 there was hardly any ship left under German flag. The legislator reacted by setting up a second register for ships. If a ship was registered here, most of German labour law was not applicable. The competent union challenged this statute in the constitutional court. It lost the case. The court allowed the legislator to react to the extreme systems competition in the shipping sector.<sup>137</sup> Thereby, the constitutional rule is applied inconsistently to different industries.

At whatever level one starts to analyse it, reality can be shown to be unendingly complex. The amount of genetic information in the genome, the number of nerve cells in the human brain or the size of the human population on the globe should suffice as evidence. The true question for the law is therefore not how complex reality actually is. What really matters is how much complexity the law is able to handle. Systems theory makes a powerful point about this. Society can handle exponentially more complexity if it splits up into subsystems with partial autonomy. In the interest of increasing the problem-solving capacity of the whole system, the idea of one central master plan is given up. Rather, each subsystem, like the economy, the law or science, is allowed to decide autonomously which signals originating from other subsystems they are willing to take into account.<sup>138</sup> The idea can be transposed to the law as well. If subfields of law are allowed to lead a partly independent life, this can increase the problem-solving capacity of the law.

Social security is one illustration from German law. It is not difficult to demonstrate that, under standard definitions, this is a subfield of administrative law. Yet in many important respects, practice in social security law violates general principles of administrative law. For instance, there are many ways of making new laws by negotiation between organised interest groups, something that would traditionally have been unacceptable in other areas.<sup>139</sup> This partial autonomy has been made possible since scientific discourse has shown little interest in this field of law, and since social security cases are heard by specialised courts. Many administrative lawyers believe that the autonomy has resulted in lower quality law. Social security lawyers, however, tend to be opposed to suggestions by administrative lawyers, viewing them as inappropriate for their field.

If one accepts the idea that the law will never fully capture the complexity of reality, a normative point from evolutionary theorising is to be taken seriously. In an uncertain environment, an organism should avoid overfitting. This term characterises a behavioural disposition so well adapted to the reality in the training period that it fails miserably if the context changes even slightly.<sup>140</sup> The same risk is inherent in any response to the environment that is selective in the

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136 More (and partly critical) from ENGEL in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2000).

137 *Bundesverfassungsgericht* 01/10/1995, *Entscheidungen des Bundesverfassungsgerichts* 92, 26.

138 For an easy readable précis, see LUHMANN *Ökologische Kommunikation* (1986).

139 More from AXER *Normsetzung in der Sozialversicherung* (2000).

140 WEIGEND in Mozer (1994).

initial stages. The elements on which the behavioural disposition focuses may be the best choice for the training period. But later, other elements may become more important. Any attempt to make the body of law consistent is bound to be such a temporary reaction. It can only take those elements of natural and social reality into account to which the law has chosen to be attentive so far. The greater the premium on internal consistency, the less mobile the law is in its reaction to elements from reality that may become more important later.

German legal history provides an illustration. After World War I, the German economy underwent hyperinflation. Parliament nonetheless refused to pass a statute that would automatically adapt money debt. Those who stood to gain from getting rid of almost all their debt were able to block the motion. Initially, German courts therefore continued to enforce contracts, even if the effective price of the merchandise had become minuscule. After a while, however, the Supreme Court gave contracting parties the right to refuse to fulfil contracts if their partners insisted on the original price. This was inconsistent with sound previous policy in many ways. One and the same contract was interpreted differently before and after inflation. The courts broke with privity of contract, and with a traditional policy of non-interference in legislative (non-)action. But the new jurisprudence was obviously adaptive to unprecedented degrees of inflation.<sup>141</sup>

The more complex the reality to which the law reacts, the less likely it is that the law will immediately find the best solution. It needs time to try out different solutions, and to define the best scope of application for each of them. This inevitably means inconsistency, while the law is still learning.<sup>142</sup> The inconsistency becomes patent if the legislator openly engages in experiments.<sup>143</sup> But experimental statutes are risky. Typically, the more contentious the issue, the narrower the political window of opportunity.<sup>144</sup> If the winning coalition intends to revisit the issue a year or two later, after more experience has been gained, at that later time resistance may be insurmountable. This can make it advisable to entrust experimentation to rule application, rather than rule generation. Put differently, some interim inconsistency in applying a vague statutory rule may be the path to better law in the long run.

In the cases just discussed, the legislator introduces experimentation on purpose. This may not be enough for the law to adapt to changed circumstances and to different normative views. The law is therefore well advised to be more generally prepared for its own evolution. Not being overly consistent helps in this respect. The parallel to biodiversity is telling. Political interventions try to maintain the richness of the genetic pool. This is done in the interest of preserving material for recombination for future generations. The idea has been transposed to "cultural biodiversity", i.e.

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141 More from NÖRR Mühlsteine (1988).

142 Cf. BRILMAYER, in *Southern California Law Review* (1986) 378, points to the evolutionary advantage of indeterminacy.

143 COONS in *California Law Review* (1987) 108 and 111; more generally on experimental legislation DORF and SABEL in *Columbia Law Review* (1998); LIEBMAN and SABEL in *New York University Journal of Law and Social Change* (2004).

