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ARTICLES

RULES AND STANDARDS

Pierre Schlag*

INTRODUCTION

Every student of law has at some point encountered the “bright line rule” and the “flexible standard.” In one torts casebook, for instance, Oliver Wendell Holmes and Benjamin Cardozo find themselves on opposite sides of a railroad crossing dispute.¹ They disagree about what standard of conduct should define the obligations of a driver who comes to an unguarded railroad crossing. Holmes offers a rule: The driver must stop and look.² Cardozo rejects the rule and instead offers a standard: The driver must act with reasonable caution.³ Which is the preferable approach? Holmes suggests that the requirements of due care at railroad crossings are clear and, therefore, it is appropriate to crystallize these obligations into a simple rule of law.⁴ Cardozo counters with scenarios in which it would be neither wise nor prudent for a driver to stop and look.⁵ Holmes might well have answered that Cardozo’s scenarios are ex-

* Associate Professor of Law, University of Puget Sound. B.A., Yale University, 1975; J.D., UCLA School of Law, 1978. For their helpful comments on earlier drafts and for their support, I wish to thank Tom Holdych, Debbie Maranville, Michael Newcity, Tom Richardson, David Skover, and Andy Walkover.

1. M. FRANKLIN & R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 51–54 (3d ed. 1983). The dispute actually concerns two different railroads, but the issues are essentially the same. Compare *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927) with *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934).

2. *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. at 70.

3. *Pokora v. Wabash Ry.*, 292 U.S. at 103–06.

4. *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. at 70.

5. *Pokora v. Wabash Ry.*, 292 U.S. at 104–06.

ceptions and that exceptions prove the rule. Indeed, Holmes might have parried by suggesting that the definition of a standard of conduct by means of a legal rule is predictable and certain, whereas standards and juries are not. This dispute could go on for quite some time.

But let's leave the substance of this dispute behind and consider some observations about its form. First, disputes that pit a rule against a standard are extremely common in legal discourse. Indeed, the battles of legal adversaries (whether they be judges, lawyers, or legal academics) are often joined so that one side is arguing for a rule while the other is promoting a standard. And this is true regardless of whether the disputes are petty squabbles heard in traffic court or cutting edge controversies that grace the pages of elite law reviews. As members of the legal community, we are forever involved in making arguments for or against rules or standards.⁶ This brings us to a second observation: The arguments we make for or against rules or standards tend to be pretty much the same regardless of the specific issue involved. The arguments are patterned and stereotyped; the substantive context in which the arguments arise hardly seems to influence their basic character. The arguments are drearily predictable, almost routine; they could easily be canned for immediate consumption in a Gilbert's of legal reasoning.⁷

But if we accept these two observations, the implications are far from dreary or routine. On the contrary, it follows that much of legal discourse (including the very fanciest law-talk) might be nothing more than the unilluminating invocation of "canned" pro and con arguments about rules and standards. This prospect is neither dreary nor routine; it is, however, somewhat humbling.

Lest undue humility get the upper hand, there are two major ways of avoiding this vexing embarrassment. First, we can argue that the two observations above are wrong. Unfortunately, I happen to think that they are in some sense correct—and part of this Article is devoted to supporting this contention.⁸ Second, we can argue that even if the ob-

6. See *infra* notes 23–54 and accompanying text.

7. See *infra* notes 20–22 and accompanying text.

8. See *infra* notes 20–54 and accompanying text.

servations are correct, there is more wisdom or rationality or sense (or other good stuff) to the rules v. standards dispute than first meets the eye. In other words, even if rules v. standards disputes are stereotyped, almost caricatured, forms of argument, there may be more substance to these arguments about form than we might have guessed. But I don't think so: Ultimately, all the more promising conventional ways of understanding the rules v. standards dispute will turn out to be located within the bounds of that dispute. The conventional forms of legal thought allow us no place outside of the rules v. standards dichotomy from where we can make sense of the dispute.⁹ In the end, no explanation (or all explanations) of the rules v. standards dispute is left standing. The attempt to tie form to substance is just so much form.¹⁰

I. DEFINING RULES AND STANDARDS

Thus far I have been pretending that the meanings of "rules" and "standards" are self-evident. Before defining these terms, a little background is necessary.

