The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism, Liberalism, and Democracy

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Abstract

It is often claimed that clear and unambiguous legal rules are essential for capitalism, liberalism, and democracy, since they allow for the legal certainty that these systems require. This paper argues that these claims are mistaken, and that the certainty we actually care about is often better-achieved by vague and indeterminate legal standards. The mistake derives from a confusion between the predictability of applying a legal rule and the predictability of a rule's outcome to people at large. But very certain rules can produce very unpredictable outcomes. One principal reason for this is the fact that legal rules exist side-by-side many other social norms that are often more influential than the law in shaping people's expectations; and, moreover, these non-legal norms are often couched in vague and indeterminate terms. As a result, vague and indeterminate legal standards may be able to produce more predictability than any alternative bright-line rule. This realization should have important consequences for the work of legislatures, lawyers, and judges, who too often assume that vague standards should be avoided because of the uncertainty they entail.

Much has been written on the distinction between legal rules and legal standards: between bright-line rules framed in clear and determinate language, and standards employing vague and indeterminate terms (like "reasonableness," "negligence," "fairness," or "good faith"). It is generally believed that rules provide the virtues of certainty and predictability, while standards afford flexibility, allow for more equitable solutions, and for a more informed development of the law. This article seeks to refute the idea that bright-line rules are superior to vague standards in regard to certainty and predictability.

As we shall soon see, the refutation is so straightforward, and so obviously true, that one may doubt whether any serious thinker believes otherwise. Hence, here are a few of prominent examples:

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"Since the law should strive to balance certainty and reliability against flexibility, it is on the whole wise legal policy to use rules as much as possible for regulating human behavior because they are more certain than [standards]..."[1] Joseph Raz.

"[S]tandards… increase the cost and difficulty of prediction [while] rules are defined [by] the ease with which private parties can predict how the law will apply to their conduct…"[2] Louis Kaplow.

"[T]he rule of law…implies (as the name suggests) a preference for rules over standards. Although a legislature, by issuing a standard, announces in advance of the regulated conduct that anyone who engages in that conduct now risks a sanction, in practice this announcement does not amount to much [because it] does not tell people what is permitted and what is not permitted, though it gives them something of an idea."[3] Eric A. Posner.

"[A]nother obvious advantage of establishing as soon as possible [clear and definite rules]: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."[4] Antonin Scalia.

"Since following a rule may produce a suboptimal decision in some particular case, the question of the comparative value of rule-based reliance is the question of the extent to which a decision-making environment is willing to tolerate suboptimal results in order that those affected by the decisions in that environment will be able to plan…"[5] Frederick Schauer.

A system committed to the rule of law is…not committed to the unrealistic goal of making every decision according to judgments fully specified in advance. Nonetheless, …[f]requently a lawmaker adopts rules because

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[1] *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 841-42 (1972).
[2] The General Characteristics of Rules, Encyclopedia of Law and Economics (1999).
[3] Standards, Rules, and Social Norms, 21 Harv. J.L. & Pub. Pol'y 101, 113 (1997).
[4] The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1179, 1183 (1989).
[5] Playing by the Rules (Oxford University Press, 1991) at 140. In an earlier paragraph Schauer notes that "the argument from reliance [i.e., predictability]…presupposed a commonality of understanding between the relying addresses [i.e., those subjected to the law] and the enforcers [i.e., judges] on whose actins reliance is placed." That is absolutely correct, and is the reason why the best rules can reduce predictability when compared with vague standards. But instead of drawing the correct conclusion, Schauer moves to commit the fallacy by identifying rules with predictability insofar as addressees and enforcers' share "a common language." At 139. This is a typical mistake.

> rules narrow or even eliminate the…uncertainty faced by people attempting to follow…the law. This step has enormous virtues in terms of promoting predictability and planning...[6] Cass R. Sunstein,

All these excerpts appear to claim that rules produce better predictability than standards in that they allow people to better predict the consequences of their possible actions. Thus, whenever a standard is chosen over an alternative rule, however justified the choice and whatever the advantages gained, certainty and predictability suffer. This view, to repeat, is mistaken. In many areas of the law, rules are bound to produce less certainty and predictability than alternative standards.

The article will examine this view in the context of the claims that clear legal rules produce the legal certainty and predictability required by capitalism, liberalism, and democracy. As we shall soon see, the fallacy consists in conflating the predictability of applying a legal rule with the predictability of that rule's operation for those whose behavior it governs. But the two can easily come apart: what may be certain and predictable for lawyers or judges applying a legal directive to a case may be highly unpredictable, before the fact, for everyone else. And, needless to say, it is the level of predictability enjoyed by people at large, not by legal interpreters, that underpins the importance of certainty in the law.

