

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

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Abstract

It is said 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 certainty and predictability of legal outcomes, and the certainty and predictability that actually matters – that of the world these outcomes generate. But the two can easily come apart: certain and predictable legal outcomes can produce a highly unpredictable world. One principal reason for this is 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 legal standards should be avoided, where possible, because of the relative 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,” or “good faith”). It is generally believed that rules provide the important virtues of certainty and predictability, while standards afford flexibility, allow for more equitable solutions, and for a more informed development of the law.¹ This article seeks to refute the idea that

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¹ See, e.g., Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 841-42 (1972) (“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 principles and lend themselves more easily to uniform and predictable application.”). Though, as the Seventh Circuit put it, “no

rules are superior to standards in regard to certainty and predictability. It will do so by reviewing the claims that clear legal rules produce the legal certainty required by capitalism, liberalism, and democracy. As I hope to demonstrate, these claims conflate the certainty and predictability of legal outcomes with the certainty and predictability that actually matter – that of the world they generate. And the two, as we shall soon see, can easily come apart: certain and predictable legal outcomes may produce a highly unpredictable world.

Debunking the argument that clear and determinate legal rules produce more certainty and predictability than vaguer alternatives should have important consequences. Debates over the adoption of statutory proposals or governing precedents routinely involve claims regarding legal certainty; and most of those making the arguments – or hearing them – simply assume that certainty is better advanced by bright-line rules. But if, as I argue, that assumption is wrong, determining the certainty and predictability of a legal regime must always involve its substance, not simply its form.

Section I articulates the claims that clear and determinate legal rules are essential for capitalism, liberalism, and democracy. Section II argues that these claims are incorrect, demonstrating that in many areas of the law the best-drafted clear and determinate rules would result in less certainty and predictability than vague and indeterminate standards. Section III 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. Section IV concludes by arguing that the rejection of the fallacy of legal certainty should have important consequences for the work of legislatures, lawyers, and judges.

I

LEGAL CERTAINTY AND CLEAR LEGAL RULES

sensible person supposes that rules are always superior to standards...” *MindGames, Inc. v. W. Pub. Co.*, 218 F.3d 652, 657 (7th Cir. 2000).

We live in a capitalist liberal democracy. This form of economic, social, and political organization 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 free cyclical elections. But some have advanced the claim that capitalism, liberalism, and democracy also require that our legal rules be framed in clear and unambiguous language, and be applied in strict accordance with that language. I will first articulate these arguments, and will then argue that they are false.

Capitalism

The importance of legal certainty to capitalism was articulated in Max Weber's classic (posthumous) *Economy and Society*. "Capitalistic enterprise," claimed Weber "...cannot do without legal security," because such security was essential for the large-scale investment of capital.² If an entrepreneur is to build a factory, she needs to be secure in her ownership of the land where the factory will stand; she needs to know that the contracts she signs with the contractors will be enforced; she needs to know what taxes she will be asked to pay for the project; in short, she needs to know where she stands vis-à-vis her expected costs and expected income. The "bourgeois 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."³ 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 interests (contract law)."⁴ 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 delimitation of

² MAX WEBER, *ECONOMY AND SOCIETY* 833 (Guenther Roth & Claus Wittich eds., Univ. of California Press 1978).

³ *Id.* at 847.

⁴ DANIEL W. BROMLEY, *ECONOMIC INTERESTS AND INSTITUTIONS: THE CONCEPTUAL BASIS OF PUBLIC POLICY* (1989).

their freedoms; and that delimitation – 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.”⁵ “[T]he 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.”⁶ Consequently, “freedom is dependent upon certain attributes of the law, its generality and certainty, and the restrictions it places on the discretion of authority.”⁷ “[A]ll coercive action of government must be unambiguously determined...”⁸ 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.”⁹

Let me exemplify Hayek’s argument 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 lectures and discussions I planned to attend, 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 schedules were not uncommon. Naturally, this uncertainty ruined my attempt to maximize my freedom. To give another

⁵ HAYEK, *THE CONSTITUTION OF LIBERTY*, supra note 6 at 156-7.

⁶ *Id.* at 21.

⁷ *Id.* at 167.

⁸ *Id.* at 222.

⁹ *THE ROAD TO SERFDOM* (1944), at 78.

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 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 faithfully follow these rules. “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.”¹⁰ Since the “prime purpose or function of law is to facilitate political choice,” said another legal theorist, legal rules “must have considerable specificity [and] clarity” so as to “facilitate[] meaningful democratic choice by presenting precise choices...”¹¹ 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., by judges).

