LEGAL INCONSISTENCIES

Raff Donelson*

---

* Assistant Professor of Law and Philosophy, Louisiana State University. JD, Northwestern Pritzker School of Law; PhD, Northwestern University; MA, University of Chicago. I had the great fortune to present earlier versions of this paper at the Louisiana Law Scholars' Symposium at Loyola University of New Orleans Law School, the Criminal Law Theory Workshop at Northwestern Pritzker School of Law, the "Rule of Law" discussion group at SEALS 2018, the Junior Faculty Works-in-Progress Conference at Marquette University Law School, Jim Lindgren's Law Scholars Workshop at Northwestern, the Intellectual Life Series at Tulane Law School, the New Voices in Criminal Justice session at AALS 2019, at the University of Arizona Law School, and at the University of Toronto. I owe special thanks to John Anderson, Vincent Chiao, Michael Coenen, Mihailis Diamantis, Chad Flanders, Ken Levy, Jim Lindgren, Saru Matambanadzo, Alice Ristroph, and Gregg Strauss for especially helpful conversation on issues raised by this Article.

It is a familiar thought from the rule of law literature and from everyday life that legal norms within a given jurisdiction ought to be consistent. However, little work has been done to explain this demand. This Article develops a theory of legal inconsistencies, both what they are and why legal systems ought to avoid them. In addition to contributing to a theoretical discussion of legal inconsistency, the Article also articulates a remedy under American law for those harmed by inconsistencies. The Article contends that legal inconsistencies violate Due Process.

I. INTRODUCTION

Sixteen-year-old Cormega Copening faced an unusual prosecution. He was charged with possession of child pornography because his cell phone contained an explicit photograph of *himself*. Some scholars think our child pornography laws are too zealous,[1] others think the American suite of broad laws and tough penalties could go even further.[2]

---

1. *E.g.*, Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) (criticizing sex panic surrounding child sexuality); Carissa Byrne Hessick, *The Expansion of Child Pornography Law*, 21 NEW CRIM. L. REV. 321, 336 (2018) (noting and criticizing far-reaching definitions of child pornography); Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1451–61 (2014) (offering a narrow understanding of child pornography that better tracks the real harms that production of such material causes); Elizabeth P. Evans, *Internet Access Restrictions for Convicted Child Pornography Sex Offenders: How Far Is Too Far?*, 36 AM. J. TRIAL ADVOC. 329, 330 (2012) (criticizing extreme adverse action taken against former child pornographers, particularly court orders that ban them from accessing the Internet, concluding "while restriction [on Internet use] may be warranted in certain situations, a full ban on Internet access is not appropriate"). For particular criticisms of sexting laws, see Alexandra Kushner, *The Need for Sexting Law Reform: Appropriate Punishments for Teenage Behaviors*, 16 U. PA. J.L. & SOC. CHANGE 281, 288 (2013) ("[S]exting should not be criminalized at all for teenagers who consent to it and keep the exchange private. . . . [C]riminalizing sexting can harm teenagers and be ineffective in addressing the sexting issue."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 516 (2008) ("With few exceptions . . ., the heavy hand of the criminal law should not be brought to bear against minors who make or distribute pornographic images of themselves. Minors in this category should be regarded either as victims in need of help to turn their lives around or, at the very least, not wrongdoers deserving of the severe vengeance and blame society justifiably imposes on adults and others who sexually abuse children.").

2. *E.g.*, Belinda Tiosavljevic, *A Field Day for Child Pornographers and Pedophiles If the Ninth Circuit Gets Its Way: Striking Down the Constitutional and Necessary Child Pornography Prevention Act of 1996* Free Speech Coalition v. Reno, *198 F.3d 1083 (9th Cir. 1999)*, 42 S. TEX. L. REV. 545, 571 (2001) (defending the constitutionally overbroad federal law aimed at stamping out child pornography); Kelley Bergelt, *Stimulation by Simulation: Is There Really Any Difference Between Actual and Virtual Child Pornography? The Supreme Court Gives Child Pornographers a New Vehicle for Satisfaction*, 31 CAP. U. L. REV. 565 (2003) (arguing for laws that ban fake child pornography); Robert M. Sieg, *Attempted Possession of Child Pornography—A Proposed Approach for Criminalizing Possession of Child Pornographic Images of Unknown Origin*, 36 U. TOL. L. REV. 263 (2005) (developing a new legal theory to facilitate prosecuting more people for conduct related to child

Whatever the wisdom of such laws as they currently stand, something seems particularly odd about Copening's prosecution. Given our reasons for having child pornography laws, prosecuting Copening for possessing the picture of himself is not only unhelpful but also counterproductive. Through such laws, society seeks to protect children's privacy, but prosecuting Copening required the invasion of his privacy. Here, then, is an example of a prosecutorial decision that is inconsistent with the justification for the criminal statute.

Copening was also charged with corruption of a minor for sending the same photograph to his sixteen-year-old girlfriend, Briana Denson. There is something strange about this too. In North Carolina, the jurisdiction where these events took place, Copening and Denson were allowed to engage in sexual activity with one another, even as minors.[3] This means, as one commentator put it, "Copening and Denson came up against a counterintuitive confluence of laws."[4] To see this, consider the following question: what would justify a legislator in thinking that sight of Copening's body corrupts Denson when in the form of a photograph but not when he appears in person? Though one might disagree, it is understandable to claim that sight of Copening in a sexual pose always corrupts Denson, whether in person or in photograph. It is also understandable to claim that sight of Copening in a sexual pose does not corrupt Denson in person or in photograph. The confluence is more puzzling. Here, then, is an example of inconsistency between the justifications of two laws.[5]

This Article concerns inconsistencies in the law. More precisely, it concerns the Consistency Principle, a central component of the rule of law.[6] Roughly, the principle provides that, within a jurisdiction, the laws should be consistent. This Article investigates the scope of the Consistency Principle, its justification, and what American courts should do when that principle is violated.

The first part of this Article concerns the scope and justification of the Consistency Principle. Nearly everyone can agree that the Principle prohibits a jurisdiction from giving legal effect to norms that contradict one another,[7] but determining what counts as contradiction is far more complicated than previous writers have noticed. It is natural to believe that a set of laws satisfy the Consistency Principle so long as an individual can act in accordance with every law in the set. Upon inspection, this turns out to be too narrow an understanding of the Principle as the Copening case demonstrates. Deep inconsistencies surround his prosecution, but Copening was perfectly capable of acting in accord with the "counterintuitive confluence of laws." He just didn't. As for defending the Consistency Principle, some have claimed that jurisdictions ought to heed the Principle because

---

pornography).

3. Michael E. Miller, *N.C. Just Prosecuted a Teenage Couple for Making Child Porn — of Themselves*, WASH. POST (Sept. 21, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/21/n-c-just-prosecuted-a-teenage-couple-for-making-child-porn-of-themselves/?utm_term=.6519fdb248a9.

4. *Id.*

5. For a remarkably well-written student note discussing a related problem under Georgia law, see Emily L. Evett, Comment, *Inconsistencies in Georgia's Sex-Crime Statutes Teach Teens That Sexting Is Worse Than Sex*, 67 MERCER L. REV. 405 (2016).

6. Lon Fuller was one of the first scholars to state explicitly that the rule of law includes the Consistency Principle. LON L. FULLER, THE MORALITY OF LAW 65–70 (rev. ed. 1969).

7. Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 830–31 (1999) ("[I]t is a basic principle of our judicial system that a person not be subject to inconsistent laws.").

otherwise laws could not fulfill their primary function, action guidance.[8] Upon inspection, this is also too narrow, and again the Copening case shows us why: inconsistent laws *can* guide action.

The first part of the Article, then, is a theoretical argument, one that aims to show that the Consistency Principle has wider scope and requires different defense than others have recognized. This theoretical argument relies on the Copening case as well as several other cases of inconsistencies, historical and contemporary, domestic and foreign, to demonstrate that the problem is not merely academic. That real-life individuals have suffered from violation of the Consistency Principle prompts the second, more practical part of the Article.

The second part of the Article develops a theory of legal relief for the teens ensnarled in the sexting case and, more generally, for anyone who suffers under inconsistency. Part II also responds to various objections to implementing that theory of relief. While there are other potential fixes for the specific problem faced by these young people, on the best theory of legal remedy, all violations of the Consistency Principle are unconstitutional denials of due process.

II. TOWARD BETTER UNDERSTANDING THE CONSISTENCY PRINCIPLE

The rule of law is a normative standard, usually understood as composed of several principles, all of which detail how a legal system can go awry *qua* legal system.[9] Scholars disagree about the precise list of principles that the rule of law requires,[10] but many would agree that the rule of law includes the Consistency Principle.[11]

---

8. *Id.* at 831 ("When a person is subject to inconsistent laws, that person cannot conform his or her conduct to the law."); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 786 (1989) (offering an interpretation of Fuller on which the point of the Consistency Principle is so that legal subjects can know what they ought to do and perform accordingly); Richard H. Fallon, Jr., *"The Rule of Law" as A Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 n.27 (1997) (agreeing with Radin that the Consistency Principle can be "fairly subsumed by the requirement that law should be capable of being followed").

9. Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 NOMOS 3, 5 (2011) ("Theorists of the Rule of Law are fond of producing laundry lists of demands."); for just one list of principles, see Renaldy J. Gutierrez, *Democracy and the Rule of Law: Myth or Reality?*, 47 DUQ. L. REV. 803, 804 (2009) (citing the four rule of law principles offered by the World Justice Project).

10. As Randall Peerenboom points out:

> conceptions of rule of law can be divided into two general types, thin and thick. A thin conception stresses the formal or instrumental aspects of rule of law—those features that any legal system must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic. . . . Thick conceptions begin with the basic elements and purposes of a thin conception but then incorporate elements of political morality such as particular economic arrangements . . ., forms of government . . . or conceptions of human rights . . . .

Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 827–28 (2005). Thin conceptions of the rule of law are advocated in the following: BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91–126 (2004); Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & PHIL. 239, 261–62 (2005); JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210–29 (2d ed. 2009). Meanwhile, thick conceptions of the rule of law are advocated in the following work: Corey Brettschneider, *A Substantive Conception of the Rule of Law: Nonarbitrary Treatment and the Limits of Procedure*, *in* GETTING TO THE RULE OF LAW: NOMOS L 52 (James E. Fleming ed., 2011).