144 HÉRITIER in *Politische Vierteljahresschrift* (1993) 18.

to the preservation of minority cultures.<sup>145</sup> It holds for the law as well. The example of German social security law again helps make the point. German administrative law has grown out of a culture that almost exclusively looked at the rule of law. This approach fit well to police law, which served as the main field of reference for the evolution of this field of law. But the more the administration is entrusted with engineering society, the more rule of law and effective governance must be balanced. Negotiated rules are therefore no longer exceptional.<sup>146</sup> Today, general administrative law can learn from the decades of experience social security law has had with that tool.<sup>147</sup>

The legal order is like a Gothic cathedral: it is permanently under construction. Reality changes, as do normative convictions. Moreover graphic cases point the law to problems that have been overlooked and to better solutions. However, any legal change creates a transitory problem.<sup>148</sup> There are always some who have taken dispositions that merit protection. If this is respected by the law, the solution to the transitory problem creates inconsistency in the treatment of old and new cases.

References to fundamental normative relativity have already been used as an argument against a deontological stance on consistency.<sup>149</sup> Since there is no conceptual way to prove that one normative starting point is better than the other, it would be a mistake for the law to consistently pursue just one of them.<sup>150</sup> It would be equally wrong to consistently apply just one methodology for understanding the reality to which the law reacts. Not so rarely, law and economics is guilty on both accounts. Authors writing in this tradition are tempted to view allocative efficiency as the exclusive norm, and methodological individualism as the exclusive conceptual tool.

Likewise, the law should not start arguing consistently from the vantage point of just one of the numerous possible construction of reality. Cultural theory does a convincing job of demonstrating that all fundamental normative views implicitly entail ontological beliefs. Individualists tend to see the world as a wonderfully forgiving place. By the proverbial invisible hand, individual egoism results in social welfare. Egalitarians start from the opposing assumption. In their view of the world, the risk of decay is pervasive. There is only a chance to prevent catastrophe if everyone makes their best efforts. Hierarchists are not as sanguine as individualists, and not as pessimistic as egalitarians. They see a serious risk of collapse, but think that, if experts are allowed to rule the world, things will remain under control.<sup>151</sup> None of these beliefs can be proven to be right or wrong. Each of them captures a true feature of reality, at least sometimes. Even if the political will of the day is to primarily build on one of these beliefs, the

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145 DAVID in Engel and Keller (2000) 69 f.

146 Negotiated law has become a hot topic in administrative law; see only DI FABIO in VVDStRL (1997); SCHMIDT-PREUß in VVDStRL (1997).

147 Willingness to learn, however, is not yet pronounced.

148 For a basic treatment, see HEY Steuerplanungssicherheit (2002).

149 See 2 above.

150 COONS in California Law Review (1987) 111; see also KUTZ in Yale Law Journal (1994) 999: legal indeterminacy is "necessary to the flourishing of a rational and reflective legal culture".

151 See again THOMPSON, ELLIS and WILDAVSKY Cultural Theory (1990).

law is well advised to preserve doctrinal loopholes through which the competing beliefs can re-enter doctrine.<sup>152</sup>

The next consideration also figured into the earlier arguments against a deontological view. In modern constitutional democracies, the legislator has a mandate to make law, or at least to change it. As repeatedly spelt out, for parliament, making new law is regulatory politics. If the legal system nonetheless insists on a high level of consistency, this can only mean one of two things. Either the judiciary wants some means for quickly diverting from the legislator's will. Or it wants a reason for setting new statutory rules aside, claiming that they are inconsistent with existing law and therefore either void or in need of extremely narrow interpretation. Put differently, insisting on consistency inhibits policy-making. This is why the German constitutional court has not wanted to impose an obligation for the "consistent use of a regulatory model" on legislation in the area of broadcasting.<sup>153</sup>

If the legal system takes the idea of the separation of powers seriously, it may not expect the political system to produce legally flawless text. The political job is different. Here, a compromise between conflicting beliefs must be forged, and organised interests may legitimately engage in power play. Once the rule is in force, however, it is the task of the legal system to faithfully integrate it into the legal order. This task may indeed imply that the new rule is to be made more consistent with the body of law. But consistency is no value as such in this. And it may not be used as a pretext for usurping the legislator's task of striking a balance between competing political interests.<sup>154</sup>

Another, related value that competes with the internal consistency of the law is citizen participation.<sup>155</sup> This participation may occur in rule generation and in rule application. If citizens have had a say on the contents of rules, implementation becomes much easier.<sup>156</sup> The expected implementation deficit is much smaller.<sup>157</sup> Citizens care about process, not only about outcome.<sup>158</sup> The effect is even more pronounced in rule application. Trust in the police almost entirely hinges upon how one is treated in a casualty, say after burglars have intruded one's house. This in turn is the best predictor for future law abiding.<sup>159</sup> By giving citizens a role in the legal system, it is possible to enhance the general acceptance of the legal system. It also provides the citizenry with an opportunity to experience the state as truly emanating from the people.<sup>160</sup>

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152 Cf. KUTZ in Yale Law Journal (1994) 1004: "the legal system is healthiest when there is conflict and dissent among its claims"; see also KUTZ in Yale Law Journal (1994) 999.