It is possible to look at positive law (constitutions, statutes, judicial opinions, and administrative orders) as a series of directives. The formula for a legal directive is "if this, then that." A directive thus has two parts: a "trigger" that identifies some phenomenon and a "response" that requires or authorizes a legal consequence when that phenomenon is present.¹¹ Directives serve a number of *substantive* objectives such as deterrence, allocation of entitlements, and inducement. Directives also have *formal* dimensions. For instance, directives can be general or specific,¹² conditional or abso-

9. See *infra* notes 55–100 and accompanying text.

10. See *infra* notes 55–100 and accompanying text.

11. This division of the directive into two component parts is rather conventional. See, e.g., Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 786–87 (1967) (defining the two component parts of directives as a description of a state of affairs and a statement of consequences that attach if the specified state of affairs is present); see also J. DABIN, *THE GENERAL THEORY OF LAW* § 42 (1944) (defining the "hypothesis" and the "solution" as the two components constitutive of every legal rule), reprinted in K. WILK, *THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN* 267 (1950); R. VON JHERING, *L'ESPRIT DU DROIT ROMAIN* 52–53 (O. De Meulenaere trans. 1877).

12. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689–90 (1976). For a microeconomic perspective on the functions of generality in legal directives, see Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J.

lute,¹³ narrow or broad,¹⁴ weak or strong.¹⁵ They can also be rules or standards. Thus, the opposition of rules and standards is one dimension of the form of a legal directive.¹⁶

Corresponding to the two parts of a directive, there are two sets of oppositions that constitute the rules v. standards dichotomy: The trigger can be either empirical or evaluative, and the response can be either determined or guided.¹⁷ The paradigm example of a rule has a hard empirical trigger and a hard determinate response. For instance, the directive

LEGAL STUD. 257 (1974). For a discussion of the delegative function of generality, see Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 420-24 (1950); Friedman, *supra* note 11, at 832-35. For the view that generality is an intrinsic aspect of systems for controlling and directing human activity, see L. FULLER, *THE MORALITY OF LAW* 48 (1964).

13. There are hierarchies among legal directives. For instance, the text of the United States Constitution provides directives for the creation and issuance of other directives. Friedman, *supra* note 11, at 795. A legal directive can be called "conditional" when significant jurisdictional prerequisites for application of the directive can be found in other directives. By contrast, an "absolute" legal directive would be one whose jurisdictional prerequisites are relatively self-contained.

14. The breadth or narrowness of a legal directive refers to the amount of territory it brings within its sweep. Some commentators propose that the breadth of a legal directive is inversely proportional to its strength. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 260-61 (1977); Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 275-76 (1981).

15. The strength or weight of a directive is a measure of its intensity. The more a directive demands to be followed in the face of potentially opposed values, concerns, or directives, the stronger or heavier it is. See Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 832-33 (1972). Raz suggests that rules do have weight. *But see* R. DWORKIN, *supra* note 14, at 26 (arguing that rules, in contrast to "principles," do not have weight).

For an exploration of these four formal dimensions of directives in the context of reconstructing the "framers intent," see Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283 (1985).

16. The terms "rules" and "standards" do not have clear and fixed meanings in the scholarly literature. See, e.g., G. PATON, *A TEXTBOOK OF JURISPRUDENCE* § 48, at 236-38 (4th ed. 1972) (a legal rule is a precept prescribing definite consequences when certain facts exist; a rule operates by incorporating either standards or concepts; standards are elastic, whereas concepts are rigid abstractions); see also Ehrlich & Posner, *supra* note 12, at 258 (rules are distinguished from standards on the grounds of precision and generality); Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482-83, 485-86 (1933) (rules prescribe definite, detailed legal consequences to a definite set of detailed facts; standards, by contrast, specify a general limit of permissible conduct requiring application in view of the particular facts of the case). The definitions of rules and standards used in this Article are borrowed from Hart and Sacks, and Kennedy. H. Hart & A. Sacks, *The Legal Process* 155-58 (unpublished manuscript tent. ed. 1958); Kennedy, *supra* note 12, at 1687-88; see *supra* note 12; *infra* note 17.

