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ARTICLES

THE FALLACY OF LEGAL CERTAINTY: WHY VAGUE LEGAL STANDARDS MAY BE BETTER FOR CAPITALISM AND LIBERALISM

OFER RABAN*

Much has been written on the distinction between bright-line rules framed in clear and determinate language, and vague standards employing indeterminate terms like “reasonableness,” “negligence,” “fairness,” or “good faith.” It is generally believed that legal rules provide the virtues of certainty and predictability, while legal standards afford flexibility, accommodate equitable solutions, and allow for a more informed development of the law.¹ This article seeks to refute the idea that bright-line rules are superior to vague standards in regard to certainty and predictability. Here are a few prominent articulations of that false idea:

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]

– Joseph Raz, *Legal Principles and the Limits of Law*²

[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”

– Louis Kaplow, *The General Characteristics of Rules*³

[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

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¹ See, e.g., *infra* notes 2–7 and accompanying text.

² 81 YALE L.J. 823, 841 (1972).

³ in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 512–13 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

to much . . . [because it] does not tell people what is permitted and what is not permitted, though it gives them something of an idea.

– Eric A. Posner, *Standards, Rules, and Social Norms*⁴

[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.

– Antonin Scalia, *The Rule of Law as a Law of Rules*⁵

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

– Frederick Schauer, *PLAYING BY THE RULES*⁶

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 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

– Cass R. Sunstein, *Problems with Rules*⁷

All these excerpts claim that bright-line rules allow people to better predict the consequences of their actions as compared to vague legal standards. Thus, whenever a standard is chosen over an alternative rule, whatever the advantages otherwise gained, certainty and predictability suffer.

This article examines this fallacy against the specific claims that clear legal rules produce the legal certainty and predictability required by capitalism and liberalism. As we shall soon see, the fallacy consists in identifying people's ability to predict the consequences of their actions with lawyers' ability to predict the consequences of applying the law. But the two, of course, can easily

⁴ 21 HARV. J.L. & PUB. POL'Y 101, 113 (1997).

⁵ 56 U. CHI. L. REV. 1175, 1179 (1989).

⁶ 140 (1991). In an earlier paragraph Schauer notes that "the *argument from reliance* [i.e., predictability] . . . presupposes a commonality of understanding between the relying addressees [i.e., those subjected to the law] and the enforcers [i.e., judges] on whose actions reliance is placed." *Id.* at 138. That is absolutely correct, and is one reason why the best rules can reduce predictability when compared with vague standards. But instead of drawing this conclusion, Schauer moves to commit the fallacy by identifying rules with predictability insofar as "addressees and enforcers" share "a common language." *Id.* at 139.

⁷ 83 CAL. L. REV. 953, 1021–22 (1995).

come apart: what may be perfectly certain and predictable for lawyers or judges applying the law may fly in the face of people's predictions. And in fact, clear rules are bound to produce less certainty and predictability than vague standards in many areas of the law.

Section I articulates the claims that legal certainty and predictability are essential for capitalism and liberalism, and that these systems of economic and political organization therefore require legal rules framed in clear and determinate language.

Section II undertakes a critical evaluation of that claim and argues that, oftentimes, the best-drafted clear and determinate rules would result in *less* certainty than alternative 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, and moral standards are often couched in vague and indeterminate terms; and that many of these standards cannot be reduced to clear and determinate rules. A short conclusion follows.

I. LEGAL CERTAINTY AND CLEAR LEGAL RULES

The United States is a capitalist and liberal state, and these forms of economic and political organization impose many substantive conditions on the content of its laws: capitalism requires that U.S. law create and maintain a free and private economic sphere, while liberalism requires a zone of personal privacy free from private or public coercion. But some have claimed that capitalism and liberalism also impose some *formal* requirements on the law: namely, that the law be framed in clear and unambiguous language, and that it be applied in strict compliance with that language. The reason for these requirements, so goes the argument, is the importance of certainty and predictability for capitalism and liberalism.