153 *Bundesverfassungsgericht* 02/05/1991, *Entscheidungen des Bundesverfassungsgerichts* 83, 238, 239 - WDR; see, however, *Bundesverfassungsgericht* 05/07/1998, *Entscheidungen des Bundesverfassungsgerichts* 98, 106 – Kommunale Verpackungssteuer.

154 More from ENGEL in Engel and Héritier (2003b).

155 COONS in California Law Review (1987) 108 and 111.

156 FREY and OBERHOLZER-GEE in Frey (1999).

157 The term has been coined by WINTER Vollzugsdefizit (1975); see also MAYNTZ Implementation (1980); WINDHOFF-HÉRITIER Politikimplementation (1980).

158 In the economic literature, for this the term, process utility has become popular; see e.g. FREY, BENZ and STUTZER in Journal of Institutional and Theoretical Economics (2004).

159 TYLER Why People Obey the Law (1990).

160 For background, see SMEND in Smend (1968).

These are the key ideas behind the American jury.<sup>161</sup> But any form of citizen participation is likely to create more inconsistency in the body of law than a legal system fully handled by professionals.

*Summum ius, summa iniuria.* This ancient wisdom from Roman law applies to the excessive striving for internal consistency. The already mentioned treatment of money debt in hyperinflation is a case in point. Rule application has always been open to the unexpected, and to the patently unjust in particular. Sometimes, consistency is morally undesirable.<sup>162</sup>

The last point is best illustrated by a rule from public international law. According to article 33 of the United Nations Charter, states are obliged to prevent war by a number of means listed in the provision. Applying public international law is one of these means. But it is only a subsidiary means, ranking low. National constitutions tend to have more trust in the sovereign powers of the state. But here as well, preventing or dissolving conflict is not necessarily the same as applying the law in force.<sup>163</sup> Courts and administrative authorities must properly balance these two goals, and they often rightly think it is more important to keep a conflict under control.<sup>164</sup> Not so rarely, the same intention is behind the introduction of new laws. For instance, many lawyers explain the constitutional right to strike as a tool for preventing greater losses for society resulting from uncontrolled employee riot.

## 6. Soft Consistency

Consistency is thus of value for the law. But this value is not absolute. If one wants a single term for the main result of this paper, the following may well suffice: the appropriate goal is soft consistency.<sup>165</sup> This notion, however, must be operationalised. This can be done by using the logic of the principle of proportionality. Consistency is, in principle, desirable for the law. But there are reasons that call for accepting some inconsistency in some situations. Soft consistency thus calls for a balancing exercise. This balancing should, however, not be done in the abstract. It would therefore be inappropriate to compare one reason in favour of consistency, or all of them for that matter, to the concrete reasons against consistency in particular cases. Rather, the concrete consistency problem must be investigated. This is what the taxonomy of consistency in the law has been developed for. Not all of these dimensions of consistency are present in every case. More importantly, not all of them must be sacrificed if one of the reasons for ignoring consistency prevails. There is thus often room not only for balancing values, but also for balanced solutions.

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161 COONS in *California Law Review* (1987) 108.

162 KRESS in *California Law Review* (1984) 371.

163 Cf. BRILMAYER in *Southern California Law Review* (1986) 368: "law is, perhaps, just a process for resolving disputes".

164 More on conflict as an independent concern from ENGEL in *Journal of Institutional and Theoretical Economics* (2003a).

165 Not surprisingly, the results are thus the same as those on assessing the value in predictability. There too, only soft, not hard, predictability is desirable, see ENGEL *Predictability* (2005) C III 9 d.



## 7. Design Implications

Defining the right balance between consistency and competing normative concerns is one thing; bringing this balance about is another. It must eventually be achieved by balanced decisions in parliament, in the courts and by the administrative authorities. But proactively designing the institutional framework can make appropriately balanced rules more likely. Since the overall goal is the right balance, there will simultaneously be design for consistency and design for inconsistency.

Although it is not normally discussed under this heading, design for consistency is well established.<sup>166</sup> If a case is being heard by one court, it cannot simultaneously be brought before another. In the US, the double jeopardy clause of the 5th amendment has this effect.<sup>167</sup> If a case has been decided by one court, *res iudicata* usually prevents it from being brought to that court again.<sup>168</sup> If two courts have a say on one and the same case, the legal order may establish a mechanism for avoiding conflicting decisions as a precaution. The American *Erie* doctrine can be brought under this rubric. It is concerned with cases that could alternatively be brought before a state or a federal court. According to this doctrine, federal courts are prevented from disregarding state common law in their decision-making.<sup>169</sup> Under the repeatedly mentioned rule of *stare decisis*, the second court is in principle bound by new judge-made law, originating in earlier decisions by other courts. The judicial hierarchy implies that superior courts can harmonise different interpretations of one and the same rule in the books of lower courts. Joint senates in the German Supreme Court are the place for reconciling interpretations that diverge across senates.