11. *E.g.*, Jurian Langer & Wolf Sauter, *The Consistency Requirement in EU Law*, 24 COLUM. J. EUR. L. 39, 43 (2017) ("[I]t is plausible that consistency (as a requirement of no contradictions) can be seen as an element of the rule of law.").

Some scholars claim that laws violate the Consistency Principle when and only when Law_1 obligates someone to do something that Law_2 forbids.[12] To understand what such scholars have in mind, imagine that a truancy law required a student to be in school on Friday morning while a court summons required that same student to appear in court that same Friday morning.[13] If there were no exceptions to either law and no superseding principle to remedy the conflict, this would be an inconsistency of the kind that some take to be definitive of the problem. As I show below, this is just one kind of inconsistency in the law; it is what I call an *irreconcilable inconsistency between laws*. This name stems from the fact that a person cannot reconcile herself to the laws' demands, for she cannot, under any circumstances, remain in the jurisdiction and avoid non-compliance with the inconsistent set of laws.[14]

Though troubling when it arises, any given irreconcilable inconsistency is likely to be short-lived because courts and legislatures have tools specifically designed to remedy them. For example, legislatures and courts sometimes directly say in the text of a new law or ruling that any prior legal norm that is inconsistent with the current law or ruling is hereby null and void. This is a prophylactic measure to stop irreconcilable inconsistencies before they start. In addition to this prophylactic approach, there are remedies on the back end. Courts often decide, as a canon of statutory construction, that where two laws conflict, the later enactments supersede prior ones.[15]

Despite being short-lived phenomena, irreconcilable inconsistencies receive most of the scholarly, judicial, and legislative attention in conversations about the Consistency Principle. This undue attention not only upstages more persistent kinds of inconsistency but also obfuscates the general reason why inconsistencies harm legal subjects. This Part of the Article focuses on the other kinds of inconsistency and on the obfuscation.

To preview the latter point, scholars are confused about the general problem that inconsistency presents. They focus on a particular problem that arises with irreconcilable inconsistencies: the action guidance problem. It is probably beyond dispute that a legal system fails, *qua* legal system, if its norms cannot guide action. If nothing else, laws should guide action.[16] To be clear, this is part of the reason why the rule of law forbids irreconcilable inconsistencies. Because other sorts of inconsistencies do not pose action

---

12. This conception of Consistency probably motivated Bruegger, given that he claimed, "It is impossible to simultaneously comply with laws that are contradictory." John A. Bruegger, *Freedom, Legality, and the Rule of Law*, 9 WASH. U. JUR. REV. 81, 87 (2016). *But see, e.g.*, FULLER, *supra* note 6, at 69 (construing inconsistency very broadly as laws "that do not go together or do not go together well").

13. I assume that the school is not the court, and the student cannot be in two places at once.

14. Once at a lecture, I errantly claimed that an irreconcilable inconsistency obtains when one cannot, *under any circumstances*, avoid non-compliance. Someone replied that one could always avoid non-compliance by suicide. This is not strictly speaking true, for suicide is not always an available legal out: a jurisdiction might criminalize suicide. Nevertheless, the reasoning behind the reply is right; sometimes one can avoid non-compliance by leaving the jurisdiction, whether by death or emigration. I want to distinguish inconsistencies one can avoid only by leaving the jurisdiction from other kinds. The difference between this kind of inconsistency and the others will become important below, see *infra* Part II.A.

15. *E.g.*, Eisenberg v. Corning, 179 F.2d 275, 277 (D.C. Cir. 1949). For commentary on the *lex posterior derogat priori* canon of construction, see HANS KELSEN, PURE THEORY OF LAW 206 (Max Knight trans., 2d rev. ed., 1967).

16. *See* H. L. A. HART, THE CONCEPT OF LAW 40 (1961) (claiming that the primary function of law is to guide action).

guidance problems, however, action guidance cannot wholly explain why the rule of law includes the Consistency Principle. Moreover, as I explain below, action guidance is not even the whole story with irreconcilable inconsistencies.

A. Improved Taxonomy

There are four main ways to violate the Consistency Principle. Because we already discussed irreconcilable inconsistencies between laws above, we now turn to the other three. For each kind of violation, I rely on simple, hypothetical examples. The simplistic examples help to illustrate the kind of violation most clearly. Real life has too many details; that explains the currency of the old saying about failing to see the forest for the trees.

1. Reconcilable Inconsistencies between Laws

The first (new) kind of inconsistency is what I call *reconcilable inconsistencies between laws*. This occurs where Law_1 sets a standard of behavior, compliance with which constitutes non-compliance with Law_2, yet compliance with both laws is possible only by refraining from the relevant activity or by greater performance when one standard sets a lower bar for compliance than the other.[17] Here are some examples.

Suppose that along a stretch of highway, there was a speed limit of fifty-five miles per hour. Suppose also along the same stretch, there was a speed minimum of sixty miles per hour. These two laws are clearly inconsistent, but they are not irreconcilably so. An irreconcilable inconsistency obtains only when one cannot avoid non-compliance with at least one of the laws while remaining in the jurisdiction. Of course, here non-compliance is easily avoided: one can choose not to drive at all. Still, this is something that the rule of law should forbid.

Consider another case. Suppose that a law provides that adultery is illegal and subject to penalties, while another law in the same jurisdiction, passed on the same day, provides that adultery is legal and subject to no penalties.[18] The two laws are clearly inconsistent but not irreconcilably so, for one can just avoid committing adultery. This case, however, brings out something of note about the perspective from which to judge whether there is irreconcilable inconsistency. It is the prospective of the person subject to the legal system's demands for compliance. If I lived in that jurisdiction, *qua* legal subject, I would live under inconsistent laws with which I can nonetheless comply. But think of the perspective of the police officer to whose attention adulterous behavior is brought. Because of her position, she may face different requirements of compliance. Perhaps, the officer faces an *irreconcilable* inconsistency because she is under duty to enforce all and only that which has been criminalized.[19] If she arrests someone for adultery, she acts

17. For Colleen Murphy, the Consistency Principle only provides that "[o]ne law cannot prohibit what another law permits." Murphy, *supra* note 10, at 241. Murphy is plausibly read as talking about reconcilable inconsistencies. When one law prohibits what another permits, compliance is still possible, as one might simply refrain from doing what is prohibited by the other act.

18. This example is borrowed from KELSEN, *supra* note 15, at 207–08. Also, this proceeding point about the perspective of the legal official is inspired by Kelsen's well-known claim that law is directed to officials, not subjects.

19. Of course, no law enforcement officer is under such a duty. It would be impossible to fulfill and stupid to try because every law enforcement agency must prioritize.

contrary to the law that claims that the act is permissible; if she fails to arrest for adultery, she acts contrary to the command to arrest for all violations of the criminal law.

Consider a third case. In this case, I move from duty-imposing laws to power-conferring laws.[20] Suppose that a statute mentioned the full list of requirements for a valid will. Among these is the requirement that testator shall have a witness. Suppose that a provision of another statute, passed the same day as the first, requires a testator to have two witnesses. These laws are inconsistent, for compliance with the first law – having a sole witness – is non-compliance with the second, which requires two witnesses. However, the inconsistency is not irreconcilable. A potential testator can get two witnesses, allowing her to comply with both laws. Now, if the first law required one to have one and only one witness and the second law required two witnesses, the potential testator would be in a deeper bind, but this conflict still would not be irreconcilable. She could just forgo creating a will altogether.[21] The mark of irreconcilability is when compliance is impossible so long as the person regulated remains within the jurisdiction.

2. Inconsistencies between the Justifications of Laws

Another way to violate the Consistency Principle is to have laws with *inconsistent justifications*. A set of laws features inconsistent justifications when the only legally permissible reasons for enacting and retaining Law_1 make it irrational to enact and retain Law_2. Here is another way to put the point. A set of laws features inconsistent justifications when there is no rationally coherent set of legally permissible reasons for enacting and retaining Law_1 and Law_2.

Consider the following example. Suppose that one municipal ordinance (MO_1) forbids park visitors from cutting down the trees in the park. Suppose also that another municipal ordinance (MO_2) explicitly permits park visitors to burn down trees in the same park. This confluence of laws should seem strange. If one considers possible reasons why a legislative body would enact MO_1, reasons that come to mind may include maintaining the park's natural beauty, preventing accidents, retaining natural sources of shade, and even combating the rise in greenhouse gases. All of those goals are defeated by having MO_2.

To be clear, an instance of such inconsistency cannot be understood as the more familiar issue of one law being over- or under-inclusive.[22] A law is under-inclusive when it fails to solve all of a problem it sets out to solve. A law is over-inclusive when it 'remedies' something that was not part of the problem. A set of laws has inconsistent justifications when one law develops a remedy for a problem and the other law undermines pursuing that remedy or disparages seeing the problem as a genuine problem. An under-inclusive law may still turn out to be a reasonable law because trying to solve the whole problem may turn out to be too cumbersome. An over-inclusive law may also still turn out to be a reasonable law because distinguishing between the legitimate and illegitimate

20. For the distinction between duty-imposing and power-conferring laws, see HART, *supra* note 16, at 26–38.

21. Indeed, most Americans do not have a will. Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP (May 18, 2016), https://news.gallup.com/poll/191651/majority-not.aspx.

22. I thank Michelle Dempsey for raising this issue and inviting me to clarify this point.

targets of the government action may be too costly.[23] A set of laws with inconsistent justifications will always be unreasonable because the laws undermine one another, just as the law providing that the truant student appear in court undermines the law providing that the student appear in school at the same time.