Capitalism

The importance of legal certainty to capitalism was famously articulated in Max Weber's classic (and posthumous) *Economy and Society*. "Capitalistic enterprise . . . cannot do without legal security," wrote Weber, because such security was essential for the investment of capital.⁸ 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 are enforceable; 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. Consequently, "bourgeois interests" need a legal system that "function[s] in a calculable way"; and calculability means, in turn "an unambiguous and clear legal system."⁹ An economy where private parties freely own, pro-

⁸ 2 MAX WEBER, *ECONOMY AND SOCIETY* 883 (Guenther Roth & Claus Wittich eds., Univ. of California Press 1978).

⁹ *Id.* at 847.

duce, exchange, and consume articles of value must provide private actors with clear and certain delimitations of their economic rights and duties; and these delimitations necessitate clear and determinate legal rules. Weber believed that Western law enabled the rise of capitalism by operating “like a slot machine into which one just drops the facts . . . in order to have it spew out the decision.”¹⁰ As others have since summed up the 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).”¹¹

Liberalism

An analogous claim has been made about liberalism—namely, that clear and determinate legal rules are essential for freedom. Friedrich Hayek explained the thesis as follows: “The law tells [the individual] what facts he may count on[,] and thereby extends the range within which he can predict the consequences of his actions.”¹² The law is “data on which the individual can base his own plans” which means 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.”¹³ The ability of the individual to avoid the coercive power of the state—that is to say, his freedom—is therefore “dependent upon certain attributes of the law”—principal among those is “its . . . certainty.”¹⁴ “[A]ll coercive action of government must [therefore] be unambiguously determined,” proclaimed Hayek.¹⁵ And, accordingly, he strongly condemned the use of vague 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”¹⁶

Let me exemplify Hayek’s insight with a personal anecdote. Several 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, expecting to spend the hours between them sightseeing. Alas, the person responsible for keeping the schedule was an Italian national with the insouciant sense of time common to his people: ses-

¹⁰ *Id.* at 886.

¹¹ Daniel W. Bromley & Jeffrey A. Cochrane, *A Bargaining Framework for the Global Commons* 6 (United States Agency for International Development, Working Paper No. 21, 1995), available at <http://ageconsearch.umn.edu/bitstream/11899/1/wp21.pdf>

¹² F.A. HAYEK, *THE CONSTITUTION OF LIBERTY*, 156–57 (1960).

¹³ *Id.* at 21.

¹⁴ *Id.* at 167.

¹⁵ *Id.* at 222.

¹⁶ FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 78 (1944).

sions regularly began late, regularly ended late, and last-minute changes in the program were not uncommon. As Hayek predicted, this uncertainty ruined my ability to maximize my freedom: unable to predict the conference's schedule, I remained confined to the conference's grounds. To give another analogy: if stones fell down from the sky in an unpredictable pattern, one's freedom of movement would be seriously constrained. But if they fell down in a pre-determined pattern, one could avoid the times and places where they fell and walk freely anytime and everywhere else. Clear and determinate legal rules allow people to know where they stand and where they should not stand, and therefore allow them to maximize their freedom.

Legal Interpretation

One corollary of the claim that clear and determinate legal rules are essential for certainty and predictability pertains to the proper method of legal interpretation: unless courts faithfully follow the rules' language, the certainty and predictability they are supposed to secure would be undermined. Indeed, advocates of the textualist method—the idea that judges should strictly follow the language of legal rules—believe that one of textualism's greatest virtues is that it allows people to better predict the consequences of their actions.¹⁷

II. THE FALLACY OF LEGAL CERTAINTY

The claims that strictly construed clear and determinate legal rules are essential for capitalism and liberalism are intuitive and widespread. But they are based on a confusion between the predictability of applying a legal rule and the predictability that a rule generates for those that it governs. As delineated above, capitalism and liberalism require the latter, not the former: what we want is a certain and predictable regulative environment (a predictable economic sphere, a predictable social sphere), not merely clear and determinate rules generating certain and predictable outcomes. And in fact, clear and determinate rules would often produce less predictable environments than vague legal standards. Here are some examples.