Design for inconsistency can consist of two things: institutions that generate inconsistency, and institutions that limit the harmful effects of inconsistency that has been accepted for different reasons. The former set of institutions are the same institutional openings for inconsistency listed above,<sup>170</sup> at least if the designer has willingly taken the ensuing inconsistency into account.

In a stylised way, the latter set of institutions can be placed in two subsets. The first subset comprises interventions that actually reduce the detrimental effects of inconsistency. This is done causally if the type or degree of inconsistency is changed. The principle of equality guaranteed by the German constitution can have this effect. As mentioned previously, it is not an absolute prohibition of inequality. Rather, instances of inequality must be backed by constitutionally acceptable justification. On these grounds, the attacked statutory provision sometimes is not struck down. Rather, the constitutional court only finds excessive inequality in some instances in which the provision is applied.

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166 BRILMAYER, in *Southern California Law Review* (1986) 371-373, speaks of “synchronisation constraints”.

167 *Ibid.* in 372.

168 *Ibid.* in SOMETHING MISSING; for the exception when the issue is protracted in time, see 3 a above.

169 *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118 (1938), cited after *Ibid.* in 371.

170 See 1 above.

The following case provides an example. Originally, in Germany a university examination was not necessary for dental practice. This changed in the 1950s. But in order to make the transition smooth, the legislator allowed those who had already practised under the earlier regime to continue doing so. Not all of them, however, were eligible for the payment from the social security schemes.<sup>171</sup> The constitutional court did not think this qualification was constitutionally acceptable.<sup>172</sup>

Another way of making inconsistency less acute consists of transforming simultaneous inconsistency into sequential inconsistency. Again, legal reform offers a good illustration. It often means that new cases are treated according to a new rule, whereas old cases still benefit from the previous, more generous rule. This is done, for instance, if the introduction of tradable permits is coupled with a grandfather clause. An example is the new German statute on emissions trading, generated in the interest of world climate controls. Under this scheme, some industries need a tradable permit to emit CO<sub>2</sub>. In the first round, permits are, however, handed out such that practically all previous emissions are covered.<sup>173</sup>

A third option consists of imposing inconsistency, but offering compensation to those who suffer from it in a particularly severe way. Their financial interest in consistent treatment is then (at least partly) protected. But they are obliged to tolerate the actual inconsistency.

In one respect, compensation can be viewed as a borderline case. It alleviates the financial burden of inconsistency, and can therefore be interpreted as a tool for reducing some detrimental effects of inconsistency. However, the inconsistency as such remains. The intervention can therefore also be classified as a provision that makes inconsistency more bearable to those upon whom it is inflicted. There are other ways of getting at this effect. One practically important option is to rely on the distinction between the true and the stated reasons. While objectively there is inconsistency, a decision is presented in a manner that veils this inconsistency.<sup>174</sup> More generally, if inconsistency is unavoidable, the legal order can aim to conceal it. Put differently, the legal order then tries to capitalise on the distinction between actual and perceived consistency. The most common way to achieve this consists of tying outcomes to context. Actually, societies can even be categorised in reference to the historically contingent cultures of inconsistencies that they accept. The German society is unable to get high-speed driving under control. The US society is unable to get gun use under control. Both societies think that the other is crazy, and tend to largely overlook the not so dissimilar problem back home.<sup>175</sup>

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171 There are two different health insurance systems in Germany, one public and one private. The large majority of the population is a compulsory member of the public insurance organisations.

172 *Bundesverfassungsgericht* 2/25/1969, *Entscheidungen des Bundesverfassungsgerichts* 25, 236.

173 The pertinent statutes have not yet passed the final legislative steps; for details see [http://www.dehst.de/DE/Home/homepage\\_\\_node.html](http://www.dehst.de/DE/Home/homepage__node.html) (7/7/2004).

174 For more on the distinction between the generation and the representation of judicial decisions, see ENGEL in \*\*\* (2004c).

175 Robert Cooter pointed me to this graphic example.

### III. Inconsistent Statements of Fact

All the foregoing has looked exclusively at the consistency of one object: legal rules. Since the definitional operation of the law is more complex, it is now necessary to ask the degree to which both description and prescription change if inconsistency is to be found in one of the remaining three elements. This section starts with authoritative statements of fact.

The same two branches of the law discussed thus far are to be investigated: rule generation and rule application. Here, rule application is the natural starting point. It is defined by the need to match historically contingent reality with abstract legal rules. Whenever legal rules are applied authoritatively, assessing the pertinent facts is therefore as important as correctly reading the applicable rules.

Two classes of facts are necessary for rule application: specific and generic knowledge. Take the simplest case as a starting point. The applicable rule has an if-then structure. The judge must find out whether reality meets the conditions of the if-clause. Often, knowing the specific facts is not enough for this. The parties may not be able to prove one of these facts. But there may be some other unquestioned fact that is correlated to the relevant fact in a law-like manner. Whether the relationship between these two facts is indeed that strong is a question of generic knowledge. Generic knowledge may also be necessary to correctly interpret the rule in the books. This rule typically only says: if conditions 1 to 5 are fulfilled, the provision applies. Often it will not be easy to tell whether a certain observed fact can indeed be understood as fulfilling one of these conditions. In order to decide in such doubtful cases, lawyers reconstruct the purpose of the norm. In so doing, they often need generic knowledge about the underlying policy problem.