Legal Interpretation

¹⁰ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989)

¹¹ TOM D. CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* 6 (1996).

One corollary of the claims above pertains to the method with which legal rules are applied. Naturally, the certainty and predictability secured by clear and determinate legal rules would be undermined if these rules were not applied in accordance with their clear and determinate language. In other words, so goes the claim, clear and determinate rules would fail to produce certainty and predictability if not applied in accordance with their clear and determinate terms. Thus Scalia is an advocate of textualism, whose “obvious advantage,” he says, is the predictability of judicial outcomes it generates.¹² And Max Weber similarly believed that Western law’s compatibility with capitalism is a function of its operation, generally speaking, “like a slot machine into which one just drops facts...in order to have it spew out decisions.”¹³

II

THE FALLACY OF LEGAL CERTAINTY

The claims that strictly construed clear and determinate legal rules are better for capitalism, liberalism, and democracy are intuitive and widespread.¹⁴ But they are mistaken. They are based on a confusion between the certainty and predictability of legal

¹² Scalia, *supra* note 31, at 1179.

¹³ Weber, *supra* note 19, at 886.

¹⁴ “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.

outcomes, and the certainty and predictability of the world these outcomes help create.¹⁵ The certainty that capitalism liberalism or democracy need, however, concern the latter, not the former: what we want is a certain and predictable world (certain and predictable economy, certain and predictable social sphere), not merely clear and determinate rules generating certain and predictable outcomes. But clear and determinate rules can produce results that are wholly unpredictable for economic actors or for citizens or for the legislators who enacted them. Here are some examples.

Capitalism

One example where a clear and determinate legal rule failed to serve economic certainty as proficiently as a less determinate legal standard is the common law's treatment of 'contracts under seal.' At a certain point in the life of the common law, contracts under seal were *per se* enforceable.¹⁶ 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 as written: 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 name of legal certainty.¹⁷ Contract scholars tell us that the justification for this legal regime was the "predictability of legal

¹⁵ 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 by no means 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).

¹⁶ "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).

¹⁷ "[I]t will be recalled that extra-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).

outcome [which] was especially responsive to the needs of...capitalist endeavors.”¹⁸ But in actual fact, this doctrine produced very uncertain and unpredictable results.

Take, for example, *Dorr v. Munsell* (1816), where the plaintiff sold the defendant the right to make and use an improvement in a machine for shearing cloth in exchange for \$400 dollars.¹⁹ As it came out (at least according to the defendant), the invention did not belong, and was not registered, to the plaintiff; it belonged to someone else.

Accordingly, the defendant refused to deliver the money promised in the sealed instrument. 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 such claims.²⁰ As the court saw it, it was merely upholding the certainty and predictability of contract law.

But in actual fact, the doctrine upheld by the court seemed to have *lessened* the certainty and predictability of contractual agreements. A legal regime that mandated a payment for an undeliverable promise, and rewarded intentional fraud, was bound to introduce substantial measures of uncertainty into contractual transactions. Of course, one could insist that *overall certainty* was nonetheless improved: that the court’s refusal to even entertain the claim of fraud reassured parties that they could completely rely on the blind enforcement of their sealed obligations, and that such enforcement produced certainty and predictability. But why think that such blind enforcement improved, rather than impaired, the certainty of contracts? Parties to contracts surely expect their agreements to be enforceable; but they also expect not to be deceived, and expect that the promises for which they pay be fulfilled. A contract regime that shuts its ears to such concurrent expectations would reduce *overall* certainty, not increase it. The purported certainty and predictability of this legal regime belonged only to the outcomes it generated, not to the real-world results of these outcomes. There can be no automatic transition from the certainty of a legal rule to the certainty of the economic environment it generates.

¹⁸ Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in the Seventeenth-Century England*, 83 COLUM. L. REV. 35 (1983).

¹⁹ *Dorr v. Munsell*, 13 Johns. 430 (N.Y. Sup. Ct. 1816).

²⁰ *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).

Indeed, it was not long before courts regained their senses and replaced that legal regime with one that was less clear and determinate, but that better reflected the expectations of economic actors. And so it was soon held that parties to a contract under seal could challenge its enforceability on the ground that it was procured under ‘material misrepresentation.’²¹ This necessitated judicial determinations 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. 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. Consider statutes that penalize “unfair competition” – generally 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.”²² 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 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

²¹ *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).

²² *People v. Nat'l Research Co. of Cal.*, 201 Cal.App.2d 765 (1962).