Having distinguished inconsistency in justification from over- and under-inclusion, let us turn to another example to see the role that "legally permissible reasons" plays in understanding the phenomenon of inconsistent justifications. Suppose that a state law allows former felons to become public schoolteachers ten years after the end of the felon's sentence. Suppose that another state law creates an exception to that rule and forever bars those convicted of illegal sale or possession of alkyl nitrites, colloquially known as "poppers." The first law seeks to strike a balance between shielding children from wrongdoers and offering forgiveness to offenders, but the second law essentially, says, "No forgiveness for *you*!" where the *you* is those who sold or used poppers. These two laws are not obviously inconsistent on the level of justification; perhaps the legislature thought that poppers are particularly dangerous drugs or that former users or sellers of this drug are particularly likely to market the stuff to children. Imagine that neither of these claims is true, that these claims are not commonly thought to be true, and that no legislative history or preambulatory text suggests that legislators think them true either. The legislators in this example are not completely senseless; however, they carved out this exception because they know that gay men are the most frequent users and sellers of poppers.[24] In essence, the legislature wants a way to prevent gay men from serving as schoolteachers, but, suppose again, they cannot achieve this goal directly because of constitutional constraints. Were this all so, we would find the two state laws inconsistent on the level of justification. There are three possible justifications for having both laws: (1) poppers are particularly dangerous, (2) those who used and sold poppers are particularly likely to market to children, and (3) those who used and sold poppers are disproportionately gay men, who we despise. If reasons (1) and (2) would not be avowed by the legislature and if reason (3) is a legally impermissible ground for government action, there is no rationally coherent set of legally permissible reasons for these laws.

My point with the poppers example is not to suggest that the primary problem with such laws is violation of the Consistency Principle. Rather, this example helps to illustrate how courts should go about the task of divining the justification for a particular legal norm. Courts should restrict the possible justifications to legally permissible grounds. If constitutional or other legal norms declare that legislators may not rely upon reason x, then a court cannot save a set of laws from inconsistency by claiming that legislators justified the laws based on x.

Before concluding this section and moving on to discuss the fourth species of inconsistency, I will raise and answer a taxonomic question that one might be wondering about. One might wonder whether the various categories of inconsistency are truly distinct.

---

23. For example, during an epidemic outbreak, it may be a good idea to quarantine an entire area, as opposed to testing each person to see if she is sick, since such testing may risk more infections.

24. Frank Romanelli et al., *Poppers: Epidemiology and Clinical Management of Inhaled Nitrite Abuse*, 24 PHARMACOTHERAPY 69, (2004) ("Inhaled nitrites ('poppers') are also a common class of drugs that have a long history of being abused in social settings, particularly among gay and bisexual men.").

No, they are not fully distinct. Irreconcilable inconsistencies are distinct from reconcilable inconsistencies in the sense that no single situation can both be an instance of one and an instance of the other. However, a case of irreconcilably inconsistent laws necessarily features inconsistent justifications, and a case of reconcilably inconsistent laws necessarily features inconsistent justifications too. To begin to see this point, consider the fact that the specific reason for requiring two witnesses for a will (i.e. needing someone to corroborate the other witness) tells against any rationale for a law that only requires one witness. Indeed, every violation of the Consistency Principle features legal norms with inconsistent justifications. With this said, when I use the term inconsistent justifications in the remainder of the Article, I shall imply that the legal norms in question do not feature any other Consistency-related faults such as irreconcilable inconsistency.

3. Inconsistencies between the Justification of a Law and Its Execution

The final kind of inconsistency obtains when there is inconsistency between the justification of a law and its execution or enforcement.[25] More formally, the violation occurs when the method of executing a law rationally undermines that law.

Consider the following example. Suppose that a regulatory agency sought to regulate the production of widgets by private companies. The agency was charged with crafting rules to improve the quality of widgets because good will, competition, and the torts system were insufficient motivation to make manufacturers produce safe widgets. The agency, in turn, decided to require inspections of the widget factories; however, the inspections are self-inspections, and the agency has promulgated no rules to explain how such inspections are to be conducted. Clearly, this is one of those 'cat watching the henhouse' situations. The justification for having inspections is undermined by allowing the companies to do it themselves without guidance. The requirement of inspections has to be executed differently if the law is to meet its objective.

B. Real Life Interlude: Cormega's Story and Other Stories of Inconsistency

To prevent anyone from thinking that violations of the Consistency Principle are purely hypothetical, I interrupt our theoretical discussion of the proper scope and defense of the Consistency Principle to consider several real-life violations including the case with which we started, the Copening case.

Cormega Copening's case features two kinds of inconsistency about justification. First, the justification for the corruption of a minor statute, as applied to him, is inconsistent with the justification for the allowing him to have sex with Denson. Second, part of the justification for criminalizing child pornography is inconsistent with prosecuting Copening for this offense.

Copening's case – and sexting more generally – is not the only arena where there are such inconsistencies. This section highlights five violations of the Consistency Principle from various places and times. By exploring many violations, we gain a more

25. Langer & Sauter note this kind of inconsistency too. Langer, *supra* note 11, at 50 ("Consistency is also part of appropriate means. For example, there should be no conflicting exceptions or inherent contradictions between a legal norm and its application.").

concrete understanding of the problem and we understand its scope better.

1. To Inspect or Not to Inspect?

In the early 1950s, Ira Cardiff, president of the Washington Dehydrated Food Company, was convicted under a provision of the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 331(f), for barring federal inspectors from entering his factory.[26] However, another section of the FDCA, 21 U.S.C. § 374, authorized inspections only upon permission granted by the factory owner in question. When Cardiff successfully appealed his conviction, the Ninth Circuit noted the inconsistency, saying, "section 374 gives the operator the right to refuse inspection and section 331(f) warns him that if he exercises the right so given him he is liable to imprisonment."[27] In our taxonomy, Cardiff faced a reconcilable inconsistency.[28] Cardiff faced inconsistency because complying with § 374 and thereby exercising his right to exclude constituted non-compliance with § 331(f). This inconsistency was reconcilable, though, because Cardiff was capable of complying with both provisions of the FDCA while remaining within the jurisdiction. He could have just let the inspectors inspect.

2. Crack and Powder Cocaine

While the inconsistency that menaced Ira Cardiff was obscure and only affected factory owners, the next real-life inconsistency is the subject of great public criticism and has ravaged the lives of thousands. I speak of the crack and powder cocaine disparity.

Crack cocaine and powder cocaine are, more or less, the same substance. Crack cocaine is made by mixing powder cocaine with water and baking soda and then heating the solution.[29] Both are habit-forming stimulants derived from two species of the Coca plant.

In 1986, President Reagan signed the Anti-Drug Abuse Act of 1986 into law.[30] Among its many provisions, this "Act provided that individuals convicted of crimes involving 500 grams of powder cocaine or just 5 grams of crack (the weight of two pennies) were sentenced to at least 5 years imprisonment . . . ."[31] In other words, one had to have one hundred times as much powder cocaine as crack cocaine to receive the same punishment. Given that these are, more or less, the same substance, any disparity should seem odd. If there was going to be a disparity, one would think it should go the other way, since crack, an admixture, has less of the active ingredient than powder cocaine. On its

26. Cardiff v. United States, 194 F.2d 686, 687 (9th Cir. 1952), *aff'd*, 344 U.S. 174 (1952).

27. *Id.* at 688.

28. Technically speaking, of course, the inconsistency arose within a single statute. This fact is not important for our purposes here; however, this fact will be relevant when we consider remedies for inconsistencies below. When a single statute is inconsistent as the FDCA was in Cardiff's time, we can show that the statute violates due process by using the rationality test. As I explain below, the rationality test commonly used in modern substantive due process analysis will not work for most inconsistencies since the discordant norms come from different statutes.

29. ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 1 (2006).

30. *Id.* at 2.

31. *Id.*

face then, these laws appear to have inconsistent justifications. Whatever reason one has for penalizing crack users and dealers at the level one does requires one to penalize cocaine users and dealers at an equal or greater level.

This conclusion comes too fast though. The 100:1 disparity would be justified if legislators believed that cocaine had different effects as crack versus powder.[32] Perhaps Congress did believe this at one time, but multiple government commissions have proven otherwise and have recommended against the disparity.[33] What else might make sense of the disparity? If the difference in sentencing were race-based, as many have assumed,[34] this would at least make sense, but it would not rescue the sentencing regime from inconsistency. If the Congress endeavored to heap extra penalties on crack users because such users tend to be poor Blacks,[35] this would not be a legally permissible ground of acting. As noted above, we have inconsistency when there is no legally permissible rationale for maintaining both laws.

Finally, it is important to remember that this disparity is no relic of the past. In 2010, President Obama signed the Fair Sentencing Act[36] into law, which did eliminate the 100:1 disparity. But it replaced that with an 18:1 disparity.[37] Inconsistency remains.[38]

3. Saudi Women Operating Vehicles

Consider another situation of laws with inconsistent justifications. Until recently, women in Saudi Arabia were forbidden from driving cars;[39] however, there was no restriction on women flying planes in Saudi Arabia.[40] Allegedly, the restriction on women

---

32. *Id.* at 4 ("The rapid increase in the use of crack between 1984 and 1986 created many myths about the effects of the drug in popular culture. . . . For example, crack was thought to be so much more addictive than powder cocaine . . . .").

33. The United States Sentencing Commission recommended eliminating the disparity entirely in 1995, but Congress refused and requested new "guidelines that did not advocate parity." *Id.* at 6. A second report in 1997 recommended decreasing the disparity, which Congress again refused. A third report in 2002 again recommended decreasing the disparity, and again Congress refused. *Id.*

34. *E.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 112–14 (2010).

35. ACLU, *supra* note 29, at i ("Because of its relative low cost, crack cocaine is more accessible for poor Americans, many of whom are African Americans.").

36. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified at 21 U.S.C. §§ 841, 844, 960).

37. Tyler B. Parks, *The Unfairness of the Fair Sentencing Act of 2010*, 42 U. MEM. L. REV. 1105, 1108 (2012).

38. United States v. Williams, 788 F. Supp. 2d 847, 880 (N.D. Iowa 2011) ("[T]here is still no persuasive rationale for maintaining the crack/powder disparity at all, let alone maintaining it at 18:1.").

39. Shannon Van Sant, *Saudi Arabia Lifts Ban On Female Drivers*, NPR (June 24, 2018, 1:59 PM), https://www.npr.org/2018/06/24/622990978/saudi-arabia-lifts-ban-on-women-drivers. There was not a specific law that forbade women from driving; rather, there was a national policy of not issuing driver's licenses to women, and in turn, any woman caught driving was guilty of driving without a license.