If one and the same legal decision at one point says the specific fact *x* is present, and at another point says it is not present, the decision is clearly inconsistent. This is an obvious case, but not an interesting one. Nobody would want to defend such a decision. Things become more difficult if the decision at one point describes specific fact *x* by category *a*, and at another point by category *b*. For a logician, this may sound outrageous. But, as mentioned repeatedly, the task of rule application is hermeneutical. One and the same fact can therefore be needed for several doctrinal purposes in one and the same decision. This may make it advisable to present it in different ways. Even more frequent are inconsistent statements of generic knowledge within one and the same decision. For instance, the same piece of scientific evidence may be needed for different doctrinal purposes. The judge may then feel urged to deny or qualify what he has taken for granted when discussing a different doctrinal point. Moreover, inconsistency within one and the same decision can result from selection. In the interest of making one doctrinal point, fact *x* is taken into consideration. At a later point, it is ignored, although, from an observer's viewpoint, it would have been relevant there as well.

There are, at times, inconsistent statements of fact within one and the same decision, but they are not common. This is different if one compares several legal decisions on whether they originate with the same authority or not. Although resistance has been growing over the last decades,

German civil procedure in principle still adheres to a concept of relative truth. The court believes whatever the parties present to it as facts, as long as they agree on that. Proof is only asked for, and, for that matter, the court is only allowed to ask for it, if one party claims a doctrinally relevant statement of fact by the other to be wrong. Consequently, not only can authoritative statements of fact differ across parties. In principle, in some cases one of the same parties, before one and the same court, may even start from an assertion that is disputed in the next case. Moreover, even if there has been proof, the statement of fact in the first case is not binding on the parties in later cases. Only if one of the parties explicitly wants the court to make a factual statement for the future, and if the court thinks there is a legitimate reason for doing so, does it issue such a statement.<sup>176</sup> The following is frequent: one and the same situation leads to a civil law and a criminal law proceeding. The OJ Simpson case is probably the most prominent illustration. Since the standard of proof in both types of proceeding differs, the defendant can be acquitted in the criminal court, since the facts of the case could not be proved, while a civil law court still holds him liable to pay damages. Here, the lower standard of proof of the civil court has been met.

The legislator does not make new rules out of the blue. Typically it reacts to a perceived social problem. Part of the legislative procedure consists of assessing the underlying facts. Whenever multiple legislation is going on, diverging views of facts are possible. The legislator today may see a phenomenon that the legislator tomorrow denies. Whenever jurisdiction to prescribe is split, as in federal states, one legislator may start from different factual assumptions than another. It is, however, debated whether any of these statements of fact is authoritative, i.e. under constitutional control.<sup>177</sup> In essence this is a debate about the amount of political leeway the constitution leaves the legislator. When a new law is made by judges, the democratic autonomy to decide should at least be much less of a concern. Consequently, here inconsistent statements of fact that back a new rule should be seen as authoritative.

With respect to authoritative statements of fact, a deontological approach to inconsistency is hard to maintain. Facts in court are openly constructed. Forbidding the legislator to rely on any inconsistent statement of fact when making new law would immobilise him. When judges make new law, their access to generic knowledge is bound to be severely limited. The legal order accepts the inherent quality problem since it believes in the persuasive force of concrete experience, or since it distrusts the political process. The cost of a deontological approach would therefore be extremely high. Moreover, the moral element in the justification of the deontological approach is much less fitting to the authoritative statements of fact. Of course, in practice, legal decisions depend at least as much on the assessment of facts as on the contents of the law. Twisting the facts can therefore easily lead to very unjust results. But with respect to the facts, there is no criterion like integrity that gives an equally strong backing to the insistence on

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176 These are called *Zwischenfeststellungsklage* in § 256 II Code of Civil Procedure. Doctrinally, even under this condition, a mere statement of fact is not possible. It must be a statement concerning a legal relationship between the parties. But in practical terms, this sometimes boils down to a statement of fact.

177 A forceful attack against legal control is to be found in MEBERSCHMIDT *Gesetzgebungsermessen* (2000), while SCHWERTFEGER in Stödter (1977), in principle, thinks such control should be exercised.

absolute consistency. At first sight, one might, however, think that the epistemic argument is even stronger here. As has been pointed out, facts are even openly constructed in civil procedure. Yet authoritative fact-finding in the law cannot live with a coherence concept of truth. The entire legal procedure is built on the assumption that there are some cognisable facts out there. It may often not be possible to get at them. But legal procedure could not start from the assumption that it is impossible across the board, or that this is irrelevant for the law.