Capitalism

Contract law lies at the heart of capitalism's legal framework, and disputes over contract doctrine often implicate issues of predictability. One such famous dispute concerns the admissibility of external evidence bearing on the interpretation of clear and unambiguous contractual provisions. According to the traditional rule, if a contractual provision is clear and unambiguous, no extrinsic evidence—such as evidence of oral promises, implicit understandings,

¹⁷ See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 58 (2001).

or industry practice—can be brought to support a different interpretation.¹⁸ This is a clear and unambiguous contracts rule that—so say its advocates—provides contractual parties with the certainty and predictability they need.¹⁹

But a minority of courts has adopted a different, and a much vaguer, standard, that admits extrinsic evidence so long as “the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.”²⁰ Thus, even if a contractual provision appears perfectly clear, a party can introduce external evidence showing that the parties in fact intended a different meaning, so long as the meaning is one that the language would reasonably bear. For example, in the case just quoted above, the defendant entered into a contract “to remove and replace the upper metal cover of plaintiff’s steam turbine.”²¹ A contractual provision declared that the defendant agreed to indemnify the plaintiff “against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract.”²² During the work, a piece of metal fell and damaged the turbine.²³ The plaintiff claimed that the defendant had to indemnify for the damage; but the defendant offered to introduce extrinsic evidence showing that the indemnity clause was meant to cover only injury to the property of third parties, not of the plaintiff.²⁴ Adopting the new standard, the California Supreme Court allowed the evidence to be introduced.²⁵

Various commentators considered the decision a terrible blow to the certainty needed by economic actors. As one of them put it:

The problem with using extrinsic evidence to establish that the plain meaning of a term in a contract is not, in fact, its meaning is that the use of the extrinsic evidence for such a purpose creates uncertainty. The primary basis of contract law is to provide certainty to the contracting parties. Court decisions eliminating this certainty do not aid [contractual parties]. Neither party can be sure that express, plain terms will be enforced. If

¹⁸ See, e.g., *Wilson Arlington Co. v. Prudential Ins. Co. of Am.*, 912 F.2d 366, 370 (9th Cir. 1990).

¹⁹ *Id.* at 369–70.

²⁰ *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968).

²¹ *Id.* at 643.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 646. Other courts soon followed suit. See, e.g., *Alyeska Pipeline Serv. Co. v. O’Kelley*, 645 P.2d 767, 771 n.1 (Alaska 1982); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1140–41 (Ariz. 1993) (en banc); *William Blair & Co. v. FI Liquidation Corp.*, 830 N.E.2d 760, 773–74 (Ill. App. Ct. 2004); *Admiral Builders Sav. & Loan Assoc. v. South River Landing, Inc.*, 502 A.2d 1096, 1099 (Md. Ct. Spec. App. 1986); *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs.*, 952 P.2d 435, 446 (N.M. Ct. App. 1997); *Denny’s Rests., Inc. v. Sec. Union Title Ins. Co.*, 859 P.2d 619, 626 (Wash. Ct. App. 1993).

either party can convince the fact-finder that the intent was something other than what the plain terms suggest, these plain terms will be ignored. This is the opposite of certainty.²⁶

Many courts agree with this assessment—including, to name some of the more prominent ones, the Ninth Circuit Court of Appeals, the Canadian Supreme Court, and the English House of Lords.²⁷ While the traditional rule ('clear and unambiguous contractual provisions are enforced as written') allows parties to easily predict the consequences of their contractual provisions, the new standard—so goes the claim—introduces a great measure of uncertainty by making the meaning of contractual provisions depend on whether other "reasonable" interpretations can be demonstrated.