17. H. Hart & A. Sacks, *supra* note 16; Kennedy, *supra* note 12, at 1687-88; see also R. VON JHERING, *supra* note 11, at 48-56.

that “sounds above 70 decibels shall be punished by a ten dollar fine,” is an example of a rule. A standard, by contrast, has a soft evaluative trigger and a soft modulated response. The directive that “excessive loudness shall be enjoined upon a showing of irreparable harm,” is an example of a standard.¹⁸

II. THE RULES V. STANDARDS DIALECTIC

The possibility of casting or construing directives as either rules or standards has given rise to patterned sets of “canned” pro and con arguments about the value of adopting either rules or standards in particular contexts. I call these stereotyped arguments the “dialectic.” This dialectic doesn’t go anywhere. It is an arrested dialectic: There is no moment of synthesis.

Exposing the mechanics of this dialectic is important for a number of reasons. First, the dialectic seems to surface across a wide variety of legal issues ranging from design defect litigation to the appropriate definition of collective bargaining units in labor law.¹⁹ Second, the actors (often

18. There are all sorts of difficulties with these definitions of rules and standards—not the least of which is the question whether we should identify rules and standards by means of a rule or a standard. Another perplexing question is where we should look in deciding whether some directive is a rule or a standard: in the law books, in the way the directive is administered, in the responses of those subjected to the directive? More troubling still is the question of what counts as one complete directive. All these questions need not detain us here. They will resurface later. See *infra* text accompanying notes 64–100.

One additional note: Characteristics of rules and standards can be recombined to create new creatures of form. For instance, since rules are distinguished from standards by reference to two parameters, trigger and response, “hybrid directives” can be created. Hybrid directives combine a soft evaluative trigger with a hard response or a hard empirical trigger with a soft mediated response. “Excessively loud noises are punishable by a fine of \$10” and “sounds above 70 decibels are enjoined upon a showing of irreparable harm” are examples of hybrids. In this Article, I am not terribly interested in hybrids.

19. See, e.g., Baird & Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1223–31 (1982) (noting the importance of the rules v. standards duality in fashioning directives to govern contract disputes); Gilmore, *Security Law, Formalism and Article 9*, 47 NEB. L. REV. 659 (1968) (discussing the history and probable effects of the transformation of rigid, rule-like personal property security law into the standard-like code of U.C.C. article 9); Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units*, 1981 LAB. L.J. 105 (suggesting that the NLRB should issue rules to define the appropriate collective bargaining unit rather than engage in ad hoc and post hoc determinations based on standards); Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Ver-*

lawyers) making the arguments for or against either standards or rules as well as the significant audience (often judges) seem to think that these arguments are important and persuasive. Third, few lawyers, judges, and legal academics seem to recognize that much of legal argument is simply the particular contextualized manifestation or application of these broader patterns of argument. Accordingly, set forth below, are a number of stereotyped arguments about rules and standards in the context of three "substantive" objectives of the legal system:²⁰ deterrence, delegation, and communication.

Deterrence

Many fields of law including tort, criminal, and regulatory law, are ostensibly designed to deter selected activities or conduct. In any given situation, it is generally possible to argue both that deterrence is best served by rules and that it is best served by standards. The arguments are as follows:

Rules

Pro: Rules draw a sharp line between forbidden and permissible conduct, allowing persons subject to the rule to determine whether their actual or contemplated conduct lies on one side of the line or the other. These persons are thus alerted to the nature of the prohibited conduct and can take steps to avoid it. The sharp line also assures that no desirable or permissible conduct will be chilled. Furthermore, rules mete out a fixed quantum of predetermined deterrent, ensuring that a certain penalty will be imposed for engaging in the prohibited conduct.

Con: By specifying a sharp line between forbidden and permissible conduct, rules permit and encourage activity up to the boundary of permissible con-

dict Practice in the Law of Torts, 57 N.Y.U. L. REV. 521, 542-50 (1982) (noting with approval that courts in design defect litigation have seized the middle ground between rules and standards by rejecting rigid, single-factor duty rules and shunning the general reasonableness standard tests).