Section I articulates the claims that legal certainty and predictability are essential for capitalism, liberalism, and democracy, and that these systems of economic, social, and political organization therefore require legal rules framed in clear and determinate language. The first part of these claims is not controversial, and is left unchallenged; it is the second part – the assertion that certainty and predictability require bright line rules – that is assailed in Section II, which argues that, oftentimes, the best-drafted clear and determinate rules would result in *less* certainty than vague and indeterminate standards. Section IIII explains why things are so, arguing that the law is but one of many normative structures; that competing economic, social, or moral standards are often couched in vague and indeterminate terms; and that these standards are often more influential than the law in shaping people's expectations. The article ends with a short conclusion.

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[6] Problems With Rules, 83 Cal. L. Rev. 953 (1995).

I
LEGAL CERTAINTY AND CLEAR LEGAL RULES

We live in a capitalist liberal democracy. This form of economic, social, and political organization obviously imposes substantive conditions on the content of our laws. Capitalism means that our laws must create and maintain a free and private economic marketplace; liberalism requires a zone of personal privacy free from private or public coercion; and democracy necessitates the institutions and liberties necessary for the free periodic elections of legislative and executive representatives. But some have claimed that capitalism, liberalism, and democracy also impose a *formal* requirement on our laws: namely, that they be framed in clear and unambiguous language.

Capitalism

The importance of legal certainty to capitalism was articulated in Max Weber's classic (posthumous) *Economy and Society*. "Capitalistic enterprise," said Weber "…cannot do without legal security," because such security was essential for the large-scale investment of capital.[7] If an entrepreneur is to build a factory on a piece of land, she needs to be secure in her ownership of the land; she needs to know that the contracts she signs with the contractors can be enforced; she needs to know what taxes she will be asked to pay; in short, she needs to know where she stands vis-à-vis her expected costs and expected income. "[B]ourgeois interests," said Weber, need a legal system that "function[s] in a calculable way"; and this calculability means, in turn "an unambiguous and clear legal system."[8] As others have since elaborated this thesis, "markets cannot function without a clear and precise definition of who owns what (property rights), who may do what to whom (civil and criminal law), and who must pay whom to protect their

[7] MAX WEBER, ECONOMY AND SOCIETY 833 (Guenther Roth & Claus Wittich eds., Univ. of California Press 1978).
[8] *Id.* at 847.

interests (contract law)."[9] An economy where private parties own, produce, exchange, and consume articles of value, free from public or private coercion, must provide private actors with a clear and certain delimitations of their economic rights and obligations; and these delimitations – so goes the argument – necessitates clear and determinate legal rules.

Liberalism

An analogous claim has been made about liberalism – namely, that clear and determinate legal rules are essential for freedom. Friedrich Hayek explained: "The law tells what facts [the individual] may count on[,] and thereby extends the range within which he can predict the consequences of his actions."[10] Thus, "the coercive acts of government become data on which the individual can base his own plans…so that in most instances the individual need never be coerced unless he has placed himself in a position where he knows he will be coerced."[11] Consequently, "freedom is dependent upon certain attributes of the law, its generality and certainty, and the restrictions it places on the discretion of authority."[12] "[A]ll coercive action of government must be unambiguously determined…"[13] Hayek strongly condemned the use of legal standards like "reasonableness" or "fairness": "One could write a history of the decline of the rule of Law," he wrote, "in terms of the progressive introduction of these vague formulas into legislation and jurisdiction, and of the increasing arbitrariness and uncertainty of…the law and the judicature."[14]

Let me exemplify Hayek's insight about the relation between certainty and freedom with a personal anecdote. A couple of years ago I participated in an academic conference in a European city I was keen to explore. Carefully examining the conference's program, I marked for myself those presentations I planned to attend,

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[9] DANIEL W. BROMLEY, ECONOMIC INTERESTS AND INSTITUTIONS: THE CONCEPTUAL BASIS OF PUBLIC POLICY (1989).
[10] Friedrich Hayek, THE CONSTITUTION OF LIBERTY, 156-7.
[11] *Id.* at 21.
[12] *Id.* at 167.
[13] *Id.* at 222.
[14] THE ROAD TO SERFDOM (1944), at 78.

expecting to spend the hours between and around those sightseeing. Alas, the person responsible for keeping the schedule was an Italian national with the insouciant sense of time common to his people: sessions regularly began late, regularly ended late, and last-minute changes in the program were not uncommon. Naturally, this uncertainty ruined my attempt to maximize my freedom. To give another analogy, if rocks fall down from the sky in an unpredictable pattern, one's freedom of movement is seriously constrained; but if they fall down in a pre-determined pattern, one can avoid the times and places where they fall and walk freely anytime and everywhere else.