40. Adam Taylor, *An All-Female Crew Lands a Plane in Saudi Arabia. But They Can't Drive From the Airport.*, WASH. POST (Mar. 15, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/03/15/an-all-female-crew-lands-a-plane-in-saudi-arabia-but-they-cant-drive-from-the-airport/?noredirect=on&utm_term=.d56c1e1970ef. To be clear, Saudi Arabia did not merely lack a law prohibiting women from flying planes, which one might see as mere oversight. Saudi Arabia explicitly licensed women to fly, and much was made of this. Ghazanfar Ali Khan, *Female Saudi Pilot Flies High*, ARAB NEWS (Apr. 29, 2014), http://www.arabnews.com/news/558946.

driving was undergirded by concerns about women's safety[41] and spiritual welfare.[42] These concerns are likely very misguided. Nonetheless, if one has these sorts of concerns, what sense does it make to allow women to fly planes? If one opposes women driving because they might be exposed to men outside their families, this can happen in a car or a plane. Moreover, a woman might fly her plane to a place very far from the protection of her family. Also, if one opposes women driving because a woman out on her own might be given to sin, (absurd and sexist as such concern may be) this result can just as easily obtain if a woman could fly a plane to wherever she wishes.

4. Amateur Bounty Hunters

Writing in the Eighteenth Century, Cesare Beccaria criticized the Italian practice of placing bounties on criminals' heads and allowing ordinary people to 'retrieve' the criminal. As Beccaria put it, this system, designed to counteract lawlessness, produced even more lawlessness.[43] We can be even more specific than Beccaria. The bounty system was designed, not to counteract lawlessness in general, but lawless killing in particular. However, as Beccaria noted, giving people license to kill someone they suspect is the fugitive results in more lawless killing due to mistaken identity, mistaken aim, and slaughtered would-be bounty hunters. In our taxonomy, this case features an inconsistency between the justification of a law and its execution.

C. Why Inconsistency Matters

Having outlined the four basic ways that a legal system can run afoul of the Consistency Principle and having provided four real-world examples of inconsistency, I now turn to diagnosing the problem with inconsistency. Or, to put the point another way, this section defends the Consistency Principle. To begin our work, I first survey and dismiss three other theories that try to identify the problem with inconsistency. The first three theories discussed below all track real problems, but the specific problem mentioned by each theory is not broad enough to encompass the full range of Consistency violations. The real problem is that one is disrespected when one's polity violates the Consistency Principle.

1. The SAG Defense

As a first pass, one might contend that inconsistencies are problematic because, in

41. Neil MacFarquhar, *Saudis Arrest Woman Leading Right-to-Drive Campaign*, N.Y. TIMES (May 23, 2011), https://www.nytimes.com/2011/05/24/world/middleeast/24saudi.html ("Many opponents were religious puritans who object to the very idea of women being exposed to strangers outside their homes by driving."); Hassan M. Fattah, *Saudi Arabia Debates Women's Right to Drive*, N.Y. TIMES (Sept. 28, 2007), https://www.nytimes.com/2007/09/28/world/middleeast/27cnd-drive.html ("Clerics and religious conservatives maintain that allowing women to drive would open Saudi society to untold corruption. Women alone in cars, they say, would be more open to abuse . . . .").

42. *Saudi Woman to Get 10 Lashes for Driving a Car*, ASSOCIATED PRESS (Sept. 27, 2011, 3:12 PM), https://www.cbsnews.com/news/saudi-woman-to-get-10-lashes-for-driving-a-car/ ("[T]he ban is rooted in conservative traditions and religious views that hold giving freedom of movement to women would make them vulnerable to sins."); Fattah, *supra* note 41 (mentioning arguments that if women drove, they "would become wayward").

43. CESARE BONESANA DI BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS, ch. XXXVI (1764).

the paradigmatic case, that of irreconcilable inconsistencies, law no longer seems capable of guiding action. Rendering this general thought more specific leaves us with the *Simple Action Guidance* (SAG) *Defense.*

> SAG Defense: inconsistencies are bad because they render law incapable of guiding action at all.

The SAG Defense is obviously false. Law *can* guide action even when there are irreconcilable inconsistencies. If someone faces legal penalties no matter what she does in the jurisdiction in question, the law may encourage her to leave the jurisdiction, to conceal herself from law enforcement, or to act so as to minimize the law's harms, say, by complying with the legal norm with stiffer penalties, should the penalties differ.

2. The CAG Defense

One might hear the preceding list of ways that law might guide someone, despite inconsistencies, and think: But that is not guidance in the proper way! It seems strange to contend that the law *guides* someone to conceal herself from law enforcement. This intuition should lead one to abandon the SAG Defense in favor of what I call the *Clever Action Guidance* (CAG) *Defense.*

> CAG Defense: inconsistencies are bad because they render law incapable of guiding action as it purports.

So far, this is extraordinarily vague. Allow me to flesh this out. Although a person can *react* to the law in various ways and therefore, in the weak SAG sense, *be guided* by the law in various ways, there is a stronger sense of *being guided* by the law. The law has a certain set of conventions by which it guides in its official way. For instance, if the law criminalizes conduct C, the law condemns C and commands legal subjects not to perform C.[44] This is true even if legal officials were to proclaim that C is a wonderful deed. If law influences people's conduct, not in just *any* way, but specifically by having them comply with its commands (commands we interpret via law's conventions), then the law guides as it purports, or in the CAG sense. For an illustration, recall the speed limit and speed minimum case from above.[45] Upon learning that, on that stretch of highway, one would be subject to a speed minimum higher than the speed limit, one may decide not to drive on that stretch of highway or not to drive at all. In the SAG sense, one is guided by the law, but, arguably, one is not guided by the law in the CAG sense.

Why? Well, in a reconcilable inconsistency, the law does not guide in the CAG sense, for there is nothing that the law commands. By having a speed limit or a speed minimum, the law accepts that someone will drive along the stretch of highway. In fact, the law proclaims that driving is permissible. However, the contents of the speed limit and speed minimum together contradict that permission. In criminalizing driving above fifty

---

44. This is an old insight from punishment expressivists like Feinberg. *See generally*, Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (July 1965).

45. *Supra* Part II.A.1.

miles per hour and driving below sixty miles per hour, the law condemns driving altogether along the stretch of highway. The law, thus, proclaims that driving on that stretch is permissible and not permissible. In the same way that stating a contradiction conveys no information,[46] the law says nothing at all about driving along that stretch. Thus, it cannot guide.[47]

I very much endorse CAG as a way of understanding legal norms, but the CAG *Defense*—that the Consistency Principle must be observed, so that law can guide in the way that it purports—cannot be the full story. This is not a full defense of the Consistency Principle. Even in those cases where law does guide subjects' behavior as it purports, we can still have instances of inconsistency, particularly laws with inconsistent justifications. Where laws with inconsistent justifications persist, the law does not, through its conventions, proclaim that the very same conduct is permissible and impermissible. Instead, Law_1 says some conduct C_1 is permissible, while Law_2 says some other conduct C_2 is impermissible. The law can thus command something. The problem with such commanding is that there is no legally permissible rationale for allowing C_1 while prohibiting C_2.

If the foregoing is correct, we must look beyond action guidance and must seek a broader explanation of the fault that Consistency violations entail.

3. The Kludge Defense

Moving beyond the action-guidance points, we might locate the problem with inconsistency in the inefficiency and lack of accountability that usually accompanies it. To make this suggestion vivid, I rely on an insightful article from Steven Teles.[48]

Teles develops a framework for understanding how government works in America today. America is a kludgeocracy, that is, a form of government wherein most policies are kludges. A kludge, as Teles cites from the *Oxford English Dictionary*, is "an ill-assorted collection of parts assembled to fulfill a particular purpose...a clumsy but temporarily effective solution to a particular fault or problem."[49] As Teles explains, kludges are bad because they cost a lot, hide how government works, and have no overarching rationale. This last point connects up with our concern about the Consistency Principle. Extrapolating from Teles, we should expect a kludgeocracy like ours to feature inconsistencies.

Now, Teles is not trying to diagnose the problem with inconsistency. He is pointing out a deep problem with the institutional design of the American government, namely that when federalism (with overlapping magisterial), separation of powers, and super-majoritarian procedures combine, we get inefficient government that is not properly

46. Manuel Bremer, *Can Contradictions Be Asserted?*, 7 LOGIC & LOGICAL PHIL. 167, 169 (1999) ("[A]n antinomy asserts nothing.").

47. I thank Chad Flanders and Mihailis Diamantis for pushing me to explain this point. This explanation not only helps me set up and knock down a potential defense of the Consistency Principle. It also helps further explicate what is inconsistent about reconcilable (and irreconcilable) inconsistency. Before the explication in the text, one might be tempted to think that there is something merely inconvenient about the situation. Now, it should be clearer that in those inconsistencies, the law speaks with two voices, canceling itself out.

48. Steven M. Teles, *Kludgeocracy in America*, NATIONAL AFFAIRS, Fall 2013.

49. *Id.*

accountable. One might depart from Teles's limited goals, however, and develop a defense of the Consistency Principle based on his arguments. In particular, one might argue that inconsistencies are bad because a) they signal upstream kludges and b) they, themselves, cause inefficiency and lacks of accountability. Call this the *Kludge Defense*.