20. Much of my development of the pro and con arguments for rules and standards stems from Kennedy, *supra* note 12, at 1687-1701. Rather than repeatedly citing to Kennedy's seminal work, I acknowledge the considerable debt of this section to Kennedy.

duct. The application of the same deterrent force to forbidden conduct regardless of how close or far it may be from permissible conduct, fails to distinguish between flagrant and technical violations. By predesignating and quantifying the magnitude of the penalty to be applied, rules allow Holmes' proverbial bad man to treat the deterrent as a fixed cost of doing business.²¹

Standards

- Pro:** By describing the distinction between permissible and impermissible conduct in evaluative terms, standards allow the addressees to make individualized judgments about the substantive offensiveness or nonoffensiveness of their own actual or contemplated conduct. Because the distinction between permissible and impermissible conduct is not fixed, but is case-specific, persons will be deterred from engaging in borderline conduct and encouraged to substitute less offensive types of conduct. Standards authorize application of a deterrent force proportional to the gravity of the evil, thus assuring that the strongest deterrent is reserved for and applied to the greatest social threats.
- Con:** Because standards do not draw a sharp line between permissible and impermissible conduct, some risk-averse people will be chilled from engaging in desirable or permissible activities, and some risk-preferring people will be encouraged to engage in antisocial conduct. Because the boundary between permissible and impermissible conduct is not preset, decision makers in borderline cases are likely to reach erratic results, producing confusion about what is or is not permissible. The failure to announce in advance the magnitude of the penalty prevents persons subject to the standard from determining how much effort they should devote to avoiding violations.

21. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

Delegation

Many fields of law such as agency, administrative, and constitutional law are ostensibly designed to delegate functions, roles, or responsibilities to a variety of actors. As with deterrence, both pro and con arguments can be advanced to suggest that delegation is best effected by rules or by standards.

Rules

Pro: Rules delegate by granting the subordinate complete authority and responsibility for the performance of certain factually defined tasks. By describing the subordinate's authority in empirical terms, the possibility of usurpation of authority or shirking of responsibility is minimized. The need for tests of authority between superior and subordinate is minimized, conflict is avoided and time is saved. In granting complete authority over delegated matters, rules provide neat divisions of labor, thereby avoiding jurisdictional disputes and friction.

Con: Using rules to define the scope and nature of the subordinate's authority gives the subordinate ready-made safe havens that allow avoidance of responsibility or exercise of authority contrary to the objectives of the superior. Authority conflicts and wasted time are likely to be significant as the delegation by rules results in exercise of authority or shirking of responsibility in ways and in contexts not expected by the superior. Because delegation by rule fails to discriminate in terms of the relative import or value of the matters that the subordinate performs, the likely result is that some significant matters will be handled by the subordinate, while some trivial matters are referred to the superior for action.

Standards

Pro: Standards delegate by specifying the degree of authority the subordinate is to exercise in terms of the moral or aesthetic significance of the tasks. Standards ensure that the subordinate will only

exercise authority over less significant matters and will refer more significant matters to the superior. Requiring that the subordinate make his own judgments as to the significance of various issues relieves the superior from a time consuming screening function. By relating the subordinate's authority to the significance of the tasks, the superior minimizes the cost of fallout from the subordinate's erroneous decisions.

Con: Delegating by standards means that the subordinate will use whatever criteria he wants to decide whether or not he will exercise authority. The judgments of subordinates about the significance of various issues simply cannot be trusted. Erroneous or subversive exercises of authority or shirking of responsibility will necessitate costly and time consuming intervention by the superior. By requiring the subordinate to make difficult evaluative judgments, standards increase the likelihood of erroneous determinations.

Communication/Formalities/Notice

Much of contract, civil procedure, and property law is designed to establish a system by which various actors can communicate and thus give legal effect to their intentions. Again, there are pro and con arguments for the view that these formalities are best governed by rules and for the view that they are best governed by standards.

Rules

Pro: Rules describe permissible modes of communication in empirical terms by specifying terms of art, boilerplate messages, and acceptable methods of communication. By specifying routine means of communication, rules minimize the possibility of misunderstanding, making transactions more secure. Rules also make transactions more secure because parties know their intentions will be honored by the decision maker and because the costs of dispute resolutions are minimized. Rules reduce the cost of communicating

intent or meaning by offering ready-made legal boxes signifying different meanings and intents. By attaching "either/or" consequences to communicative activity, rules encourage parties to learn and master the routine means of communication and thus facilitate most communications and transactions.

- Con: The specification of routine means of communication by rules restricts and truncates communication, and thwarts understanding. Some transactions will be deterred because their substance cannot easily be communicated via the routinized means of communication and because failure to fit the transaction within an established legal box may result in nullity. Formalities cast in terms of rules can distort meaning and understanding and defeat authentic communication by favoring those most adept at manipulating legal boxes.