In short, the importance of legal certainty to liberalism derives from the predictability with which the coercive power of the state is exercised: the citizen knows where she stands (and where she should not stand) and can therefore maximize her freedom. And that predictability is allegedly secured by clear and determinate legal rules – and impaired by vague and indeterminate standards.

Democracy

Finally, we have the claim that *democracy* requires clear and unambiguous legal rules, as well as judges who follow them to the letter. "In a democratic system," said Supreme Court Justice Antonin Scalia in an often-cited article, "Statutes that are seen as establishing rules of inadequate clarity or precision are criticized, on that account, as undemocratic…because they leave too much to be decided by persons other than the people's representatives."[15] Since the "prime purpose or function of law is to facilitate political choice," said another renowned legal theorist, legal rules "must have considerable specificity [and] clarity" so as to "facilitate[] meaningful democratic choice by presenting precise choices…"[16] Thus clear and determinate rules (as opposed to vague and indeterminate legal standards) are important for democracy because only clear and determinate rules make sure that policy decisions are in fact made by representatives of the people, rather than by someone else (i.e., judges).

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[15] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1176 (1989).
[16] TOM D. CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM 6 (1996).

Legal Interpretation

One corollary of these claims pertains to the method with which legal rules are applied. The certainty and predictability to be secured by clear and determinate legal rules, so goes the argument, would be undermined if these rules were not applied in accordance with their clear and determinate language. Thus Scalia is an advocate of textualism, whose "obvious advantage," he says, is the predictability of judicial outcomes it generates.[17] And Max Weber similarly believed that Western law's compatibility with capitalism is a function of its operation "like a slot machine into which one just drops facts…in order to have it spew out decisions."[18]

II
THE FALLACY OF LEGAL CERTAINTY

The claims that strictly construed clear and determinate legal rules are essential for capitalism, liberalism, and democracy are intuitive and widespread.[19] But they are based on a confusion between the predictability of applying a legal rule, and the

[17] Scalia, *supra* note 31, at 1179.
[18] Weber, *supra* note 19, at 886.
[19] "Standards are more costly for legal advisors to predict or adjudicators to apply because they require determinations of the law's content *ex post*. … Thus, from an *ex ante* perspective, rules provide better guidance to the subjects of the law, and from an *ex post* perspective, standards may better be able to be adapted to the varying circumstances of the case." [[Rules advance certainty, consistency, and predictability to private parties and promote judicial economies by minimizing the need for a detailed consideration of facts and circumstances each time a law is applied (Sullivan, 1992). ??]]…This represents a value of law's specificity. Under rules, individuals are more likely to adjust their conduct to the precepts of the law. Under a standard such as reasonableness, what is "reasonable" under the circumstances can vary widely. …[S]tandards are given content and substance only after individuals act. The forward-looking and deterrent functions of law are thus more effective when laws are formulated as precise rules. This constitutes another benefit of law's specificity." Vincy Fon and Francesco Parisi, *On the Optimal Specificity of Legal Rules* 3 (2007) (University of Minnesota Law School Legal Studies Research Paper No. 07-17), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=569401).

predictability of that rule's operation for those it governs.[20] The certainty that capitalism, liberalism, or democracy require concern the latter, not the former: what we want is a certain and predictable regulative environment (certain and predictable economy, certain and predictable social sphere), not merely clear and determinate rules generating certain and predictable outcomes. Yet, clear and determinate rules can produce results that are wholly unpredictable for everybody, including the legislators who enacted them. Here are some examples.

Capitalism

Let us start with a well-known failure of a bright line rule in the regulations of contracts. At a certain point in the life of the common law, contracts under seal were *per se* enforceable.[21] The seal stood for knowledge of the terms and willingness to be bound by them, and courts refused to entertain claims that a contractual provision should not be enforced: allegations involving written amendments not under seal, lack of consideration, and even claims of fraud in procuring the contract, were all automatically rejected in the

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[20] There is one obvious sense in which it is wrong to say that bright-line rules are superior to standards insofar as certainty and predictability are concerned: clear rules may *explicitly* create an uncertain and unpredictable environment. A rule requiring that contract disputes be resolved by tossing a coin may be perfectly clear as a legal rule, but it makes it hard to predict the consequences of possible actions. The same holds for a rule of strict liability for certain activities, in comparison with a rule imposing liability only for negligent actions. The latter is far vaguer, but allows for better predictability. An article by Isaac Ehrlich and Richard Posner gives another great example: a rule defining statutory rape as sexual intercourse with a person under 16 years of age, compared with a vaguer alternative defining statutory rape as sexual intercourse with a person the defendant knows or should have known is under 16 years of age. The latter is a vaguer legal regime, but it allows for more certainty and predictability. See Isaac Ehrlich & Richard A. Posner An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257 (1974). This point, however, is different than the one advanced in this article, which does not speak of legal rules that explicitly create legal uncertainty but of rules that explicitly seek certainty but fail.