In fact, however, the *very purpose* of the new standard is to accord with people's predictions. After all, if there really was an understanding between the parties that indemnification was due only in case of damage to third parties, the expectations of the parties would be frustrated by the traditional rule. Put differently, people do not simply expect their contractual provisions to be enforced; they expect *their understandings* of these provisions to be enforced. And these understandings sometimes diverge from what the contract's literal language requires. This can happen for various reasons: from ill-conceived use of contractual terms, to reliance on extra-contractual understandings (oral understandings, industry practices), to failure to realize what a contractual provision may entail in certain unforeseen circumstances. Literal enforcement of

²⁶ David F. Tavella, *Are Insurance Policies Still Contracts?*, 42 CREIGHTON L. REV. 157, 170 (2009)

²⁷ See *Travelers Ins. Co. v. Budget Rent-A-Car Systems, Inc.*, 901 F.2d 765, 768–69, 771 (9th Cir. 1990) ("The rule . . . [allowing extrinsic evidence is] dangerous because it adds a heaping measure of uncertainty where certainty is essential. Insurance companies, like other commercial actors, need predictability; they write their contracts in precise language for that reason, and they calculate their premiums accordingly. When insurance contracts no longer mean what they say, it becomes exceedingly difficult to calculate risks. . . . [W]e doubt that such a . . . [rule] serves the long-term interest of those whose livelihood depends upon certainty and predictability in the enforcement of commercial contracts."); *Shogun Finance v. Hudson*, [2003] UKHL 62, [2004] 1 A.C. 919, 944 (appeal taken from EWCA) (U.K.) ("This rule [barring extrinsic evidence in contract interpretation] is one of the great strengths of English commercial law and is one of the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty."). See also Stephen Waddams, *Modern Notions of Commercial Reality and Justice: Justice Iacobucci and Contract Law*, 57 U. TORONTO L.J. 331, 336 (2007) ("Justice Iacobucci's emphasis on the merits of certainty in commercial transactions was reflected also in his rather strict formulation of the rule excluding extrinsic evidence in interpreting contracts, in a patent case decided five years later, *Eli Lilly & Co. v. Novopharm Ltd.*, [[1998] 2 S.C.R. 129, 161 D.L.R. (4th) 1], where he wrote the unanimous judgment of the [Canadian Supreme] Court.").

perfectly clear contractual provisions can fly in the face of people's predictions of their contractual rights and duties.

Faced with this rather obvious fact, the advocates of the traditional rule rely on a related argument: they concede that in some cases the vague standard would produce more predictability than the traditional bright-line rule, but claim that following the bright-line rule would nonetheless produce more *overall* predictability. This is so either because more people's predictions would end up being frustrated if clear contractual terms may be interpreted non-literally, or because people would find it more difficult to predict what their contracts might actually mean under a rule allowing non-literal interpretations.

But these claims do not withstand scrutiny. As for the second possibility, the claim not only assumes that most people consult rules of evidence when contemplating their contractual rights and duties (a rather doubtful proposition), but also that they consider the doctrine allowing non-literal interpretations to be detrimental to their ability to predict these rights and duties. But why would they? After all, that doctrine allows non-literal interpretations only in cases where the parties' own understanding would be disserved by a literal reading. So why think that the doctrine would play against one's understanding rather than in favor of it? Indeed, people cannot predict the substance of their future contractual disputes, and so cannot know whether a literal reading would be accurate in such yet-unknown circumstances. So a rule consciously striving to ascertain their actual understandings—rather than one that blindly follows the literal language of their agreement—would appear to provide *more*, not less, predictability.

So perhaps the claim is ultimately based on the first possibility—namely, that more contractual predictions would end up being frustrated under the new standard. But, once again, it is difficult to see why this empirical assertion should be true. Properly understood, the claim is that judges who decide to deviate from literal contractual language are, for the most part, mistaken in doing so. After all, if judges were on the whole correct in their interpretations, they would *improve* predictability rather than reduce it. But why think that judges mostly get things wrong when they opt for non-literal interpretations? Or that the number of errors they produce is greater than the number of errors produced by blind literal readings of contractual provisions? Naturally, all the available decisions on the matter contain detailed explanations as to why the deviation from the literal language in fact *corresponded* with the parties' predictions. So the claim is not likely to be supported by an examination of actual disputes. But then again, what else can support it?