The set of arguments that can help assess the desirability of consistency is smaller with respect to authoritative statements of fact. Some of the reasons that consistency is of value apply here as well. Inconsistency can be a signal, helping the principal control the judicial agent. One might say that if courts rely on their power to construct the facts in order to escape parliamentary control, they are out of line with the principle of democracy. The more stable the official statements of fact over time and across authorities, the more predictable the application of the law becomes. Finally, inconsistent statements of fact can create a problem for justice and legitimacy. However, a number of the reasons that have been used to describe value in consistent legal rules are not relevant here. There is no argument for technical efficiency. Consistency cannot be seen as a tool for coping with uncertainty or complexity. The internal autonomy of the law and its evolution are not at stake.

The set of arguments that may help justify inconsistent statements of fact is also reduced. Good governance is typically not needed as justification. Normally the openness to the inherent specificity of statements of fact suffices. Normative relativity does not play a direct role either. However, sometimes it may be more elegant to react to this relativity by twisting the facts than by forging a new effective rule.<sup>178</sup> The autonomy of rule application may come into play. It fits in if the judiciary constructs reality in a way that differs from the legislator's view. Rule of law is important here. Criminal procedure is the best illustration. Its very high standard of proof is normative in the following sense: here, false positives loom much larger than false negatives. It is better to acquit ten true criminals than to sentence one innocent person. The rule of law also stands behind a central piece of German procedural law. In Germany, the standard of proof is not objective. Rather, what matters is whether the individual judge is personally convinced.<sup>179</sup> In the interest of doing justice to the parties, the judge is forced to take personal responsibility for the statements of fact on which he bases his decision. Likewise, the US system is inspired by rule of law and democratic considerations when it entrusts so many decisions to juries, although it is not very likely that two juries will start from the same assessment of facts. Finally, twisting the facts can be a powerful tool for dissolving conflict among the parties to a case.

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178 Cf. KUTZ, in *Yale Law Journal* (1994) 1014, speaks about the "background dependence and theory-ladenness of facts".

179 For background, see SCHULZ *Beweistheorie* (1992).

## IV. Inconsistent Judicial Output

In the definitional operation of the law, legal rules and authoritative statements of fact are mere inputs. The output is a decision issued by a court or an administrative authority. Exceptional cases, notwithstanding, such as those in which a policeman uses his firearm, there are two components to these decisions: the actual decision (dealt with in section 1 below), and the official reasons given for it (dealt with in section 2). As a rule, only the decision itself has the force of law. Both components can exhibit inconsistency.<sup>180</sup>

### 1. Actual Decision

In principle, inconsistency can be internal or external. A decision is internally inconsistent if one and the same decision has two components that are at variance with each other. This will be rare. It is conceivable only if one and the same decision document addresses several issues at a time. Practically speaking, the alleged inconsistency is almost always external. One decision is compared to another, be it by the same or by another decision authority. For the inconsistency of judicial output to be an independent problem, the following claim must be supported: both the pertinent legal rule and the authoritative statements of fact must be the same, but one decision reaches a different result than the other.

Why should this ever happen? Strictly speaking, hermeneutics cannot be brought forward as a reason. Of course, one and the same rule in the books is likely to be interpreted very differently by different decision authorities.<sup>181</sup> This even holds if the authoritative assessment of facts is identical. But above, the concept of the legal rule has been extended to include the effective rules applied by such authorities. Now if two authorities interpret the rule in the books differently in light of the same set of facts, this leads to two different effective rules. External inconsistency resulting from hermeneutics has thus been classified differently in this paper. It has already been brought under the rubric of the inconsistency of rules.

From this, it follows that the remaining cases must be characterised by some form of open decision-making discretion. This is more frequent in administrative authorities than in the courts.<sup>182</sup> The police is empowered but not obliged to intervene if public order is in danger. If it intervenes, it may choose from a rich set of possible interventions, starting with mere admonition and ending with the use of physical force. Often, a statute stipulates the conditions under which and the purposes for which discretion may be used. For instance, construction permits may be granted, although a project is not fully in line with zoning ordinances, so long as the spirit of the zoning rules is not violated. In a broader sense, authoritative settlements can also be brought under this rubric. Since both parties eventually consent to this, the court validates a settlement order that is at variance with how the case would have been decided authoritatively.

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180 Cf. THOMPSON in *Southern California Law Review* (1986) 424: "decisional inconsistency".

181 BRILMAYER, in *Southern California Law Review* (1986) 365 f., refers to this as "institutional indeterminacy".

182 For a summary treatment, see COONS in *California Law Review* (1987) 59-113.

Normatively speaking, the acceptability of such inconsistency when applied to multiple decisions hinges upon the reasons for giving rule application authorities discretion. Open discretion involves more than the acceptance of the autonomy of rule application vis-à-vis rule generation. But there may nonetheless be good reasons for this. This paper is not the proper context for another discussion of administrative and judiciary discretion. Suffice it to point to one obvious reason: it may be impossible for the legislator to foresee with sufficient precision the situations that might call for administrative intervention.<sup>183</sup>

## 2. Reasons

Inconsistent reasons could again be either internal or external. Internally inconsistent reasons can imply two things: first, that the reasons themselves are contradictory; second, that the reasons are at variance with the actual decision. Both occasionally occur, but they are rare. External inconsistency, however, is very frequent:<sup>184</sup> i.e. two decision-making authorities take the same decision, based on the same facts, but they give different reasons for it. Concurrent opinions in decision-making bodies are a clean case. They are to be found in decisions by the US Supreme Court and by the German Constitutional Court. Decisions taken by the English High Court have long provided an extreme case. Here jurisprudential culture has encouraged every member of the decision-making body to give different reasons for the unanimously taken decision. A less clean, but still pertinent case consists of two authorities who decide highly similar cases, but provide very different reasons for their decisions. It is not rare for this to occur with one and the same decision authority at different points in time. The different reasoning typically provides a way of gradually establishing a new line of jurisprudence.