Standards

- Pro: Standards delineate the formal requirements of communications in evaluative terms designed to ascertain whether there has been effective communication. By allowing the parties to choose the most appropriate means of communication in light of their particular substantive intentions, standards minimize the possibility of distortion. Because standards are cast in evaluative terms, they place the onus on the parties to work out and communicate their intentions completely and thoroughly, thereby minimizing unexpected or unconsidered consequences of their transaction. This obviates both frequent conflict and the need for official intervention by a decision maker. If ritualized communication can minimize transaction costs, standards allow the parties to develop their own rituals. By tailoring the consequences of miscommunication to the gravity and the nature of the defect, standards serve to enforce the parties' expectations as to matters upon which communication was effective. In this

way, standards give effect to the parties' intentions more accurately than the all-or-nothing consequences of complete effectuation or nullity.

Con: Standards encourage the proliferation of a multiplicity of communicative means and mediums, making communication more uncertain and transactions less secure. Even ritualized forms of communication established by the parties are insecure because there is a chance that the ritualized messages and meanings will not conform to the standard. Because the validity of the communication cannot be determined in advance by the parties, standards encourage parties who have the most to lose from adhering to the communication to seek invalidation of the communication by an official decision maker. Because standards provide a proportioned response to miscommunication rather than an all-or-nothing response, the parties cannot gauge in advance what the consequences of miscommunication will be.

These patterns of argument are familiar enough. They occur frequently in legal discourse, albeit dressed in the trappings of detail and the authority of concretion. Once we have mastered the basic pattern of this rules v. standards dialectic, the canned arguments can be raised in just about any context that can be portrayed as a rules v. standards dispute.²² Whether or not the arguments will be persuasive in any given context is another question—one that depends largely on how the issues are framed, what values are held dear, and other considerations that will be discussed later.

Part III of this Article attempts to show that the opposition of rules and standards is a frequent legal phenomenon. In a sense, this might seem "underwhelming": If we divide the world in two (say, between rules and standards) what could be more predictable than the conclusion that every-

22. See *infra* text following note 100. The rules v. standards dialectic seems well entrenched in less formal contexts such as child-rearing. Consider Johnny's education: Should he be told that he cannot ride his bicycle on 4th and 5th streets? On streets that have more than four lanes? Or on streets which are unsafe? Such child-rearing issues can lead to a parental version of the rules v. standards dialectic.

thing falls into one category or the other? The point, however, is not that everything is either a rule or a standard, but rather that, when controversy arises, the issue is often framed as a rules v. standards dispute. More importantly, the arguments that ensue track the dialectic fairly closely.

III. RULES AND STANDARDS IN CONSTITUTIONAL LAW

In order to demonstrate the prevalence of the dialectic, this Part shows how disputes about important issues in constitutional law track the dialectic. Indeed, within constitutional law, there seems to be an intricate hierarchy of rules v. standards issues.

A. *Rules and Standards in Interpretation*

In large measure, the currently fashionable disputes about how the Constitution is to be interpreted track the dialectic. On one side we have "textualists" who demand fidelity to something they call "the text."²³ They expound a rule: The text is the authoritative given that judges are bound to follow.²⁴ Failure to adhere to this rule will bring about all sort of evils, including judicial creativity and arbi-

23. The determination of what it is that has to be interpreted (i.e., the text) is itself contested. The location of the boundary between text and context is by no means fixed. Consider, for instance, three distinct versions of what constitutes the text. First, there are the literalists who think that the text means literally the text. One exponent of this view might be Justice Black, the one who reminded us that where the first amendment says, "Congress shall make no law," it means "no law." For further exploration of this perspective, see Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962). This vision of the text, for obvious reasons, is not particularly popular with constitutional theoreticians. See M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 32 (1982). Then there are those who think that the constitutional text might well encompass the written text as well as the "social text" of evolving standards of decency, public opinion, social morality, and so on. Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 767-68 (1982); see also Leedes, *An Acceptable Meaning of the Constitution*, 61 WASH. U.L.Q. 1003 (1984) (describing the Constitutional text dynamically as an ongoing process of clarification). A third and particularly sweeping view of the text denies any discontinuity between the written text and moral philosophy. Remarks of Dworkin, *Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 537 (1981). For an interesting attempt to reclaim the constitutional text as a secular (read: nonmystical) legal document, see Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

24. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 384 (1981); Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 225-26 (1983).