[21] "The obligation of the maker of a sealed instrument under the common law was dependent solely on whether certain forms were observed. If they were, the obligation was binding . . . . Perhaps the most striking illustration of this is the fact that, according to the early law, one whose seal was attached to an obligation was bound, even though the seal had been stolen and attached to the instrument without the obligor's consent." 1 Williston on Contracts § 2:2 (4th ed. 1990).

name of legal certainty.[22] Contract scholars tell us that the justification for this legal regime was the "predictability of legal outcome [which] was especially responsive to the needs of…capitalist endeavors."[23]

But in actual fact, this regime produced very unpredictable results. In *Dorr v. Munsell* (1816), for example, the plaintiff sold the defendant the right to make and use an improvement in a machine for shearing cloth in exchange for $400 dollars.[24] As it came out, the invention did not belong to the plaintiff but to someone else. Once this was discovered, the defendant refused to deliver the money promised in the sealed contract. But the plaintiff sued for the money, and won: the court simply refused to entertain the claim that the sealed contractual obligation was induced by fraud, stating that the "very nature of the instrument" precluded an inquiry into that claim.[25] As the court saw it, it was merely upholding the certainty and predictability of contracts.

But the doctrine only reduced the predictability of contractual agreements: a legal regime that gave legal effect to intentional fraud introduced substantial uncertainty into contractual transactions, and reduces people's ability to plan in reliance on those. The certainty of which the court spoke was the certainty of legal application, not the certainty required by parties economic actors.

Of course, one could insist that *overall certainty* was nonetheless improved, because refusal to entertain any claims regarding sealed contracts reassured parties that they could completely rely on the blind enforcement of their sealed agreement. But that is an empirical argument, and a doubtful one at that: there can be no automatic transition from the certainty of a legal rule to the certainty of the economic environment it generates. At any event, why think that blind enforcement improves, rather than impairs, the certainty of contracts? Parties to contracts expect their agreements to be enforceable; but they also expect not be deceived. People do not simply expect that their agreement

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[22] "[E]xtra-formal factors, including even fraud and mistake, were originally without effect on the sealed promise." Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941).
[23] Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in the Seventeenth-Century England*, 83 COLUM. L. REV. 35, 127-8 (1983).
[24] Dorr v. Munsell, 13 Johns. 430 (N.Y.Sup. Ct. 1816).
[25] *Id.* at 430. *See also* Dale v. Roosevelt, 9 Cow. 307 (N.Y. Sup. Ct. 1827); Vrooman v. Phelps, 2 Johns. 177 (N.Y. Sup. Ct. 1807).

be enforceable; they expect their understanding of the agreement be enforceable, and blind enforcement may often frustrate that understanding.

Indeed, it was not long before courts regained their senses and replaced the 'contracts under seal' regime with one that was less clear and determinate, but that better reflected the expectations of economic actors. Thus it was soon established that contract under seal were not enforceable if they were procured by "material misrepresentation."[26] This necessitated a determination as to what was or was not a misrepresentation, and, if a misrepresentation, whether it was material or not – determinations that made the governing legal standard far more vague and indeterminate; and yet this less certain standard provided a far more predictable and certain economic environment.

I do not simply claim that *ill-conceived* clear and determinate rules produce less certainty than more nebulous alternatives. That claim is trivial. Rather, my argument is that no matter how *well-conceived* clear and determinate rules may be, in many areas of the law (including contracts) they could never perform, certainty-wise, as well as indeterminate and relatively nebulous standards. The problem with the "contracts under seal" regime was not that it was stupid; the problem was its inept attempt to reduce the complicated question of contracts' enforceability into a bright-line rule. In that, no bright-line rule could succeed.