If anything, there is greater likelihood that the traditional bright-line rule harms overall predictability, as compared to the vague standard. Whether we consider external evidence or whether we blindly follow the literal text, there is always the risk of frustrating the parties' predictions and expectations. But in the former case, we at least consciously deliberate about our decision: we purposely seek to align the legal outcome with the parties' predictions. The tradi-

tional rule, by contrast, lets the vagaries of circumstance determine the outcome.

The claim that bright-line rules produce more predictability derives, ultimately, from a confusion between the certainty that lawyers value and the certainty that economic actors value. It is easy to see why lawyers or judges find clear rules to be more predictable than vague standards: their job, for the most part, is to apply legal doctrine to a known set of facts. That job is *by definition* more certain and predictable with rules rather than standards. But the set of facts to which the legal doctrine would apply is yet unknown to parties entering contractual agreements. Thus, the predictability that they seek is of a completely different nature: they seek the predictability of the contractual rights and duties that they assume. And here, once again, vague standards may very well perform better than bright-line rules.

Liberalism

Clear and determinate legal rules can also reduce our freedom. Take the crime of rape, defined in many American jurisdictions as sexual intercourse accomplished with force and without consent.²⁸ 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 are 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”²⁹ And so, unsurprisingly, the definition has been subjected to much criticism.

Some of these critics have called for replacing the current definition with a clear and determinate legal rule. One such proposal involves the requirement of “explicit verbal consent”: in the absence of explicit verbal consent to an intercourse, and assuming a complaining victim, rape had been committed.³⁰ There would be no need to undertake the thorny question of whether some form

²⁸ See, e.g., KAN. STAT. ANN. § 21-3502(a)(1)(A) (2008) (Kansas’ rape statute).

²⁹ FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 12, at 222 (1960).

³⁰ See, e.g., Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 486–87 (2005) (recommending the requirement of explicit verbal consent in rape cases involving alcohol); Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1105 (1993) (calling for the adoption of an explicit verbal consent regime). The proposal of explicit verbal consent has even been implemented as campus policy in one American university: 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, § 1, at 1, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE1DB1239F936A1575AC0A965958260&fta=y>.

of *implicit* consent was given; instead, here is a clear and straightforward legal regime, one that gives potential victims and defendants a clear notice as to where they stand, and which thereby allows them to maximize their freedom by avoiding placing themselves in legally ambiguous situations.

But in actual fact, such legal regime would only *increase* uncertainty. Remember that the certainty with which we are concerned pertains to the ability of actors to predict the consequences of their actions, *not* the ability of lawyers to predict the application of a legal rule. And although the rule mandating explicit verbal consent may be very predictable in application, it would make it difficult to predict the legal consequences of one's actions. After all, 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. Thus, a definition of rape that regards a complaining victim, intercourse, and the absence of verbal consent as sufficient for conviction would make many legitimate actors eligible for years of imprisonment whenever a sexual partner decides to file a complaint. Once again, a clear and unambiguous rule whose application is perfectly predictable would produce a risky and unpredictable social environment.

Legal Interpretation

By now it should be obvious that courts would often *reduce* certainty and predictability if they act as textualists and faithfully follow the clear language of bright-line rules. But the fallacy persists in many of our courts. Take, for example, *Devillers v. Auto Club Insurance Ass'n*, a decision by the Michigan Supreme Court where self-proclaimed textualists hold a majority.³¹ The case applied a Michigan statute limiting claimants' ability to recover benefits from insurance companies that improperly deny coverage.³² The statute reads: "[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 means that a claimant who was *entitled* to collect insurance payments but was improperly denied coverage is nevertheless barred from recovering for any loss incurred a year or more before the date her lawsuit is filed. The statute, which functions as a qualified statute of limitations for insurance claims, sought to encourage speedy resolutions of denial-of-coverage disputes.