trariness.²⁵ Indeed, according to the textualists, abandonment of the textualist rule by the Court will yield a Constitution whose meaning will be neither certain nor predictable.²⁶ These arguments for textualism are, of course, steeped in the pro-rule genre.²⁷

Closely related to textualism is the "intentionalist" view. Intentionalists maintain that the Court should adhere to the framers' intent in interpreting the Constitution. Intentionalists also make pro-rule arguments for their posi-

25. Or as Judge Bork put it: "Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights." Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 8 (1971); see Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 700-04 (1976) (attributing errant and offensive Supreme Court decisions to interpretive departures from the text and the intent of the framers); Van Alstyne, *supra* note 24, at 213-19 (describing the considerable costs of judicial adventures in constitutional interpretation and defending a return to the text).

26. Van Alstyne, *supra* note 24, at 218.

27. The textualist position with regard to interpretation is not without irony: much of the text of the Constitution reads (literally) like standards. It does seem that most constitutional provisions that are considered important from a litigation perspective read like standards. In actuality, however, it may be that we are simply accustomed to reading these provisions as standards.

It was not always thus. Consider the power of Congress to regulate commerce among the several states. U.S. CONST. art. I, § 8. Currently, we are probably accustomed to construing this clause as a standard. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). During the heyday of dual sovereignty, however, the commerce power seems to have been interpreted as a rule. Thus, commerce itself was defined in terms of specific transactions:

Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce.

United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895). And of course, "[c]ommerce succeeds to manufacture, and is not a part of it." *Id.* at 12. As for the power to regulate commerce, it "is the power to prescribe the rule by which commerce shall be governed." *Id.* But commerce must be regulated directly: It would not do to allow regulation of manufacturing under the commerce clause, for although "the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly." *Id.* In short, the commerce clause during the dual sovereignty days seems rule-like. In fact Justice Fuller's opinion in *E.C. Knight* comes replete with pro-rule rhetoric about the importance of holding the line between the commerce power and the police power, even in the face of "acknowledged evils, however grave and urgent they may appear to be . . ." *Id.* at 13.

In sum, our willingness to see standards when we look at the constitutional text may be more a reflection of our own predispositions than a revelation about what is truly there.

tion.²⁸ And certainly, the pattern of attacks on the intentionalist proposals seems to track anti-rule reasoning. The classic attack on intentionalism holds that political and moral value judgments are essential to the reconstruction of framers' intent and that these judgments cannot be furnished by interpretive rules or by the framers themselves.²⁹

On the standard side of the interpretive question are those who would interpret the Constitution in terms of norms such as the contemporary value consensus of the community, fairness, and evolving standards of decency.³⁰ One particularly standard-like approach is offered by Brest, who sets forth five highly value-charged interpretive considerations.³¹ The classic attack on such "nonoriginalist" approaches sounds in anti-standard thought: nonoriginalism

28. I have argued that the intentionalist position both relies upon and attempts to maintain a clean and narrow vision of law uncontaminated by normativity and political dimensions. See Schlag, *supra* note 15. The very possibility and desirability of following the framers' intent presumes a rule-oriented vision of constitutional interpretation. In other words, if the framers' intent is not some clearly ascertainable thing fixed in history, or if one is not truly bound in a rigid way to follow that intent, the search for the original understanding loses its *raison d'être*. *Id.* The corroboration that intentionalism is steeped in the rule genre comes from an examination of the arguments that are made against intentionalism: Commentators committed to the enforcement of the original understanding are attacked for underestimating the complexities and the value judgments involved in applying their theories of framers' intent. The presence of such complex value judgments vitiates whatever attraction intentionalism otherwise might have had. Put simply: If framers' intent is standard-oriented, there is very little to recommend it. See, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 786-804 (1983).

29. This is the classic pattern of argument advanced by those opposed to framers' intent as an interpretive norm. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 208-20 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-500 (1981); Tushnet, *supra* note 28, at 798-801.

30. See, e.g., Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975); Perry, *Abortion, the Public Morals and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 713-33 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 266-67 (1973).

31. Brest suggests that a constitutional decision should:

- (1) foster democratic government;
- (2) protect individuals against arbitrary, unfair and intrusive official action;
- (3) conduce to a political order that is relatively stable, but which also responds to changing conditions, values and needs;
- (4) not readily lend itself to arbitrary decisions or abuses; and
- (5) be acceptable to the populace.