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.”²³

These statements imply that replacing this vague and indeterminate standard with a more precise rule would result in a less certain, and less predictable, economic milieu: after all, allowing consumer deception to go unpunished may certainly reduce the certainty and predictability of the economic sphere. Once again, there is no easy transition from the certainty of a legal regime to the certainty that we actually care about – that of the regulated environment.

Liberalism

Opting for clear and determinate legal rules can also lessen our freedom. Take the crime of rape. Rape is defined in many American jurisdictions as ‘sexual intercourse accomplished with force and without consent.’²⁴ 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 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.²⁵

Some critics of the present definition have been calling for its replacement with a clear and determinate rule. One such often-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 thorny questions of whether some form of implicit consent was in fact given, or whether the defendant used sufficient force; instead, here is a clear and straightforward legal regime, one that gives potential defendants a clearer notice as to

²³ *Schechter 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)).

²⁴ *See, e.g.*, Kan. Stat. Ann. § 21-3502(a)(1)(A) (2008) (Kansas’ rape statute).

²⁵ FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 6, at 222 (1960).

where they stand, and which thereby allows them to maximize their freedom by avoiding placing themselves in ambiguous and legally-risky situations.

This proposal, mind you, is no idle talk: it has been advocated by some prominent jurists, and implemented as campus policy in at least one American university.²⁶ But in fact such legal regime would only *increase* the uncertainty that potential defendants face: given prevalent social norms, explicit verbal consent is unlikely in many cases of perfectly legitimate and consensual intercourse, whatever the law says on that matter. The result is that many blameless actors may find themselves eligible for long terms of imprisonment under this bright line rule. 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.

The proposal of verbal consent also demonstrates why, in certain areas of the law, vague and indeterminate standards are practically indispensable. After all, one can be coerced to provide a verbal consent (and if were required by law, some certainly would). Thus, a regime of verbal consent that regards consent as sufficient for acquittal would be unacceptable. Instead, any regime of verbal consent must also include an inquiry as to whether the verbal consent was given voluntarily – an inquiry that is all but identical with the one the verbal consent regime sought to replace. There does not seem to be a way around the vague concept of consent – and its opposite, that of coercion.

Democracy

Finally, democracy can also suffer from strictly-construed bright-line rules, and for the same reasons. A legislature made up of the people's representatives is indeed the proper body for making policy choices; but why think that legislative control over these choices is best advanced by strictly-construed clear and determinate rules? On the contrary: as the discussion above demonstrates, some legislative policies are best expressed in vague and indeterminate terms, and any attempt to reduce them to clear and

²⁶ 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>.

determinate ones would result in sub-optimal realization of these policies. A legislature keen on respecting the reasonable expectations of parties to contracts, or on forbidding practices that deceive consumers, or 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 unwanted results: rewarding fraud, immunizing consumer deception, and penalizing consensual intercourse are clearly undesirable results, and – at least for who suffer their consequences – are equally unexpected.

Legal Interpretation

The other side of this coin is the realization that a judiciary keen on respecting legislative policy choices must sometimes abstain from following literal statutory language when applying clear and determinate rules. Indeed the strict construction of statutes may produce results that are wholly astounding, and wholly unwelcome, for the legislators who enacted them.

The mistake in the claim that legislators are best able to predict and direct the operation of their statutes if those are “strictly construed,” is the failure to account for 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. Of course, once the facts of a given case are known, it is easier to predict the outcome of the case if the relevant rule is clear and determinate and is followed to the letter; but then again, courts habitually apply statutes to factual circumstances that legislators did not or could not have foreseen. To give a hypothetical example before moving to some real ones: when a child is told ‘do not open the door to strangers,’ her parents do not expect her to refuse to open the door if they return home with an unknown friend, nor to refuse to open the door to firefighters if the house is on fire. We expect the same of courts applying statutes. But with textualists gaining grounds in our courts, these elementary expectations are sometimes disappointed.

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. 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."²⁷ This meant that even if a claimant was entitled to collect under the terms of her insurance policy, she was nevertheless barred from recovering for any loss incurred a year or more before the date her lawsuit was filed. The statute, a sort of statute-of-limitations for insurance benefit claims, sought to protect insurance companies by enforcing 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 finally 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 precedent and barred recovery.²⁸ That precedent, said the Court, was an illegitimate usurpation of legislative power, "an act of judicial defiance in which this Court substituted its own judgment...for the plainly expressed will of the Legislature."²⁹

The dissent claimed that the result was absurd: that it expected people to sue before they have any reason to think that they need to sue, or even to consult a lawyer; that if they did sue their claims would be dismissed for lack of ripeness; that the ruling encouraged insurance companies to delay benefit decisions in the hope of evading valid insurance claims; that the decision defied people's reasonable expectations; and, most to our point, that it departed from the legislative policy choices underlying the statute – all to no avail. The only pertinent determinant, said the Michigan Supreme Court, was the literal text. And why was the literal text the only determinant? Because, said the Court, "if 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.³⁰ Unless strict textualism is employed, said the Court, "our system of government ceases to

²⁷ Mich. Comp. Laws § 500.3145 (2008).