This claim may be clearer in the context of statutes that penalize "unfair competition" – understood as commercial practices that deceive consumers. Rejecting a claim that California's criminal "unfair competition" statute was unconstitutional because of its "uncertainty and vagueness," a California court opined that "it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited…since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery."[27] The court went on to cite a U.S. Supreme Court opinion, which (itself citing a congressional report) stated: "It is impossible to frame [a clear and

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[26] *See*, *e.g.*, Munroe v. Perkins, 26 Mass. 298, 303-05 (1830); Randall v. Rich, 11 Mass. 494 (1814); Whitney v. Allaire, 4 Denio 554 (N.Y. Sup. Ct. 1847) (holding defrauded party may defend action upon sealed or unsealed instrument based on fraud in inducement), *aff'd*, 1 N.Y. 305 (1848); Van Epps v. Harrison, 5 Hill 63 (N.Y. Sup. Ct. 1843) (allowing defrauded party to defend action upon sealed or unsealed instrument when fraudulently induced into contract).

[27] People v. Nat'l Research Co. of Cal., 201 Cal.App.2d 765 (1962).

determinate] definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task."[28] And allowing consumer deception to go unpunished would reduce the certainty and predictability of the economic sphere for both consumers and for suppliers.

I will later explore the circumstances under which the adoption of precise rules would result in a less predictable regulative environment. For the time being it is important to recognize, once more, that there is no easy transition from the predictability of the application of a legal rule to the predictability that we actually care about – that of the consequences of possible economic actions.

Liberalism

Opting for clear and determinate legal rules can also lessen freedom. Take the crime of rape. Rape is defined in many American jurisdictions as "sexual intercourse accomplished with force and without consent."[29] Since the notions of "force" and "consent" are vague, determining whether rape occurred can be notoriously difficult: courts habitually face ambiguous situations involving passive victims and aggressive but non-violent defendants, where the presence of force or the absence of consent can be difficult to determine. Such indeterminacy in the definition of a serious crime carrying long years of imprisonment seems to fly in the face of Hayek's insistence that "all coercive action of government must be unambiguously determined…" And so, unsurprisingly, the definition has been subjected to much criticism.[30]

Some critics of the present definition have been calling for its replacement with a clear and determinate rule. One such proposed solution is a requirement of an "explicit verbal consent": in the absence of explicit verbal consent to intercourse, and assuming a complaining victim, rape had been committed. There would be no need to undertake the

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[28] Schecter Poultry Corp. v. U.S., 295 U.S. 495, 532, 55 S.Ct. 837, 844 (1935) (citing Fed. Trade Comm'n v. R.F. Keppel & Bro., 291 U.S. 304, 312, 54 S.Ct. 423, 426 (1934)).
[29] *See*, *e.g.*, Kan. Stat. Ann. § 21-3502(a)(1)(A) (2008) (Kansas' rape statute).
[30] FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 6, at 222 (1960).

thorny questions of whether some form of implicit consent was in fact given; instead, here is a clear and straightforward legal regime, one that gives potential victims and potential defendants a clearer notice as to where they stand, and which thereby allows them to maximize their freedom by avoiding placing themselves in legally ambiguous situations. The proposal has even been implemented as campus policy in one American university.[31]

But in fact such legal regime would only *increase* the uncertainty that potential defendants and victims face. Recall, again, that the certainty with which we are concerned pertains to the ease with which actors can predict the consequences of their actions. Now given prevalent social norms in this area, explicit verbal consent is unlikely in many cases of perfectly legitimate and consensual intercourse, whatever the law says on that matter. Consequently, a definition of rape that regards a complaining victim, an intercourse, and the absence of verbal consent as sufficient for conviction would produce a highly unpredictable social environment.

Nor would such a definition make much sense if not supplemented by a vague standard: after all, one can be coerced to provide a verbal consent. Thus, any regime of verbal consent must also include an inquiry as to whether the consent was given voluntarily – an inquiry that reintroduces (if at a different level) the very vagueness that the verbal consent regime sought to replace. There does not seem to be a way around the vague standard of consent – or its opposite, that of coercion – in the legal definition of rape.

Democracy

Finally, democracy can also suffer from bright-line rules. A legislature made up of the people's representatives is indeed the proper body for making policy choices; but many policies cannot be reduced to clear and determinate terms. A legislature keen on enforcing the agreements of parties to contracts, of forbidding practices that deceive

[31] Antioch College in Ohio adopted a sexual offense policy that requires "willing and verbal" consent for each sexual touching. *See* Jane Gross, Combating Rape on Campus In a Class on Sexual Consent, N.Y. TIMES , Sept. 25, 1993, http://query.nytimes.com/gst/fullpage.html?res=9F0CE1DB1239F936A1575AC0A965958260&fta=y.

consumers, or of criminalizing rape, had better frame its policy choices in vague and indeterminate language. Clear and determinate rules, in these contexts as in many others, are a recipe for unexpected and undesirable results (rewarding fraud, immunizing consumer deception, penalizing consensual intercourse or failing to penalize coerced ones).