Those who might advocate for the Kludge Defense or some other related concern (e.g. one cannot plan one's affairs if everything one does is criminalized), they note a real problem with inconsistency, but, like the action-guidance defenses before it, this defense is too narrow. Inconsistencies need not involve kludges. The crack/powder cocaine disparity has nothing to do with kludges; it has everything to do with harming a politically unpopular group. Also, inconsistencies need not to be inefficient. Whenever efficiency is mentioned as a concern, one must always remember that a means is never inefficient *simpliciter*, it is inefficient to a particular end. As such, some means are inefficient to one end but very efficient for another end. Inconsistencies like the crack/powder cocaine disparity might be inefficient to the end of stopping drug abuse, but it might be very efficient for another more nefarious purpose, like re-enshrining Black subjugation.[50]

4. The Disrespect Defense

To understand the general problem that all inconsistencies occasion, we have to think more expansively and, in particular, more jurisprudentially. In jurisprudential conversations, we are often looking for what distinguishes law from other behavior guiding systems.[51] For instance, jurisprudence scholars ask about the difference between law and club-rules[52] or the difference between law and morality.[53] Most important for our purposes, we might think about the difference between law and the demands of a mafioso.[54]

By *mafioso*, I mean something rather peculiar that may depart from actual mafias. I stipulate that law is different from the demands of the mafioso in that law features a legitimating narrative. In our lives as legal subjects, there must be reasons why we are subject to particular demands, reasons that have to do with promoting important values, such as safety, freedom, equality, piety, prosperity, and the like. To the extent that the demands are not even thought to track these values, legal subjects live under the arbitrary

50. One, of course, need not accept this particular claim about drug policy to appreciate and accept my general point: inconsistency is not necessarily inefficient; thus, inefficiency cannot be *the* problem with inconsistency.

51. Danny Priel, *The Boundaries of Law and the Purpose of Legal Philosophy*, 27 L. & PHIL. 643, 646 (2008) ("Much of what descriptive legal philosophers are concerned with is the question of boundaries, that is, the proper way of distinguishing between those things in the world that are laws and those things in the world that perhaps bear some resemblance to law but nonetheless are not laws . . . . They do so by looking at legal practice and by trying to distinguish it from other normative practices and systems of norms (etiquette, rules of clubs, social norms, morality and so on).").

52. For a discussion of characteristics of law that particularly distinguish it from club rules, see RAZ, *supra* note 10, at 116–20.

53. *See, e.g.*, HART, *supra* note 16, at 181–207; Mark C. Murphy, *The Explanatory Role of the Weak Natural Law Thesis*, *in* PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 3 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

54. For an early discussion of the difference between law and thugs who make demands on us, see HART, *supra* note 16, at 19–23. For more recent discussion on the difference between organized crime and legal systems, see SCOTT J. SHAPIRO, LEGALITY 215–16 (2011). *But see*, Matthew Kramer, *Requirements, Reasons, and Raz: Legal Positivism and Legal Duties*, 109 ETHICS, Jan. 1999, 375, 393–95 (eliding the mafia/law distinction).

whims of others,[55] or, more colorfully, they live under the thumb of a mafioso. Ultimately, mafiosos are under no compunction to justify their various demands;[56] their swords and guns have the last word. To live under law, by contrast, the demands on our freedom imposed by legal officials – these have to be undergirded by reasons, and the reasons given by the officials have to be reasons that can do the justificatory work, at least by the officials' light. Otherwise, we just have lying mafiosos. When the 'legal' system treats us as involuntary clients of lying mafiosos, we are disrespected.[57] We are treated as mere means for the pursuit of others' ends.[58]

It is not important that we investigate the beliefs and desires of each and every legal official in our jurisdiction to determine whether we are disrespected in this way. Rather, as legal subjects, we should be able to look at our legal system as a whole and affirm it as something that is decidedly *not* the mere whim of mafiosos. That means that the full set of legal norms has to be undergirded by a coherent set of reasons. Otherwise, we should infer we live under a mafia, under people who are not bound to give us reasons. This, no doubt, sounds dramatic, but consider how inconsistent legal norms sound to someone bound by them. The North Carolina government told Copening they were protecting his privacy by showing his naked photos to a host of adults, releasing his name for journalists and others to see, and threatening to put him on a sex offender registry. This would be hilarious if it were not tragic.

III. PUTTING THE CONSISTENCY PRINCIPLE TO WORK

Part I of this Article sought to expand our understanding of the Consistency Principle, to demonstrate real-world violations of the Principle, and to explain why the Principle is important to uphold. Though as the old adage goes, "The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it."[59] In keeping with this point, Part II shifts to developing a theory of legal relief for those harmed by legal inconsistencies.

A. Due Process is the Remedy

Violations of the Consistency Principle are violations of due process of law. Therefore, to remedy inconsistencies, those harmed by them ought to challenge their

---

55. A line from Joseph Raz is especially helpful here: "[A]n act which is the exercise of power is arbitrary only if it was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them." RAZ, *supra* note 10, at 219.

56. As Scott Shapiro notes, "When organized crime happens to solve moral problems, these occurrences are treated by us as *serendipitous*, as happy accidents. By contrast, the moral benefits generated by a just legal system are not accidental or side effects of legal activity; rather, producing them is the very point of its activity." SHAPIRO, *supra* note 54, at 216.

57. Again, Raz helpfully explains this intuition: "[O]bservance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future . . . respecting their autonomy, their right to control their future." RAZ, *supra* note 10, at 221. While Raz is talking generally about the rule of law, what he says applies specifically to the Consistency Principle, an element of the rule of law.

58. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS, at Ak. 429 (James W. Ellington trans., 3d ed. 1993) ("Man, however, is not a thing and hence is not something to be used merely as a means.").

59. Karl Marx, *Theses on Feuerbach*, *in* THE MARX-ENGELS READER 143, 145 (Robert C. Tucker ed., 2d ed. 1978).

convictions or adverse administrative adjudications in courts on Due Process grounds.[60] If the defendant were successful, a court need not resolve the inconsistency; instead, the court would exempt the prevailing defendant from the adverse consequences.

While fairly straightforward and general, advocating for this Due Process remedy is likely to raise several questions. First, one might wonder what kind of due process violation this is, procedural or substantive. Second, one might wonder why inconsistencies violate due process in the first place, whether construed as procedural or substantive. Third, before accepting this theory of relief, one might wonder about other alternatives. Answering these three concerns sets the agenda for this section of the Article.

I argue below that inconsistency is problematic on both procedural and substantive conceptions of due process. Concededly, the case may be stronger on the side of procedural due process, but there is a good case on both fronts. After completing the argument for Due Process remedy, alternative remedies are considered. As I demonstrate, none of the surveyed remedies has the generality, clarity, and finality of the Due Process remedy.

1. Rule of Law Violations as Procedural Due Process Violations

As courts see it, the requirement to afford all people due process of law has two components, procedural due process and substantive due process. Roughly, in procedural due process analysis, a court asks whether, in the course of depriving someone of "life, liberty, or property,"[61] Government has engaged in the correct procedures, while in substantive due process, a court asks whether the deprivation itself was undue, apart from the procedures used to carry out the deprivation.

Accordingly, procedural due process might be seen as guaranteeing that the rule of law (understood in a thin, formal way) will be respected in a particular jurisdiction. To demonstrate the connection between procedural due process and formal accounts of the rule of law, I enlist the help of Lon Fuller. In his influential work from the 1960s, Fuller provides a list of eight formal rule of law principles.[62] Courts have already held that several of these principles are requirements of procedural due process. The Consistency Principle, which is on Fuller's list, has not been fully incorporated into procedural due process, but it ought to be, for it is of no less moment than the other Fullerian principles that courts have already adopted. By parity of reasoning, courts should declare inconsistency to be antithetical to procedural due process.

Fuller's eight principles are as follows.[63]

CONSISTENCY: the laws in a jurisdiction must be mutually consistent

ENFORCEMENT: the published version of laws must accord with how they are enforced

60. Maybe prohibitory injunctive relief could be warranted too, but settling that questions takes us far afield from the present inquiry, which is simply the general constitutional remedy.

61. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

62. FULLER, *supra* note 6, at 38–39.

63. The preceding list paraphrases other scholarship on Fuller. Raff Donelson & Ivar R. Hannikainen, *Fuller and the Folk: The Inner Morality of Law Revisited*, *in* OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY, VOL. 3 (T. Lombrozo, J. Knobe, & S. Nichols eds., forthcoming 2019). It is important to note that some scholars understand Fuller as offering rule of law principles (what makes for good law), some take him to offer conditions of legality (what makes a norm a legal norm), and some, like myself, see his principles as doing double duty.

GENERALITY: laws must be general rules of conduct
INTELLIGIBILITY: laws must be capable of being understood by legal subjects
POSSIBILITY: laws may only require those acts subjects are physically capable of performing
PROSPECTIVITY: in regulating conduct, law must be prospective
PUBLICITY: laws must be publicly announced
STABILITY: law may not change too frequently

Current understandings of fair notice, which is a requirement of procedural due process,[64] incorporate a good deal of these Fullerian principles. Courts typically hold that unintelligible laws do not provide fair notice and thereby violate procedural due process.[65] Court have also held that retrospective laws can fail to provide fair notice and thereby can violate procedural due process.[66] Fuller's publicity principle has been understood similarly.[67] Similar arguments have been advanced for the possibility principle.[68] There are independent constitutional provisions that guarantee generality,[69] but even the rationale for those provisions traffics in procedural due process language.

The foregoing should provide strong reason to conclude, by parity of reasoning, that courts should see consistency as a part of procedural due process too. If that is not enough, there is some limited (but on-point) precedent for seeing inconsistency as violating procedural due process. Recall the case of *Cardiff v. United States*. The summary of his case above focused on the 9th Circuit decision,[70] but Cardiff's case reached the Supreme Court.[71] The Court affirmed the 9th Circuit and held that the reconcilable inconsistency afflicting Cardiff violated procedural due process. The Court relied on a fair notice theory in doing so. As I explain below, calling this a failure of notice is misleading.[72] Nonetheless, this case shows that the Court has recognized that legal inconsistencies are an affront to procedural due process.

2. Inconsistent Laws as Irrational Violations of Substantive Due Process

In substantive due process review, a court asks whether a denial of "life, liberty, or

64. Lambert v. California, 355 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of notice.").

65. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

66. Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) ("The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation.").

67. Cendant Corp. & Subsidiaries v. Dep't of Revenue, 226 P.3d 1102, 1109 (Colo. App. 2009), *as modified on denial of reh'g* (Colo. App. 2009) ("There can be no secret laws because they violate very basic considerations of due process.") (internal quotations omitted).

68. United States v. Gresham, 118 F.3d 258, 262 (5th Cir. 1997) (mentioning that some courts have held "it would violate due process to convict a defendant for violations of a statute when compliance with it is legally impossible" then holding otherwise).