Within the taxonomy of this paper, there is a fine dividing line between inconsistent reasoning and inconsistent legal rules. This is again due to the broad concept of a legal rule applied here. Since the concept has been extended to include effective rules, the core of the consistency problem has already been treated above. Within this conceptual framework, inconsistent reasoning can only be seen as an independent problem if one more broadly defines reasoning. This is, however, in line with judicial practice. It commonly distinguishes the "decisive reasons"<sup>185</sup> from the remaining elements in the reasoning part of the written judgment.

Why might it be normatively acceptable to allow for inconsistency in reasoning? The answer must follow from the purposes the reasoning part of a judgment serves. These purposes are manifold. The reasons may be needed for correctly interpreting the decision;<sup>186</sup> if so, they are decisive and not considered here. A second purpose is to assist in officially constructing

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183 More, for example, from NAGEL (1993).

184 On this cf. MORAL SORIANO in Ratio Juris (2003).

185 The "*tragenden Gründe*", in German terminology.

186 KISCHEL Begründung (2003) 45.

reality.<sup>187</sup> This is the authoritative statement of facts addressed earlier. But it is suitable to deal with the remaining purposes here.

A third goal is to provide the legal system with one more degree of freedom, in the interest of coping with greater complexity.<sup>188</sup> A fourth purpose is to enable control,<sup>189</sup> in particular by appellate courts.<sup>190</sup> A fifth is their anticipated effects on addressees.<sup>191</sup> These effects can be manifold. Ordinary addressees are not themselves lawyers. The judge must therefore clarify what the decision means for them. In cognitive science, this activity has been dubbed compression.<sup>192</sup> The mechanics of the law are "brought to human scale".<sup>193</sup> Consequently, one reason for providing justification is to present the judicial decision in a manner plausible in terms of folk psychology. The reasons may also serve as a tool for removing uncertainty. They may help overcome spurious individual constructions of reality. A particularly likely reason for this is overconfidence, resulting from a self-serving bias.<sup>194</sup> In addition, it is not so rare that the reason for going to court has less to do with substance than with emotionally laden conflicts among the parties.<sup>195</sup> In such cases, the justificatory part of the decision can try to go beyond the legal substance of the case, and aim at restoring peace. Moreover, not all litigants are equal. Psychological research on personality offers many insights into this.<sup>196</sup> The reasons allow us to address different parties individually.

While all the former can be read as the judicial system's services to the parties, not so rarely, the law has an autonomous interest in representing its decisions well. Otherwise, addressees are less likely to acquiesce.<sup>197</sup> Psychologically speaking, they show reactance.<sup>198</sup> Legally speaking, appropriate representation is a way of generating legitimacy in the eyes of the addressees.<sup>199</sup> This effect of the reasons has different facets. In the weakest case, the way the case is presented

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187 This is particularly visible in the burden of proof. It allows the court to decide on an uncertain factual basis. The written version of the decision lays down the version of reality on which the decision is based.

188 LUHMANN *Automation* (1966) 51 ff; TRUTE in Schmidt-Abmann and Hoffmann-Riem (2004) 300.

189 SCHAUER in *Stanford Law Review* (1995) 657; KISCHEL *Begründung* (2003) 48-52.

190 Explicitly *Bundesverfassungsgericht* Feb. 20, 2001, R 53 (unpublished paragraph): "Die verfassungsrechtlich gebotene volle gerichtliche Kontrolle der Annahme von "Gefahr im Verzug" ist in der Praxis nur möglich, wenn nicht nur das Ergebnis, sondern auch die Grundlagen der Entscheidung der Behörden und ihr Zustandekommen zuverlässig erkennbar werden. Aus Art. 19 Abs. 4 GG ergeben sich daher für die Strafverfolgungsbehörden Dokumentations- und Begründungspflichten, die den wirksamen gerichtlichen Rechtsschutz erst möglich machen (vgl. schon BVerfGE 61, 82 <110>; 69, 1 <49>)".

191 Cf. SCHAUER in *Stanford Law Review* (1995) 658: "That giving reasons is a way of opening a conversation may in fact be an independent basis for a reason-giving requirement".

192 TURNER *Cognitive Dimensions* (2001) 26 and passim.

193 Personal communication with MARK TURNER.

194 BABCOCK and LOEWENSTEIN in Sunstein (2000).

195 More from FARNSWORTH in Sunstein (2000).

196 A particularly pertinent strand of personality psychology is work on sensitivity to injustice; see SCHMITT in *Personality and Individual Differences* (1996).