In *Devillers*, the insurance company corresponded with the insured for *two years* before finally denying his claim.³⁴ Once the claim was denied the insured sued, but the court allowed recovery only for the one-year period before the lawsuit was filed.³⁵ The plaintiff claimed that the period of recovery should

³¹ *Devillers v. Auto Club Ins. Ass'n*, 702 N.W.2d 539 (Mich. 2005).

³² *Id.*

³³ MICH. COMP. LAWS § 500.3145 (2008).

³⁴ *Devillers*, 702 N.W.2d at 562 (Cavanagh, J., dissenting).

³⁵ *Id.* at 542.

be tolled until the moment coverage is actually denied.³⁶ But the court rejected that claim on the ground that the statutory language was clear and unambiguous; and

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. In fact, should a court confound those legitimate citizen expectations by [failing to faithfully follow the text of the statute], it is that court itself that has disrupted the reliance interest.³⁷

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 their insurance companies before they knew they had a reason to sue, or even to consult an attorney.³⁸ The court mistook the predictability of legal interpretation for the predictability of economic transactions. But while its textualist methodology may have promoted the former predictability, it damaged the latter; and, once again, it is the latter that accounts for the importance of certainty and predictability in our law.

The Michigan court made its confusion even more explicit when it responded to a dissenting opinion deploring the majority's textualism by saying: "What are the standards upon which litigants can reasonably predict [the dissenter's] future interpretations, the rule of law being dependent upon such predictability?"³⁹ Apparently, the majority believed a non-textualist analysis to be standardless and therefore unpredictable. But be that as it may, the predictability that is important to the "rule of law" is, first and foremost, the predictability of people's rights and duties under their insurance policies, not the predictability of the "future interpretations" of insurance law.

At this point in the argument, it may be tempting to revert to the *overall predictability* claim—the claim that although the Michigan decision may have frustrated reasonable expectations in this particular case, it enhanced *overall* predictability by consistently employing a textualist analysis. But that claim, once again, depends on a host of highly dubious empirical propositions that are simply assumed, but never defended.⁴⁰ It assumes, for one, that people base their understandings of their rights and duties under their insurance policies on the interpretive methodology of statutory texts. But most people who buy insurance, or sign contracts, or do whatever it is people do that lands them in

³⁶ *Id.*

³⁷ *Id.* at 585.

³⁸ 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 not only those subjected to them, but also the legislators whose policy choices it purported to implement. *See, e.g.,* *Cameron v. Auto Club Ins. Ass'n*, 718 N.W.2d 784 (Mich. 2006); *People v. Chavis*, 658 N.W.2d 469 (Mich. 2003).

³⁹ *Devillers*, 702 N.W.2d at 592–93.

⁴⁰ *See supra* Section II (discussion of the "external evidence rule" under "capitalism").

legal disputes, do not acquaint themselves in advance with the dozens or hundreds of legal rules governing their action. Only when a problem arises do they examine (or consult someone who examines) the words of the governing statutes. As John Austin observed long ago, lawyers "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 the religious [or economic or social or cultural] sentiments of the community" may dictate people's expectations far more than the law itself.⁴¹

Sure enough, insurance companies (and other sophisticated repeat players) may and do take the law and its interpretive methodology into account when contemplating their actions. But even willingness and ability to consult the law and its interpretive methodology in advance, and to act accordingly, would be futile in many cases if the governing methodology is textualism. As mentioned above, literal interpretations may defy parties' expectations for myriad reasons, including but not limited to the use of ill-conceived contractual terms, reliance on industry non-contractual understandings, or failure to realize what a contractual provision may mean in certain unforeseen circumstances. Textualist analysis—or, for that matter, clear and unambiguous rules—can facilitate predictability only when people can configure them into their predictions. But oftentimes people cannot.

In short, there is little reason to think that courts engaged in textualist interpretation can better promote predictability. This is especially true given that non-textualist interpretation (which often, of course, ends up following the text) consciously takes into account people's expectations, while textualism does not.