Legal Interpretation

The other side of this coin is the realization that when the legislature does enact bright-line rules, deviations from literal statutory language may be necessary in order to respect its policy choices and expectations.[32] After all, the predictability we seek is not the predictability with which courts apply statutes, but the predictability with which legislature policy choices are implemented.

In *Devillers v. Auto Club Ins Assn.* (2005), the Michigan Supreme Court – where self-proclaimed textualists hold a majority – applied a Michigan statute limiting claimants' ability to recover from insurance companies who improperly deny coverage. The statute read: "[A] claimant may not recover [insurance] benefits for any…loss incurred more than 1 year before the date on which the [legal] action was commenced."[33] This meant that a claimant who was entitled to collect insurance payments but was denied payment was nevertheless barred from recovering for any (covered) loss incurred a year or more before the date her lawsuit was filed. The statute, a sort of statute-of-limitations for insurance claims, sought to enforce speedy resolutions of denial-of-coverage disputes.

The case before the Michigan court involved an insurance company that corresponded with the insured for two years before denying his claim. A previous precedent established that the statutory one-year limitation period begins to run only from the time that coverage is denied; but the supreme court of Michigan overruled that

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[32] I use the term 'strict construction' generally to refer to a strict textualism. Although Antonin Scalia has distanced himself from that term, stating that he is not a "strict constructionist," *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997), he certainly is a strict constructionist as the term is used here (and, in fact, in most other places).
[33] Mich. Comp. Laws § 500.3145 (2008).

precedent and barred recovery.[34] The statute, said the Court, says nothing at all about counting the one-year limitation only from the moment coverage is denied. Thus the precedent contradicted the plain words of the statute and was "an act of judicial defiance in which this Court substituted its own judgment…for the plainly expressed will of the Legislature."[35] "[I]f the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. …[A] court confound[s] those legitimate citizen expectations" when it does not strictly follow the statute's text.[36] Unless strict textualism was employed, "our system of government ceases to function as a representative democracy."[37] Ha!

Here was the fallacy of legal certainty in its glorious folly: in the name of legal certainty and predictability, the Michigan Court required people to sue before they had any reason to sue, or even to consult a lawyer. This preposterous result was no isolated event: within a short time of declaring itself strict constructionist, that Michigan court made a number of decisions that would have surprised and appalled the legislators whose policy choices it purported to implement.[38]

The claim that respect for legislative policy choices requires blind obedience to statutory texts fails to consider the many cases where statutes are applied to situations never previously contemplated. Legislators may have certain factual hypotheticals in mind when they draft and enact a statute, but they do not and cannot consider, and therefore address, the vast array of circumstances that courts meet in applying it. And in a democracy, legislatures are the proper source of policy choices; they are *not* the proper authority for resolving individual cases in whatever manner they desires. Textualist interpretation, divorced from any consideration of the underlying policy choice, makes little democratic sense.

But strict constructionists insist that inquiring into legislative policy choices would lead to democratic deficit as judges would tend to implement their own policy

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[34] *See* Devillers v. Auto Club Ins. Ass'n., 473 Mich. 562 (2005).
[35] *Id.* at 585.
[36] *Id.* at 585.
[37] *Id.* at 592.
[38] *See, e.g.,* Cameron v. Auto Club Ins. Ass'n, 476 Mich. 55 (2006); People v. Chavis, 486 Mich. 84 (2003).

choices over the policy choices of elected representatives. Establishing legislative policy choices, they say, is too speculative a matter, while the temptation to do what one thinks is right is too great. As Antonin Scalia put it, "under the guise or even the self delusion of pursuing unexpressed legislative intents, … judges will in fact pursue their own objectives and desires…"[39] Strict constructionists need not deny that democratic control is not always served by blind obedience to text; but they insist that democratic control is nevertheless enhanced *overall* by such blind obedience. (This claim parallels the one we saw in the context of contracts under seal: strict enforcement of sealed contracts may not always respect the actual agreement of the parties, but it does so *overall*.)

That proposition has little to support it (Scalia's talismanic example is a case dating back to 1892).[40] It is also an unlikely proposition. Whether we consider legislative intent or just blindly follow a text, there may be a price to pay: if we allow deviation from the literal text, we may deviate from the text where legislative policy choices would have required compliance; if we follow the literal text without consulting the underlying policy choice, we may fail to advance it. However, in the former case we at least consciously deliberate about our decision: we consciously seek to comply with legislative choice. In the latter, by contrast, we let the vagaries of existence determine our compliance with it. Obsessed with restraining judicial discretion, strict constructionists recommend that we burn the house to roast the pig (or, better still, that we burn the house to rid ourselves of a cockroach): fearful that errors may be made in identifying legislative policy choices, they recommend that we not bother with them at all. This is a bizarre proposition for an institution founded on the use of reason and rationality; and it does nothing to advance democracy.