Brest, *supra* note 29, at 226.

allows judges to reach just about any result they want.³² The nonoriginalists respond with pro-standard rhetoric: everything is very complicated; the Constitution has to be applied to an incredible number of different contexts; flexibility and sensitivity are required.³³

B. *Rules and Standards in Deciding Who Should Decide*

The dialectic also surfaces at another level: Should rules or standards be used to decide whose interpretation of the Constitution should be applied when? This kind of question arose, for instance, in the legislative veto decision, *INS v. Chadha*.³⁴ Chief Justice Burger, writing for the Court, held that a federal statutory provision allowing a one-house veto violated both the presentment and bicameralism clauses of the Constitution.³⁵ The Chief Justice's choice to rely on these clauses—declaring that they were not “empty formalities”—exemplifies a rule-oriented approach.³⁶ After all, the presentment and bicameralism clauses read like rules. Confirming the rule-orientation of the majority opinion, Justice White's dissent criticized Chief Justice Burger's approach on classic anti-rule grounds: overinclusiveness. Justice White made the overinclusiveness argument by pointing out that the majority's approach “appears to invalidate all legislative vetoes irrespective of form or subject matter.”³⁷

32. Thus, one of the classic attacks on the noninterpretivists is that the approach can yield just about any result. See Bork, *Commentary: The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 696 (1979) (suggesting that the philosophical approaches to the Constitution can reach any result); Van Alstyne, *supra* note 24, at 228–29. Sometimes this charge is combined with the further accusation that the noninterpretivists are politically motivated in some unseemly way. See *id.* at 228.

33. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 24 (1962); Brest, *supra* note 29, at 226–27.

34. 462 U.S. 919 (1983).

35. *Id.* at 956–58.

36. *Id.* at 958 n.23. Commentators have noted the rigid definitional approach used by Burger in *INS v. Chadha*, 462 U.S. 919 (1983), as well as the absence of pragmatic or normative concerns in his opinion. See Smolla, *Bring Back the Legislative Veto: A Proposal for a Constitutional Amendment*, 37 ARK. L. REV. 509, 515–16 (1983); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 189–90 (1983).

37. Justice White noted: “Courts should always be wary of striking statutes as unconstitutional; to strike an entire class of statutes based on consideration of a somewhat atypical and more readily indictable exemplar of the class [as Burger did here] is irresponsible.” 462 U.S. at 974 (White, J., dissenting).

Justice White's dissent formulates and disposes of the relevant issues in a typical standard-oriented manner. Not only does he examine the issue under the light of the more standard-like separation of powers doctrine, but also his description of that doctrine is steeped in the pro-standard genre. He states that separation of powers has a "history of accommodation and practicality." Separation of powers has not led to "undue prophylactic measures that handicap the effective working of the national government as a whole."³⁸ "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions."³⁹ Only such a standard will allow government to address a formidable agenda of complex policy issues. Justice Burger answers these arguments in pro-rule terms: If one is to avoid tyranny, then it is necessary to adhere to "those hard choices [that] were consciously made by men [the Framers] who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."⁴⁰

C. *Rules and Standards in Substantive Constitutional Law: Freedom of Speech*

Disputes about the meaning of freedom of speech are often cast as rules v. standards disputes. Questions concerning the scope and intensity of the free speech clause and questions about appropriate judicial methodology for the framing and resolution of free speech issues often track the dialectic.

Consider first the question of what speech is protected by the first amendment. One type of theory suggests that

38. *Id.*

39. *Id.* at 1000 (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

40. *Id.* at 959. This sort of "brave manly" talk about the necessity for holding the line is classic pro-rule rhetoric. For another example of this hold-the-line talk, see *supra* note 27. Indeed, one possible way of understanding the rules v. standards dialectic is in terms of a male/female distinction. Rules have this striking, tough, hold-the-line, realpolitik, abstract-as-can-be quality to them, whereas standards are signposts suggesting sensitive treatment of all aspects of the problem in context. See generally C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (discussing the morality of rights (rules?) and the morality of responsibility (standards?)).