²⁸ See *Devillers v. Auto Club Ins. Ass'n.*, 473 Mich. 562 (2005).

²⁹ *Id.* at 585.

³⁰ *Id.* at 585.

function as a representative democracy.”³¹ Ha! Here is the fallacy of legal certainty in its glorious folly: in the name of legal certainty and predictability, the Michigan Court required people to sue their insurance companies before their claims were denied.

Given the Court’s judicial philosophy, 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 follow.³² It did so in the name of respecting these very legislative choices, while, at the same time, explicitly refusing to consider what these policy choices are (or, in judicial parlance, refusing to consult the “legislative intent”).³³

On its face, this refusal makes little sense: in a democracy, legislatures are the proper source of policy choices; they are *not* the proper authority for resolving cases independently of any policy choice. We follow statutes because the legislature has the authority to determine our public policies, not because the legislature has the authority to resolve individual cases in whatever capricious or arbitrary manner it desires. So what can justify the application of a statute without a consideration of the policy choice it embodies?

Strict constructionists refuse to inquire into legislative policy choices on the ground that relying on such choices – instead of simply following the literal text – is likely to lead to the implementation of *judges’* policy choices, rather than the policy choices of elected representatives: determining the legislature’s policy choices, they say, is too speculative a matter, while the temptation to do what the judge thinks is right is too great. As Antonin Scalia put it, “under the guise or even the self delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires...”³⁴ Put differently, strict constructionists fear that reliance on

³¹ *Id.* at 592.

³² *See, e.g.*, *Cameron v. Auto Club Ins. Ass’n*, 476 Mich. 55 (2006); *People v. Chavis*, 486 Mich. 84 (2003).

³³ Appeals to legislative intent have been used by courts at least since the 14th Century to explain deviations from the literal text of statutes. *See* Thomas Lund, *Activist Judges of the Early Fourteenth Century*, 2008 Utah L. Rev. 471 (2008); THEODORE F.T. PLUCKNETT, *STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* 57-65, 72-81 (Harold Dexter Hazeltine, ed. 1986) (1922).

³⁴ ANTONIN SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 30, at 17 (1997).

legislative policy choices in applying statutes would justify departures from textual requirements not only in those cases the legislature did not contemplate, but also in those that it did, and that it specifically sought to address in the statute. Strict constructionists may concede that democratic control may not be enhanced by blind obedience to text in those cases that were not contemplated by the legislature, but insist that democratic control is nevertheless enhanced *overall* by such blind obedience.

That assertion has little to support it (Scalia's often repeated example is a case from 1892).³⁵ At any event, either way there is a price to pay: if we allow deviation from the literal text in the name of legislative intent, we may, indeed, end up deviating from the text where legislative intent would have required compliance with it; but if we insist on following the literal text without consulting legislative intent, we may follow the literal text where legislative intent would have disapproved. But in the former case we at least deliberate about our decision: we consciously seek to comply with legislative wishes. In the latter, by contrast, we let the vagaries of existence determine our judicial decisions. 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 and implementing legislative policy choices, the argument recommends that we not bother with them at all; that is, that we apply statutes without paying any heed to the harm they seek to redress, or the policy objective they seek to achieve. 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

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

³⁵ *Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892).

the best framed clear and determinate legal rules may produce high levels of uncertainty and unpredictability?

The principal reason for the latter question 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 also why vague and indeterminate legal standards may often bring more certainty and predictability: after all, many of those non-legal norms (economic norms, social norms, moral norms) themselves consist of highly vague and indeterminate concepts, so that vague legal standards are better able to reproduce them.