69. The Bill of Attainder Clauses (U.S. Const. art. I, § 9, cl. 3; § 10, cl. 1) generally prevent legislatures from simply declaring that some named parties are to receive ill treatment. This suggests commitment to the idea that law ideally functions as setting out general rules of conduct, rules that parties can use to regulate their behavior, rules that a judiciary might use to determine compliance.

70. *See supra* Part II.B.1.

71. United States v. Cardiff, 344 U.S. 174 (1952).

72. *See infra* Part III.A.3.c.

property" was undue, apart from the procedures used to carry out the denial. To make this determination, courts must first make a determination about the character of the right denied. The right in question may be fundamental or not. If the right is fundamental, a court will use strict scrutiny as its standard of review; that is, the court will inquire whether infringing on the right was done to advance a compelling state interest and whether this method of advancing the state interest was narrowly tailored to achieving that goal. When the right is fundamental, unless the court finds both a compelling state interest and narrow tailoring, the deprivation violates substantive due process. If the right is not fundamental, courts employ the more deferential rationality test. On this standard of review, the court inquires whether infringing on the right might advance any legitimate state interest and whether using this method was rational. When the right is not fundamental, unless the court finds that the state action was a rational means of achieving some legitimate state interest, the deprivation violate substantive due process.[73]

Given this framework, how might inconsistencies figure? As noted above, all inconsistencies are inconsistent at the level of justification. That means that there can be no legitimate reason for the state to act as it does. There can be a legitimate reason for the state to adopt one law and a legitimate reason to adopt another law, but, if there is an inconsistency, there is can be no legitimate reason that could explain a polity having both laws in force at once.

If this much is right, it means that all inconsistencies fail rationality review. Now, as things stand, courts only consider the rationality of one legal norm at a time, but nothing should prevent them from inquiring about a set of laws. If they did, they would see that some would fail.

3. Issues with Other Theories of Relief

Above I sketched two arguments for the claim that courts should deem all violations of the Consistency Principle to be violations of due process, both procedural and substantive. Of course, this theory is not the only possible one. Scholars, courts, and activists have suggested several other ways to remedy violations of the Consistency Principle. Below, I consider five other theories and explain why the Due Process solution is best.

a. First Amendment

The first alternative remedy to consider looks to a different constitutional provision. Instead of taking a due process approach, one might argue that the North Carolina sexting law violates the First Amendment.[74] This approach may appear to be a non-starter, for it is no secret that courts have long recognized that the First Amendment does not protect obscene materials in general[75] and explicit images of minors in particular.[76] Some scholars

73. The preceding overview of substantive due process can be found in many places; one of the best is ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 814–18 (4th ed. 2011).

74. Professor Mary Anne Franks is quoted making this argument in Miller, *supra* note 3.

75. Roth v. United States, 354 U.S. 476, 481 (1957) ("[T]his Court has always assumed that obscenity is not protected by the freedoms of speech and press.").

76. New York v. Ferber, 458 U.S. 747, 763 (1982).

have offered persuasive arguments to narrow those precedents;[77] nevertheless, three additional problems would remain, even if one were to convince courts to read the First Amendment differently.

First, even if sexting laws do violate the First Amendment, this will not help those who encounter other laws that violate the Consistency Principle. Sexting may well be the most visible issue that involves possible violations of the Consistency Principle, but it is not the only area where violations exist. Other violations of the principle may not be amenable to a First Amendment fix. For instance, the aforementioned disparity in sentencing for powder and crack cocaine possession is also a large and widespread problem that has persisted for decades. Since there is no First Amendment interest at stake in cocaine prohibition, a First Amendment remedy would be inapt.

At this point, a proponent of the First Amendment remedy might concede that her solution is partial and yet insist that the path forward is to use the First Amendment in conjunction with other theories to address new violations of the Consistency Principle as they arise. This emendation of the First Amendment remedy suggests a second problem. Using ten theories to address a singular constitutional evil is an unwieldy strategy, one not to be employed when a categorical approach like the due process approach is available.

Third, the First Amendment remedy fails to address the constitutional violation at issue. The issue at hand, even in the sexting case, is not the curtailment of expression. Rather, the issue is that jurisdictions are treating legal subjects unfairly by imposing inconsistent laws. A First Amendment remedy misses that point. This criticism may seem academic or pedantic, but there is a practical upshot. The First Amendment remedy is a proxy remedy. Proxies, by their very nature, only *approximate* what the true antidote can accomplish, and as such, proxies should not be used when one can just as easily use a solution that can directly and completely address a problem.

b. Cormega's Law and Other Legislative Fixes

The First Amendment strategy is ill-suited to remedy violations of the Consistency Principle because settled case law speaks against this strategy, because it cannot reach all instances of inconsistency, because using it as a partial remedy is wieldy, and because the strategy misses the point. Similar worries plague a second possible remedy for violations of the Consistency Principle. Copening's mother advocated for a legislative fix to the specific problem faced by her son. She imagined calling the legislation that would permit teens to sext "Cormega's Law."[78]

The most obvious problem with this legislative fix is its narrow scope. Cormega's Law, were it enacted in North Carolina or across the United States, would not reach all violations of the Consistency Principle. As noted above, sexting does not exhaust the scope of the problem. There are three ways that one might amend the legislative fix to address the narrowness: (1) One might propose a new law to address each inconsistency as one

77. *E.g.*, John A. Humbach, *"Sexting" and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010).

78. Paul Woolverton, *Sexting Charges Dismissed for Fayetteville Teenager*, FAYETTEVILLE OBSERVER (July 7, 2016, 12:01 AM), http://www.fayobserver.com/bae7b802-8b76-542b-9cd5-f0671cee3d47.html. It is unclear from the journalistic report whether Copening's mother advocated for a law that would outright permit teen sexting or whether she merely wanted a law with less strict penalties for the behavior.

finds it in the particular jurisdiction in which it arises, (2) one might propose that Congress and each state pass a single law that nullifies all instances of inconsistency, or (3) one might hope for a single piece of legislation that purports to nullify all instances of inconsistency. These emendations to the legislative fix invite new worries.

The first two emendations should be rejected as too unwieldy. Employing strategy (1) could require countless new laws over time. Under (2), we need fifty-one new laws. Though fifty-one is more manageable than the untold number of laws that might be needed under (1), any scheme requiring fifty-one different sets of legislators to agree should be rejected if a more practicable option exists. Option (3) is the most promising, but it is beset by federalism problems. This contemplated single piece of legislation would have to be a piece of federal law. If it were not federal law, it clearly could not remedy instances of federal law that violate the Consistency Principle because state and local lawmakers cannot repeal or otherwise invalidate federal law.[79] Moreover, no states can bind other states.[80] However, even if it were a piece of federal legislation, purporting to bind all federal, state, and local lawmakers, there would be a different federalism problem: Congress has no power to regulate every area of state law.[81]

c. Notice

A more promising and more general approach is to suggest that there is a failure of notice when laws violate the Consistency Principle. Even from the perspective of someone advocating for a due process theory, the notice theory has two advantages: first, notice requirements are part of the requirements for due process, and thus, the notice theory is a due process theory, and second, the Supreme Court has used a notice theory to strike down a conviction when the defendant faced a reconcilable inconsistency.[82]

Two problems attend the notice theory. First, current understandings of the notice requirement cast doubt on the willingness of courts to extend the theory to inconsistent justifications *writ large*. Second, just as a matter of semantics, it seems false to say that one has insufficient notice when the laws in question are clear, public, and relatively longstanding. I develop these two points in turn.

While courts have claimed that irreconcilable and reconcilable inconsistencies provide inadequate notice to legal subjects, I know of no case where the notice doctrine has been extended to inconsistent justifications. This means that using a notice theory to cover all varieties of inconsistencies would be an innovation. Innovation is not a bad thing,

---

79. Ableman v. Booth, 62 U.S. 506, 516–17 (1858) (holding that states cannot nullify federal law).

80. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571 (1996) ("[I]t is clear that no single State could . . . impose its own policy choice on neighboring States."); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986) ("[One state] may not project its legislation into other States.") (internal citations and brackets omitted); Bonaparte v. Appeal Tax Court of Balt., 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

81. Of course, there is a theory on which Congress could regulate all areas of state law to attempt to remedy all inconsistencies: it could claim that it was relying on its enforcement power granted by the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. This theory, of course, requires that inconsistencies run afoul of some Fourteenth Amendment guarantee. Thus, this legislative fix presupposes the correctness of some other theory, which means that it is incomplete. Coincidentally, if my Due Process remedy is correct, Congress could then pass statutes to try to stamp out inconsistencies.

82. United States v. Cardiff, 344 U.S. 174 (1952).

but if part of the draw of the notice theory is that courts are already doing something like that, this attraction is only partially right.

That courts have not extended the fair notice doctrine to cover inconsistent justifications should not be surprising, for it seems patently false to claim that one has no notice of what Government will do in many cases of inconsistency. To see this, consider the speed limit/minimum case. Along that stretch of highway, if one drives, one runs the risk of getting caught for breaking one of those traffic laws. If this silly confluence of laws were longstanding, it would be disingenuous to contend that one had no notice in the normal sense of the word. Consider also the crack/powder cocaine disparity. A disparity in some form has been in place for over thirty years. Anyone who receives punishment for dealing crack had notice. Make no mistake, those who face inconsistent laws have been harmed, but their harm is the disrespect that legal inconsistency necessarily occasions, not the harm from a failure of notice.

d. Equal Protection

The next alternative remedy to consider is an equal protection theory. To understand how this remedy is supposed to work and why it is ultimately too limited, we must set out in brief modern equal protection doctrine.

Under modern equal protection doctrine, courts evaluate whether government action violates the Constitution's guarantee of equality by reference to three standards of review: strict scrutiny, intermediate scrutiny, and rational basis review.[83] Strict scrutiny, appropriate when the government action classifies on the basis of "race, alienage, or national origin" or when the classification infringes on a fundamental right, requires the government to show that the classification is narrowly tailored to furthering a compelling government interest.[84] Intermediate scrutiny, appropriate when the government action classifies on the basis of sex, gender, or legitimacy, requires the government to show that the classification is substantially related to furthering an important government interest.[85] With the caveat for claims involving fundamental rights, the heightened forms of scrutiny, strict and intermediate, are appropriate only when the government employs suspect classifications, presumptively invalid classifications based on characteristics such as race and sex. Rational basis review is appropriate for all other classifications.[86] Under rational basis review, the government must show that the classification is rationally related to furthering some permissible government interest.[87]

Certain violations of the Consistency Principle also violate the Equal Protection Clause. Schematically, this occurs when one legal norm provides some benefit to Group A, another legal norm denies the benefit to Group B, and there is no permissible legal

83. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

84. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); *see also*, Loving v. Virginia, 388 U.S. 1, 11 (1967).