III
WHY THINGS ARE SO

[39] ANTONIN SCALIA, A MATTER OF INTERPRETATION, *supra* note 30, at 17 (1997).
[40] *Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892).

Why is it that vague and indeterminate legal standards may bring more certainty and predictability to the implementation of legislative policy choices? And why is it that the best crafted clear and determinate legal rules may produce high levels of uncertainty and unpredictability?

One principal reason is the omnipresence of non-legal norms, which often eclipse legal norms in shaping people's expectations. Whatever the law may say on certain matters, people's expectations may be very different, so that a result that may be perfectly predictable to judges or lawyers faced with given facts may be quite astounding to everyone else. In this respect, legal rules are fundamentally different than the rules governing games like baseball or chess – so often used by legal theorists as analogies to legal regulations – which create the very universe they govern, and where there can be no competing expectations other than those created by the rules. Legal rules cannot always dictate the normative expectations of actors; often, they can only join them. Which is why vague and indeterminate legal standards often produce more certainty and predictability: many of those non-legal norms (economic norms, social norms, moral norms) consist of highly vague and indeterminate concepts, so that vague legal standard are better able to reproduce them.

Multi-Dimensional situations

The omnipresence of vague and indeterminate economic, social, or moral standards should not be surprising. Commentators often cite Aristotle's admonition that "precision is not to be sought for alike in all discussions…"[41] And "precision" – or, if you will, linguistic clarity and determinacy – is often lacking in descriptions of human conduct and human mental states, which are (unsurprisingly) prevalent in both legal and non-legal norms: 'coercion,' 'deception,' 'fairness,' 'reasonableness,' 'negligence,' 'recklessness,' 'good faith,' 'malice,' 'intention' – the list goes on and on. All these are concepts whose applications are informed by various combinations of factors having different significance, or weights. The structure of these determinations resembles the definitions in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, where a disorder is said to exist whenever, say, eight of fifteen

[41] Aristotle, NICOMACHEAN ETHICS 13-14 (W. Ross trans. 1940).

listed factors of varying importance are present.[42] Such definitions seek to capture something of a pattern, a gestalt, a feature made up of various elements neither of which is necessary or sufficient.

The actual picture is even more complicated: the factors informing our determinations of concepts like "negligence" or "coercion" are not only of varying importance, and are neither necessary nor sufficient; they also interact with each other, so that the presence or absence of one may impact the importance or weight of another.

Lon Fuller, in a posthumously published article entitled *The Forms and Limits of Adjudication*, asked a question similar to the one we are asking here.[43] "What tacit assumptions," asked Fuller, "underlie the conviction that certain problems are inherently unsuited for adjudicative disposition?" Adjudication, for Fuller, consisted in the articulation of rules or principles "which can give meaning to the demand that like cases be given like treatment."[44] But certain situations, he said, are better suited for resolution by non-adjudicative means. The question, said Fuller, was which: when was it futile, or counter-productive, to try to decide a case by articulating a governing rule or principle? The question I am asking is quite similar: in what circumstances it is futile, or counter-productive, to try to decide a case by articulating clear rules, as opposed to vague standards? Fuller's question concerns a more distance point along that continuum.

Fuller answers his question by appealing to the notion of "polycentric situations" (discussed in Michael Polanyi's The Logic of Liberty[45]), which involve multiple components that have mutual influence on each other:

> We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. …This is a

[42] Indeterminate and vague legal standard can therefore presumably be reduced (though with considerable difficulty and possibility of error) into such multi-factor multi-weight legal tests; but such tests are equally different from bright line legal rules as the vague standards themselves are.
[43] 92 Harv. L. Rev. 353 (1978).
[44] Id. At 368.
[45] M. Polanyi, The Logic of Liberty: Reflections and Rejoinders (1951) at 171.

> “polycentric” situation because it is “many centered” - each crossing of strands is a distinct center for distributing tensions.

Fuller gave a simple example of a polycentric decision:

> Suppose…it were decided to assign players on a football team to their positions by a process of adjudication. I assume that we would agree that this is…unwise... It is not merely a matter of eleven different men being possibly affected; each shift of any one player might have a different set of repercussions on the remaining players: putting Jones in as quarterback would have one set of carryover effects, putting him in as left end, another. Here, again, we are dealing with a situation of interacting points of influence and therefore with a polycentric problem beyond the proper limits of adjudication.