Multi-Dimensional concepts

The omnipresence of vague and indeterminate economic, social, or moral standards is not surprising. Commentators often cite Aristotle who said: “our discussion will be adequate if it has as much clearness as the subject matter admits of, for precision is not to be sought for alike in all discussions...”³⁶ “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 and weight. Determining whether an action is ‘negligent’ is a complex, multi-dimensional judgment-call involving multiple factors. The structure of these determinations resembles that of the definitions appearing in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, where a

³⁶ Aristotle, *NICOMACHEAN ETHICS* 13-14 (W. Ross trans. 1940).

disorder is said to exist whenever, say, nine of fifteen listed factors of varying importance are present.³⁷ 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.

Our legal concepts often reproduce such vague and indeterminate non-legal norms because our law is often but a formal institutionalization of those – which is why replacing these indeterminate concepts with more determinate ones may bring loss of certainty and predictability. Thus what we seek to do in the regulation of rape is to punish *coerced* sexual intercourse – coercion (or lack of consent) being the phenomenon we are after; and if we regulate that phenomenon directly, we stand to maximize the certainty and predictability of our legal regime. By contrast, we can seek to render our legal regime more determinate by using proxies for the presence or absence of coercion – for example, the presence or absence of verbal consent; but proxies are mere indications that may or may not prove correct. Like it or not, what we are ultimately after is precisely the presence of that vague and complex psychological, indeed philosophical, phenomenon.

It is unsurprising, therefore, that our legal definition of rape is vague or relatively indeterminate. Vague and indeterminate terms are often the most effective vehicles for attaining certainty and predictability because they represent, one-for-one, the “thing” – a mental state, a characterization of an action, a description of a situation, a value – that we actually seek to regulate. Reductionist formulations of these phenomena produce rules that are less certain and less predictable because they are different than the actual “event” that market participants or citizens or legislators have in mind when they form their normative expectations. And while we have the ability to change legal formulations, our ability to change people’s normative expectations is far more limited.

IV CONCLUSION

³⁷ 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.

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 potentially distinct from the certainty and predictability of our system of legal rules. Legal rules operate in a rich environment of other norms and expectations – which means not only that clear and determinate legal rules may fail to generate certainty and predictability, but that vague and indeterminate legal standards may be much better at it.

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 cultural] sentiment of the community” may dictate people’s normative (and even legal) expectations far more than the law itself.³⁸ Legal rules may be very predictable in application while producing highly unpredictable environments – 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 requirement³⁹).

³⁸ 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).

³⁹ 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 voluntarily 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.

In real life, people make contracts, buy and sell products, and have sexual intercourse in a universe of norms and expectations that may be quite oblivious to the governing legal norms (until they land in court...). The certainty of legal rules (unlike the certainty of the rules of baseball or chess) do not translate automatically into the certainty and predictability that actually matters – that of the actual world. Friedrich Hayek, for all his early insistence on ‘unambiguous rules fixed and announced beforehand,’⁴⁰ had later in life come to realize that certainty and predictability may be spoiled by strictly-construed clear and determinate legal rules:

If the judge...were confined to decisions which could be logically deduced from the body of already articulated rules, he would often not be able to decide a case in a manner appropriate to the function which the whole system of rules serve. This 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 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...⁴¹

One may wonder what, if anything, remains of Hayek’s decades-long insistence on the Rule of Law as a system of clear and determinate rules announced in advance and

⁴⁰ FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

⁴¹ FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY* 117 (1973).

followed no-matter-what. Be that as it may, Hayek is certainly correct that a legal regime containing unwritten legal standards may produce more certainty and predictability than any strictly-construed set of clear and determinate rules. And this holds, *a-fortiori*, for a legal regime employing vague and indeterminate standards that are themselves a codification of prevailing norms. Of course, for people like Antonin Scalia, Hayek's proposal is the legal nightmare over which they lose sleep at night. But Scalia and his sympathizers fail to perceive that the certainty the lawyer craves is not the certainty that investors or citizens or legislators require.

It has long been recognized that vague legal standards and a non-textualist judiciary may produce better regulative results. Of this there is no greater proof than the omnipresence of such standards in our law, and the actual practice of most of our judges. And yet, these practices are too often seen, even if ultimately 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 the environments they regulate.

This realization should carry important consequences for legislators, for judges, and for lawyers. Our economic system, our personal freedoms, and our democracy all depend on a relatively certain and predictable world. But this, far from requiring clear and determinate legal rules, often entails enacting vague standards, employing vague principles, and going beyond clear literal texts. Our economic norms, our moral precepts, and our political values, are often vague and indeterminate, and irreducibly so. They are matters of judgment that cannot be reduced to ready-made formulas, automatic and uncontroversial. Those legislators or judges who insist on reducing such complex norms into clean-cut, boxed-up, unambiguous language may in fact create a highly uncertain world.