197 See only KISCHEL *Begründung* (2003) 52-58. The technical ramification is a higher or lower willingness to appeal (58); BALZER in *Neue Juristische Wochenschrift* (1995) 2454 is opposed to such "extrajudicial" considerations.

198 The classic work on reactance is BREHM *Reactance* (1966); see also BREHM and BREHM *Psychological Reactance* (1981); DONNELL, THOMAS and BUBOLTZ in *Journal of Social Psychology* (2001).

199 SCHARPF *Games* (1997) 152 f. links both concepts.



allows the loser to save face. This is a way of preserving self-esteem.<sup>200</sup> The effect is somewhat stronger if the addressee sees the reasons as an element of procedural fairness.<sup>201</sup> In the strongest case, the addressee perceives the reasons as serious discourse. He now understands why the applied rules are justified.<sup>202</sup>

This then leads to the sixth purpose of reasoning. It can aim at stressing normativity. A seventh purpose of explicitly written reasons is their anticipated effect on professional audiences. The formal audience comprises all higher courts, including a constitutional court. Representation norms see to it that these courts are provided with the necessary information, without being overwhelmed with detail. But there is also an informal professional audience, the professional discourse of lawyers. It is most pronounced in legal orders like the German one, where legal academia and legal practice are closely intertwined. German courts never know whether their decisions will be published and discussed in professional journals. This serves as an additional check, and plays itself out in science-like components of the reasons. And the higher the court, the greater this role.

Related to this is an eighth purpose. It is not only the legal community that notices court decisions. Sometimes the public at large also does. This is particularly likely if a case attracts media interest. But there are also narrower audiences, like tenants' associations in landlord and tenant jurisprudence, or the accidental visitor in the courtroom. In these instances, the reasons aim at conveying legitimacy to the judicial system,<sup>203</sup> and at generating trust in its proper functioning. The reasons also contribute to expressing social values, as enshrined in legal rules.<sup>204</sup>

Finally, the anticipation that one must later provide official reasons has an impact, in complex psychological ways, on how judges and administrators take their decisions in the first place. The obligation to give formal reasons thus also serves as a tool for improving decision quality.<sup>205</sup>

## V. Inconsistent Outcomes

The law does not exist for itself. It is a tool that helps society coordinate, and that makes society better off where it would fail without central intervention. Consequently, inconsistency can also be found at the level of outcomes, not only at the level of output. Conceptually, inconsistency can mean two things: First, it can mean that the legal intervention has failed. It did not reach its

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200 Cf. BRENNAN and PETTIT in *Economics and Philosophy* (2000).

201 See FREY and BOHNET in *Journal of Institutional and Theoretical Economics* (1995); FREY and STUTZER *Beyond Bentham* (2001).

202 More on the discursive character of applying the law in court from ENGEL in Rengeling (2001a).

203 KISCHEL *Begründung* (2003) 58.

204 The literature on "expressive law" stresses the point, COOTER in *Journal of Legal Studies* (1998) 585; see also ADLER in *University of Pennsylvania Law Review* (2000); ANDERSON and PILDES in *University of Pennsylvania Law Review* (2000); MCADAMS in *Virginia Law Review* (2000); BOHNET and COOTER *Expressive Law* (2001).

205 This is the central topic of ENGEL in \*\*\* (2004c).

stated goals. Despite the output of the legal system, social reality remains unchanged, or it even worsens. Second, it can mean that instances of legal intervention are compared. Although the law claimed it would bring about the same outcome, in many cases the actual effect is different in the two instances.

All this may legitimately be called inconsistency. Society is, in principle, better off if this kind of inconsistency becomes less frequent or less pronounced. There is thus value in consistency. However, consistency is of no value as such here either. If government mustered additional sovereign powers for increased inconsistency, this might stifle creativity, to name only one competing concern.

Inconsistent outcomes are also a legal issue, and in particular a constitutional one. Specifically, the constitutional court's supervision of policy-making can be justified as a control that sees to greater consistency *ex post*. That way, constitutional jurisprudence is turned into an institution for policy evaluation. But this interpretation of consistency leads far away from the topic of this paper. It must be dealt with in a different academic context.<sup>206</sup>

## **VI. The Confines of a Balanced Norm**

Summing up, consistency is thus of value for the law. But this value is not absolute. In many contexts, consistency could and should be traded against competing normative goals. The purpose of this paper has been to delineate the confines of such a balanced norm. It must start by properly defining the object of consistency. Consistency among rules is not the same thing as consistency in the authoritative assessment of facts, in the judicial output, or in the ultimate outcomes. Analytically, any of these objects can be further split up. For instance, the interpretation of one and the same rule in the books can differ across courts, across parties, over time or with respect to particular features of cases. Mathematical and statistical tools do help the law to be as precise as possible in defining the starting point of the analysis. Based on this, the principle of proportionality can be applied in a meaningful way. Inconsistency is usually not sought after by the legal system in its own right. But there are long lists of reasons why the law is better off in accepting at least some inconsistency in many contexts.

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206 Actually, this paper does already exist, ENGEL in Engel and H eritier (2003b).

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