III. WHY VAGUE STANDARDS MAY ENHANCE CERTAINTY

Vagueness and Certainty

Here is one last objection: it may indeed be the case that the rule forbidding introduction of external evidence, or the explicit verbal consent definition of rape, may produce less certainty than their vaguer alternatives; but those who believe that clear and unambiguous rules produce more certainty and predictability need not think that *any* clear rule does so. The claim pertains only to *well-crafted* rules, not to ill-conceived ones; and the external evidence rule or the rule of explicit verbal consent may be ill-conceived. The proper comparison is therefore between well-crafted and strictly-followed clear and unambiguous rules, and well-crafted vague standards. It is here that bright-line rules are bound to perform better predictability-wise.

A few responses are in order. First, a good many jurists consider the external

⁴¹ JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 162 (Isaiah Berlin et al. eds., Weidenfeld & Nicholson 1954) (1832).

evidence rule and the suggestion of explicit verbal consent perfectly well-conceived. Indeed, these rules are not figments of my imagination: they are the real-life suggestions of distinguished jurists seeking to improve certainty and predictability in these areas of the law. But more fundamentally, the objection assumes that there always is a clear and determinate bright-line alternative that would perform better, predictability-wise, than a vague standard. Yet what could support that assumption? Indeed my argument is that in many areas of the law (including contracts or rape law) bright-line rules would *never* produce more predictability than alternative nebulous standards. The problem with the external evidence rule or with explicit verbal consent is not that they are ill-conceived, but that they seek to reduce the irreducible.

Consider, for example, statutes that penalize “unfair competition,” understood as commercial practices that deceive consumers. . These criminal statutes, found in the codes of many states as well as the federal government, use highly vague and indeterminate phraseology in defining the illegal conduct. California’s unfair competition law, a typical example, criminalizes “unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising”⁴² In 1962, criminal defendants challenged the statute as unconstitutional because of its “uncertainty and vagueness,” but a California court rejected the challenge by maintaining that California simply could not draft a more determinate statute: “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.”⁴³ The California court went on to cite a U.S. Supreme Court opinion, which (itself citing a congressional report) stated:

It is impossible to frame [clear and unambiguous] 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.”⁴⁴

In fact, any alternative statute would substantially reduce the certainty and predictability that facilitate economic transactions. Allowing consumer deception to go unpunished would make for a far more uncertain economic environment for sellers and consumers alike.

A similar impossibility with avoiding vagueness can be seen in the proposal of explicit verbal consent in the definition of rape. After all, people can be *coerced* to provide verbal consent. Thus, any regime of verbal consent must

⁴² CAL. BUS. & PROF.CODE § 17200 (West 2008).

⁴³ *People v. Nat’l Research Co. of Cal.*, 201 Cal. App. 2d 765, 772 (1962) (citation omitted).

⁴⁴ *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532 (1935) (citing *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 312 n.2 (1934)).

also include an inquiry as to whether the consent was voluntarily given—an inquiry that reintroduces (if at a different level) the very vagueness that the verbal consent regime sought to replace. And, once again, a failure to include that vague inquiry is bound to confound everyone's expectations.

Multi-Dimensional Situations

Now why is that? Why is it that, in certain areas of the law, bright-line rules are *bound* to result in less certainty and less predictability than relatively vague and indeterminate standards? The short answer is that certain subject matters simply do not lend themselves to reduction to clear and unambiguous rules. As Aristotle noted long ago, "precision is not to be sought for alike in all discussions."⁴⁵ And "precision"—or, if you will, linguistic clarity and unambiguousness—is often lacking in descriptions of human mental states, which are (unsurprisingly) prevalent in both legal and non-legal norms (including the concepts of coercion, deception, fairness, reasonableness, negligence, recklessness, good faith, malice, intention—the list goes on and on). These concepts, and the phenomena they describe, are informed by various combinations of factors having different, and varying, imports. Determining whether a person was negligent or whether she was coerced resembles making a diagnosis under 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 factors of varying importance and of varying possible combinations are present.⁴⁶ 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, where the presence or absence of one element may impact the importance or weight of the others.