85. *See* United States v. Virginia, 518 U.S. 515, 533 (1996); *see also*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

86. *See, e.g., City of Cleburne*, 473 U.S. at 442 (mental ability); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (age); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (socioeconomic status); Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 489 (1955) (profession).

87. Romer v. Evans, 517 U.S. 620, 631 (1996).

reason for the exclusion.[88] Thus, some legal norms that violate the Consistency Principle would also fail rational basis review under the Equal Protection Clause. However, the important word in the previous sentence is *some*. There are many ways to violate the Consistency Principle without following the structure of giving a benefit to one group and withholding it from another. For instance, consider the irreconcilable inconsistency offered at the outset, that of the student who must appear in court and appear in school at the same time. This example features irrationality, but not an irrational classification. The same is true of our speed limit/minimum example, for that case too features no irrational classification. Indeed, many irreconcilable and reconcilable inconsistencies will not violate the Equal Protection Clause. Laws with inconsistent justifications are those most likely to violate the Clause.

The Equal Protection remedy is thus partial. It cannot reach all instances of inconsistency. As noted above, *ceteris paribus*, partial remedies are to be rejected when a complete remedy, like the Due process remedy, is on hand.

e. Canon of Statutory Construction

The final alternative remedy I consider is the suggestion that courts should, as a matter of statutory construction, never read laws such that they violate the Consistency Principle.[89] Call this the canon of statutory construction remedy, or the canon remedy. The canon remedy is born from the thought that it is more controversial to claim that the *Constitution* provides defense to parties adversely affected by inconsistencies than merely to claim it is *good policy* to read legal texts so as to avoid inconsistency.

Two additional facts further support using the canon remedy. First, we already have several canons that do similar work, so it would not be a great departure from current practice. For instance, as noted above, *lex posterior derogat priori* allows courts to defuse many irreconcilable and reconcilable inconsistencies. Also, the Absurd Results doctrine,[90] which allows courts to avoid legal outcomes that both seem required by the plain language of a statute and patently absurd, could help courts in situations involving laws with inconsistent justifications and maybe even inconsistencies between a law and its enforcement. Because courts already have such tools, this is not uncharted territory, so encouraging courts to use this remedy to avoid violations of the Consistency Principle should not seem particularly risky. A second fact in support of the canon remedy is that it appears to be a general way to uphold the Consistency Principle, unlike some of the other proposed strategies.

Despite its benefits, the canon remedy is limited, not in scope but in power. To see this, I begin by noting a familiar fact about canons of construction. Canons of construction are defeasible. Noted scholars have contended that canons must sometimes give way to other canons or to the dictates of commonsense.[91] Few would deny that canons must also

88. *See*, the poppers example, *supra* Part II.A.2.

89. I owe this suggestion to Michael Coenen who first mentioned it to me.

90. For an overview of the doctrine and a few central cases, see Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 53–56 (2006).

91. *E.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 *passim* (1950).

give way to a legislature that insists on a particular construal of its legislation.[92] This latter point is instructive for thinking about how the canon remedy would work in practice and for seeing the limitation of this remedy. If the canon remedy were in use and were applied to a set of irreconcilable criminal laws, it would allow a court to interpret the inconsistent laws such that the criminal defendant would not be liable for not complying with one law in the set. Essentially, the court would claim that one of the criminal laws at issue is to be read as exempting parties from criminal liability if the party's criminal action was compelled under threat of criminal penalty. Suppose that, after a court hands down its ruling, the legislature writes a new law expressly disclaiming any such exemption. At this point, a court would not be free to employ the consistency canon again, to read in exemptions that the legislature deliberately withheld. Thus, the canon remedy can only go so far if a legislature is committed to violating the rule of law.

The canon remedy is, then, a *provisional* kind of solution to violations of the Consistency Principle. The Due Process remedy, by contrast, is final. Short of changing our constitutional structure, no one will be able to disregard courts' attempts to stamp out consistency violations. For those partial to the canon remedy, I should note what might count as an added bonus for the Due Process remedy: courts will regularly read statutes such that they do not contravene the Consistency Principle because of the constitutional avoidance canon.[93] Thus, these two strategies will, more or less, coincide.

B. Objections

Several worries attend the kind of cause of action for which I advocate. First, one might worry that there might be too many inconsistencies, such that no one can be prosecuted for anything. Second and alternatively, one might worry that any seeming inconsistency can be made consistent, such that this theory of relief will help no one. Third, one might wonder whether there is positive value to having inconsistencies in the legal system, value that might be lost, were my theory to be accepted. Fourth, one might worry that this theory of relief empowers the judiciary too much.

1. Too Many Violations?

According to the first worry under consideration, violations of the Consistency Principle abound. Perhaps they are inevitabilities. During periods of transition, a legal system will take on new legal norms that are out of sync with the old. Some of the old will face repeal because of its repugnancy to the new way of thinking. However, some of the old will persist, innocuous enough to the new order, but still not susceptible to rationalization within the new paradigm of thought. If this happens and happens all the time, so this objection continues, I am suggesting that we swim against the tide, but such

92. As the Court noted about the absurd results canon, "[j]udicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." Comm'r v. Asphalt Prods. Co., 482 U.S. 117, 121 (1987).

93. Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

is a fool's errand.[94]

There are two ways to respond to this worry. One can deny that violations are so numerous, or one can bite the bullet and say that we ought to combat violations even if they lurk at every turn. I shall take the first path, for true inconsistencies are less common than a potential objector might think. It is implausible to suggest that irreconcilable inconsistencies are everywhere. The most plausible version of this objection suggests that laws with inconsistent justifications are everywhere. To see that this too is an exaggeration, I consider two situations where significant inconsistencies seem to arise, but I show how the seeming inconsistencies can be resolved. The proceeding test cases should allow us to see that many seeming consistency problems can be similarly defused.

The first case concerns abortion. Legal abortion and fetal homicide laws appear to be in tension. To put the point more formally, one might think there is an inconsistency between permitting abortions and criminalizing as murder the intentional killing of a fetus by someone other than a mother or her agents.[95] One might see inconsistent justifications because one might believe that the only justification for permitting abortions is that fetuses are not persons and further that the only justification for criminalizing as murder the intentional killing of a fetus is that fetuses *are* persons.[96] This seeming inconsistency can be fixed, as there are justifications for abortion that grant the personhood of fetuses.[97] One might justify abortion by holding that fetuses have no moral right to a woman's bodily resources, just as a sick patient may have no moral right to a hospital's resources – even if denial of such resources would result in the respective person's death. Still, so this justification would continue, it would be wrong for someone *else* to murder the fetus or sick patient once the mother or hospital has decided to extend support for the furtherance of the respective person's life.

The second case concerns a heart-wrenching story involving a family raising a child with severe mental illness.[98] Jim and Toni Hoy adopted Daniel as a toddler and raised him alongside their other three children. Though Daniel was a typical toddler, after a few years, the young boy began having violent outbursts. The Hoys sought medical attention but often to no avail because their private insurance would not cover the mental health care Daniel needed. Daniel's condition continued to deteriorate, and, in one incident, he threw his brother Chip "down the stairs and punched him over and over before their dad pulled the

---

94. The foregoing is my best reconstruction of an excellent point raised by Etienne Toussaint.

95. *See, e.g.*, 18 U.S.C. § 1841 and Ala. Code § 13A-6-1 for laws that criminalize this way.

96. For a version of this argument, see Arina Grossu, *Fetal Homicide Laws and the Logical Inconsistency of Abortion*, FAMILY RESEARCH COUNCIL (Mar. 7, 2014), https://www.frc.org/op-eds/fetal-homicide-laws-and-the-logical-inconsistency-of-abortion.

97. *E.g.*, Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). The proceeding argument in the text is a variant of Thomson's arguments in that article. For a similar point made thirty-four years later, see Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 724 (2006) ("Proponents of legal abortion have much to lose by agreeing to conduct the debate about reproductive rights within a framework that hinges on the status of the fetus and thus sidelines the threat to the pregnant woman's autonomy.").

98. Christine Herman, *To Get Mental Health Help for a Child, Desperate Parents Relinquish Custody*, NPR (Jan. 2, 2019, 2:31 PM), https://www.npr.org/sections/health-shots/2019/01/02/673765794/to-get-mental-health-help-for-a-child-desperate-parents-relinquish-custody. I thank Colin Miller for bringing this case to my attention.

boys apart."[99] When the Hoys again came to a hospital, seeking help for Daniel, they were turned away because of their inability to pay. More bad news was to come that day, for the Illinois Department of Children and Family Services told Mrs. Hoy, "If you bring him home, we're going to charge you with child endangerment for failure to protect your other kids . . . [a]nd if you leave him at the hospital, we'll charge you with neglect."[100]

This second case may sound like it features an inconsistency.[101] If the Hoys take Daniel home, they break the law; if they leave him where he is in the hospital, they break the law. This would be an inconsistency of some kind, were the only two places in the world the Hoy household and the hospital. Of course, this is not so. There were lots of other options: they could have left Daniel with a relative or friend who does not have children, one parent could have gotten a second home to raise Daniel away from the other three children, or they could have done what they, in fact, did do. Jim and Toni relinquished their custody of Daniel, so that he would become a ward of the state and receive the medical attention he needed for free. No doubt this was a tragedy. No one should minimize this, but, if the preceding is correct, what happened to the Hoys was no violation of the Consistency Principle after all.

2. Can't Anything Be Made Consistent?

The foregoing response to the first objection, however, makes defending against the second objection all the more difficult. One might worry that an ingenious government attorney will always find a way to make sense of why a jurisdiction should have two laws, even if there is a seeming tension between said laws. This weighty objection merits a more thorough response than I can provide, so my response will be partial.