And similarly, such polycentric situations are best-governed not by clear rules but by vague standards.

Many of our social, moral, or economic decisions involve polycentric determinations; and why wouldn’t they? Life can be complicated… And so our normative standards are replete with such concepts, and, consequently, so do our laws, which are often but formal institutionalizations of those. And so vague and indeterminate legal standards often produce more certainty and predictability than any alternative rule because they represent, one-for-one, the social, moral, economic, or political norm that already prevails, and which, given its inherent complexity, simply cannot be reduced to bright-line rules.

IV
CONCLUSION

Certainty and predictability are important for capitalism, liberalism, and democracy because they allow people to know where they stand (capitalism and liberalism) and allow legislators to control policy (democracy). But such certainty and predictability is distinct from the certainty and predictability of our system of legal rules.

Looking at the world with their professional bias, jurists often fail to perceive the degree to which the law is not the only player in town. (And so it should come as no surprise that both Max Weber and Friedrich Hayek were lawyers.) As John Austin once said, legislators (and, for that matter, judges and scholars) tend to "forget that positive law may be superfluous or impotent, and therefore may lead to nothing but purely gratuitous vexation. They forget that the moral or religious [or economic or social or cultural] sentiment of the community" may dictate people's expectations far more than the law itself.[46] Legal rules may be very predictable in application while producing highly unpredictable results – either because actors do not expect the law to regulate as it does (after all, most people acquaint themselves with the law only *after* the event giving rise to that need), or, even if knowledgeable of the law, they do not expect to be subjected to it (as with the verbal consent requirement[47]).

In real life, people make contracts, buy and sell products, and have sexual intercourse in a universe of norms and expectations that is often oblivious to the governing legal norms. Thus, the predictability with which legal rules are applied do not always translate into the predictability that actually matters – that of the world they govern. Friedrich Hayek, for all his early insistence on 'unambiguous rules fixed and announced beforehand,' had later in life come to realize this:[48]

> This [last remark] throws important light on a much discussed issue, the supposed greater certainty of the law under a system in which all rules of law have been laid down in written or codified form, and which the judge is restricted to applying such rules as have become written law. In my

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[46] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 162 (Isaiah Berlin et al. eds., Weidenfeld and Nicholson 1954) (1832).

[47] A recent decision from California is another good demonstration of this point. In Van Horn v. Watson, 2008 Cal. Sup. Ct. No. S152360, the California Supreme Court held that people voluntary aiding others at times of emergency may be subjected to lawsuits for damages caused by the aid rendered. An LA Times report on the case began with the sentence "Being a good Samaritan in California just got a little riskier." See Carol J. Williams, "California Supreme Court allows good Samaritans to be sued for nonmedical care," December 19, 2008.) Indeed the expected result of the decision is not so much to deter people from trying to help others in life-threatening situations as much as increasing the good Samaritans' risk of being sued.

[48] FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944).

> own case even the experience of thirty odd years in the common law world was not enough to correct this deeply rooted prejudice, and only my return to a civil law atmosphere has led me seriously to question it. Although legislation can certainly increase the certainty of the law on particular points, I am now persuaded that this advantage is more than offset if its recognition leads to the requirement that *only* what has thus been expressed in statutes should have the force of law. It seems to me that judicial decision may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law…"[49]

One may wonder what, if anything, remains of Hayek's voluminous writings on the Rule of Law as a system of clear and determinate rules announced in advance and faithfully followed. But be that as it may, Hayek is certainly correct that a legal regime containing (unwritten!) moral standards may produce more certainty and predictability than any strictly-construed set of clear and determinate rules.

It has long been recognized that vague legal standards and a non-textualist judiciary would often produce better regulative results. Of this there is no greater proof than the persistent omnipresence of such legal standards, and the non-textualist practice of most judges. And yet, these practices are too often seen, even if advantageous, as setbacks to certainty and predictability. Missing is the realization that these standards, and these judicial practices, may be superior precisely because they enhance the certainty and predictability of legal consequences.

The extensive use of vague legal standards no doubt harbors dangers. Vague standards can easily mask arbitrariness, inconsistency, injustice, and can also, of course, generate uncertainty. Their proper use requires professionalism, intelligence, good faith, and attention to the reasonable expectations of actors. Thus the fruitful use of vague legal standards, including their ability to increase the certainty and predictability of legal regulations, depend on a high caliber legal profession. But then again, it's hard to imagine a form of legal regulation that doesn't.

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[49] FRIEDRICH HAYEK, LAW, LEGISLATION, AND LIBERTY 117 (1973).