Lon Fuller, in a posthumously published article entitled *The Forms and Limits of Adjudication*, asked a question similar to the one posed here: "What tacit assumptions," asked Fuller, "underlie the conviction that certain problems are inherently unsuited for adjudicative disposition . . . ?"⁴⁷ 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."⁴⁸ But certain resolutions, said Fuller, do not lend themselves to that demand.⁴⁹ The question was, *which*? When was it futile, or ineffective, to try to resolve a dispute by articu-

⁴⁵ ARISTOTLE, NICOMACHEAN ETHICS 13–14 (William David Ross trans., 1940).

⁴⁶ Indeterminate and vague legal standards 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 as different from clear legal rules as the vague standards they would replace.

⁴⁷ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354 (1978).

⁴⁸ *Id.* at 368.

⁴⁹ *Id.*

lating a governing rule? The question posed here is similar: under what circumstances is it futile, or ineffective, to try to decide a case by articulating a clear and unambiguous rule rather than a vague standard? Fuller's question concerns a different point along the same continuum.

Fuller's answer appealed to the notion of "polycentric situations," situations having multiple elements with mutual influence over each other.⁵⁰

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 "polycentric" situation because it is "many centered"—each crossing of strands is a distinct center for distributing tensions.⁵¹

Fuller gave a simple example:

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.⁵²

Likewise, such polycentric situations are best-governed by vague standards and not by clear rules.

Many of our social, moral, and economic decisions involve polycentric situations; and why wouldn't they? Life can be complicated. And so it is unsurprising that our normative standards are replete with such concepts—and that, consequently, so are our laws, which are often mere formalizations of these non-legal (or pre-legal) standards.

Thus vague and indeterminate legal standards often produce more certainty and predictability than any alternative bright-line rule because they replicate, one-for-one, the social, moral, economic, or political norms that already prevail, and which, given the nature of the phenomena they describe, cannot be reduced to clear and unambiguous language.

IV. CONCLUSION

Capitalism and liberalism thrive when people can predict the consequences

⁵⁰ Fuller borrowed the notion of "polycentric situations" from Michael Polanyi. See Michael Polanyi, *THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS* 171 (1951).

⁵¹ Fuller, *supra* note 47, at 395.

⁵² *Id.*

of their actions, and can consequently maximize economic efficiency and personal freedom. But such predictability is distinct from the predictability of applying legal rules to given cases. Looking at the world with their professional bias, jurists often fuse together these two distinct sorts of predictability (and so it should come as no surprise that both Max Weber and Friedrich Hayek were also lawyers). But while clear and determinate legal rules are superior, *by definition*, insofar as the predictability of application is concerned, vague legal standards are often better in allowing people to predict the consequences of their actions.

Friedrich Hayek, for all his early insistence on unambiguous rules fixed and announced beforehand, had come to realize this truth later in life.⁵³ In 1973, at age seventy-four, he wrote:

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 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"⁵⁴

One may wonder what, if anything, remains of Hayek's decades-long insistence on clear and determinate legal rules announced in advance and faithfully followed. But be that as it may, Hayek is certainly correct that a legal regime containing vague moral standards (indeed *unwritten* moral standards!) may often produce more certainty and predictability than strictly-construed clear and determinate rules.

Hayek's insight should receive the wider recognition it deserves. 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 better proof than the practices of our legislatures and courts). 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 with which people can predict the consequences of their actions.

A final caveat: the extensive use of vague legal standards no doubt harbors

⁵³ FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

⁵⁴ FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY* 117 (1973).

dangers. Vague standards can easily mask arbitrariness, inconsistency, and injustice, and can also (of course) generate uncertainty. Their proper use requires good faith, professionalism, and intelligence, and therefore depends on a high caliber legal profession. But then again, it's hard to imagine a form of law (and of legal interpretation) that doesn't.