The due process argument I propose is much like rationality review used in both substantive due process jurisprudence and equal protection jurisprudence. While rationality review is easy to satisfy in many cases,[102] it is not toothless. Likewise, what one might call *Consistency Review* would be easy to satisfy in many cases, but it, like rationality review, would not be toothless either.[103] If the most ingenious government attorneys sometimes lose on rationality review, which they do,[104] there is no reason to

99. *Id.*

100. *Id.*

101. Colin Miller suggested this to me both in person and online, Colin Miller (@EvidenceProf), TWITTER (Jan. 3, 2019, 9:48 PM), https://twitter.com/EvidenceProf/status/1081034583712374785 ("[A] Catch-22: take him and you're committing a crime; DON"T [sic] take him home & you're committing a crime."). This is also how Mr. Hoy himself understood his experience, for he said of the Department of Family and Children Services' ultimatum, "[t]hey put our backs against the wall, and they didn't give us any options." Herman, *supra* note 98.

102. Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 GEO. J.L. & PUB. POL'Y 493, 494 (2016) ("[A]lmost any possible legislation can be justified under modern rational basis review."); Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071 (2015) ("Rational-basis review, the most deferential form of scrutiny under the Equal Protection Clause, rarely invalidates legislation.").

103. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (1999) ("This Article addresses successful rational basis claims under the Equal Protection Clause in the Supreme Court. These cases are sufficiently rare to stand out as unusual, but they do exist."); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1341–53 (2018) (arguing that we only view rationality review as ineffectual and overly-deferential owing to myopic focus on Supreme Court cases, to the exclusion of state court cases).

104. In Holoszyc-Pimentel, *supra* note 102, at n.2, we get a list of cases where the Supreme Court has held

doubt that some will lose on consistency review too.

My response to this worry essentially says, "we must admit that some combinations of laws are provably irrational if we accept that some single laws are provably irrational." One can pretend that this response is fully satisfying, but I am more candid. Like with any proposed remedy, one can only speculate on how courts might employ this. Maybe it will be dead-letter, if adopted. There is no theoretical reason why that should be the case, but as the great Dostoyevsky once quipped, "A thousand things may happen in reality which elude the subtlest imagination."[105]

3. The Value of Incoherence

The third objection rests on the idea that there is positive value to retaining inconsistencies in the law. If there is such value, so this objection goes, getting rid of all inconsistencies through the due process solution is wrongheaded. On its face, claiming that we need to have inconsistency in the law can sound outlandish, but this objection is something to take seriously. One might develop this objection by talking about the value of federalism. Even if one dislikes federalism, it is stitched into the very fabric of American constitutionalism. As such, it would be very bold to suggest that the Due Process Clause requires jettisoning federalism.

To see how inconsistency and federalism concerns relate, consider the following example. Several states permit the recreational use of marijuana or its medicinal use, while the federal government bans its use for either medical or recreational purposes. Here we have what appears to be a straightforward reconcilable inconsistency, for someone 'lighting up' in Denver, her conduct is permitted under state law but prohibited under federal law. If there is an inconsistency here, it is the product of federalism: when one has two independent legislatures, they can and reliably will reach different results at least sometimes.

This objection, though *prima facie* compelling, rests on a mistake. It is not clear that there is a reconcilable inconsistency in the marijuana case. Because the federal government has limited powers[106] and because of the Supremacy Clause,[107] it should not be possible for a state and the federal government to regulate the same conduct in disparate ways. Either the federal government is regulating in a domain where it has legislative jurisdiction or it is not. If it has legislative jurisdiction, conflicting state laws are null via the Supremacy Clause. If it lacks legislative jurisdiction, it is federal overreach, and the state law should stand. On the specific question of marijuana, the Court has already spoken, and federal

---

that a law violated Equal Protection, using rationality review: United States v. Windsor, 570 U.S. 744 (2013); Romer v. Evans, 517 U.S. 620 (1996); Quinn v. Millsap, 491 U.S. 95 (1989); Allegheny Pittsburgh Coal Co. v. Cty. Comm'n, 488 U.S. 336 (1989); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612 (1985); Williams v. Vermont, 472 U.S. 14 (1985); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Plyler v. Doe, 457 U.S. 202 (1982); Zobel v. Williams, 457 U.S. 55 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Reed v. Reed, 404 U.S. 71 (1971).

105. FYODOR DOSTOYEVSKY, THE BROTHERS KARAMAZOV (Bk XII, Ch. XII).

106. U.S. CONST. art. I, § 9; *id.* amend. X.

107. U.S. CONST. art. VI, cl. 2.

law does preempt state law on this score.[108]

This tidy response to the federalism objection skirts around some complicated issues. The response above provides that the structure of American federalism itself does not allow inconsistencies to arise because superseding measures prevent state and federal law from ever conflicting. This way of dissolving the federalism objection is actually more controversial than it might appear at first blush. As a matter of contemporary practice, federal and state law regulate the very same conduct in disparate ways on a number of issues, creating what appear to be reconcilable inconsistencies that no courts think to invalidate. For instance, under the federal Controlled Substances Act, simply possessing a small amount of marijuana, say ten grams, is punishable by up to a year in prison for a first offense;[109] however, under Louisiana law, simply possessing ten grams of marijuana carries a maximum sentence of fifteen days, if it is one's first offense.[110] If one thinks of the United States as a single jurisdiction, we have a reconcilable inconsistency, for in the same polity, the law claims that for a given act, one can be jailed for only fifteen days *and* up to one year. These two norms are in obvious conflict. One can resolve this conflict by denying that the nation is one jurisdiction. In fact, courts have long held that state and federal governments are separate sovereigns for criminal justice purposes. If Louisiana and the federal government are separate sovereigns, there is no inconsistency, for the Consistency Principle only regulates the goings-on within a single jurisdiction. It would thus appear that, again, the structure of American federalism itself does not allow inconsistencies between state and federal law to arise; this time because discrepancies between state and federal law count as laws from different jurisdictions, which is not an issue the Consistency Principle aims to address. But is that so? Can it be reasonable to treat the laws of Louisiana and federal law as coming from separate sovereigns, such that when they conflict, they pose no greater rule of law problem than differing laws in Mongolia and Malawi? If one answers the preceding questions in the affirmative, the federalism objection neatly dissolves. If one answers in the negative, as I would, one can still dissolve the federalism objection but at a cost. One would have to say, as claimed above, that the Constitution bars states and the federal government from regulating the same conduct in disparate ways. That not only means that states cannot legalize what the federal government permissibly forbids (and *vice versa*), but it also means that the state cannot be lenient on matters the federal government takes seriously (and *vice versa*).

4. Judicial Activism

The final objection to be considered is a worry about the potential for judicial activism, should courts attempt to eliminate inconsistency from American law. In its most plausible version, this objection admits that irreconcilable and reconcilable inconsistencies should be subject to judicial review and rectification, but the objector would draw the line there. The objector would contend that the other two categories of inconsistency – inconsistent justifications and inconsistency between a law's justification and its enforcement – are too political. To find that two laws cannot rationally accommodate one

108. Gonzales v. Raich, 545 U.S. 1 (2005).
109. 21 U.S.C. § 844.
110. LA. STAT. ANN. § 40:966(C)(2)(a).

another is to make a subjective, political decision, one might think. In our system of governance, we do not entrust judges with such decisions. Such decisions should remain with the political branches of government, the executive and the legislature, for they, not judges, are democratically accountable. Call this the *Judicial Activism Complaint*. Below I advance two responses to the Complaint.

The first response is to reject the main premise of the Complaint, namely that judges are not democratically accountable as a general matter. Were laws reviewed for consistency, as I advocate, many cases would likely come before state courts. As I envision it, most of the people who would litigate consistency concerns would be appealing criminal convictions, convictions for violating state law. In particular, the average criminal defendant bringing such an action would contend that the justification of the state statute under which he was convicted was inconsistent with either the method of prosecuting him or with the justification of some other state statute. In the envisioned situation, allowing courts to resolve this problem would not be undemocratic because "[t]he majority of state court justices and judges in this country are elected."[111] Of course, we can imagine consistency issues also arising in federal courts; if so, the Complaint rears its head again. However, we must be careful here. While federal judges are appointed, they are appointed by elected officials in a process that is highly politicized; thus, it is hard to claim that the *demos* has no input.

This first response is unlikely to convince those who would press the Judicial Activism Complaint. Potential objectors can concede that judges have *some* democratic accountability yet still worry that my proposal gives judges, bearing too little democratic accountability, too much leeway to decide matters based on personal whims, rather than law.

Here I shift, then, to the second response to the Complaint. Allowing Consistency review will empower courts no more than employing current rationality tests. Courts, both state and federal, already ask whether laws rationally advance their conceivable objectives under rationality tests, which are components of both Equal Protection and Substantive Due Process analyses. All this Article proposes is that courts make the same inquiry about a larger set of laws. If Equal Protection review is not to be trucked over worries about judicial activism, neither should Consistency review.

IV. CONCLUSION

This Article has sought to fill a gap in both our legal understanding and practice. Though previous writers have discussed legal inconsistency, this Article has offered a more comprehensive view of the phenomenon, by differentiating the various kinds of legal inconsistency, highlighting several of its instances, and explaining why avoiding inconsistency matters. I have argued that there are four kinds of legal inconsistencies: irreconcilable inconsistency, reconcilable inconsistency, inconsistent justifications, and inconsistency between a law's justification and its enforcement. I argued that all of these are problematic because, when a polity allows inconsistencies to persist, it disrespects its

111. Sandra S. Newman & Daniel M. Isaacs, *Historical Overview of the Judicial Selection Process in the United States: Is the Electoral System in Pennsylvania Unjustified?*, 49 VILL. L. REV. 1, 13 (2004).

legal subjects, tells them that they do not deserve to be given reasons for the various legal demands placed on them. In responding to the gap in our practice, no one has fully theorized what remedies for inconsistency might exist under American law. I have put forward a Due Process solution. Though this may not be the last word on either the descriptive or remedial fronts, I hope to have pressed the conversation forward.