only political speech is protected: There are rule-like and standard-like versions of this type of theory. Judge Bork has offered a particularly rule-like variant. Relying on the notion of neutral principles, Bork argues that the first amendment protects only political speech—defined as “criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country.”⁴¹ The classic response to such a rule-like vision is that it would freeze the contours and content of protected speech by linking protection to a particular political, economic, and social structure.⁴² An arguably more standard-like vision of political speech is offered by Meiklejohn. He argues that the free speech clause protects “public speech”—all speech relating to issues which bear upon our common life. The classic attack on this vision is that either it is rule-like in the same manner as Bork’s and thus underinclusive in its failure to accord protection to literature, scholarship, and art; or, instead, it is standard-like, in which case the realm of protected speech knows no limits.⁴³ Respond-

41. Bork, *supra* note 25, at 29. Judge Bork ties his conception of political speech to empirical institutional referents:

The category of protected speech should consist of speech concerned with governmental behavior, policy, or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda.

Id. at 27–28.

42. And that is simply not permissible for a theory of freedom of speech—or so goes one classic argument against rule-like definitions of the realm of protected speech. Tribe, *Toward a Metatheory of Free Speech*, 10 Sw. L. REV. 237, 239–41 (1978).

43. One commentator observed:

The most serious weakness in Mr. Meiklejohn’s argument is that it rests on his supposed boundary between public speech and private speech. That line is extremely blurred. . . . The truth is that there are public aspects to practically every subject. . . . The author recognizes this when he says that the First Amendment is directed against “mutilation of the thinking process of the community” This attitude, however, offers such a wide area for the First Amendment that very little is left for his private speech

On the other hand, if private speech does include scholarship . . . and also art and literature, it is shocking to deprive these vital matters of the protection of the inspiring words of the First Amendment.

Chafee, Book Review, 62 HARV. L. REV. 891, 899–900 (1949); *see also* Schlag, *An*

ing to the claim that his theory was fatally underinclusive in defining the realm of protected speech, Meiklejohn opted for a frankly standard-like rendition of his theory: Protected speech includes speech from which the voters derive "knowledge, intelligence, sensitivity to human values, the capacity for sane and objective judgment . . ." ⁴⁴ The critical response was classic anti-standard rhetoric: Judges could draw the line anywhere with this standard; people would not know whether or when their speech is protected. ⁴⁵

The rules v. standards dialectic is also manifest in the debate over whether different types of speech ought to be accorded different degrees of protection. Defining subcategories of protected speech (e.g., commercial, indecent, political) seems rule-like when compared to an approach that would accord protection to all speech based on the extent to which first amendment values are implicated in individual cases. The rule-like approach of creating subcategories brings with it classic objections to rules. "Quite obviously . . . a particular speech may in fact cut across these artificial lines, readily embarrassing an attempt to say which kind of speech it was. The libelous may well be related to the political utterance, the aesthetic may be quite inseparable from the allegedly obscene." ⁴⁶ Of course, the standard-like approach of doing without subcategories raises objections as well. The delineation of different degrees of protection for speech without the aid of subcategories harbors some classic defects of standard. This approach gives no advance notice of how much any given piece of speech is protected and allows judges to reach any result they want.

In any event, the Court seems to have moved beyond this debate by recognizing various subcategories of free

Attack on Categorical Approaches to Freedom of Speech, 30 UCLA L. REV. 671, 707-09 (1983) (attacking the categorical structure of Meiklejohn's theory); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 935-38 (1978) (criticizing both the narrow and the broad version of Meiklejohn's theory).

44. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256.

45. See *supra* note 43.

46. Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 141 (1982); see Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 288 (1981) (noting that subcategorization brings with it the risk of loose and overlapping boundaries).

speech such as defamatory, commercial, and indecent.⁴⁷ The rules v. standards dispute continues, however, at a different, more concrete level: How should the various categories be defined?

Both rule-like and standard-like definitions of commercial speech have been offered in the case law. A particularly rule-like definition of commercial speech is speech which does no more than propose a commercial transaction.⁴⁸ This definition is significantly both overinclusive and underinclusive: arguably, even advertising does more than propose a commercial transaction, and arguably, there is much speech that we would want to call commercial that does not propose a commercial transaction.⁴⁹ Standard-like definitions of commercial speech have been offered as well; for example, commercial speech is speech related solely to the economic interests of the speaker and the audience.⁵⁰ But as Justice Stevens argued, it is unclear whether the limiting factor in this definition is the subject matter of the speech or the motivation of the speaker.⁵¹

Even when there is agreement about how the varieties of speech should be defined, the rules v. standards dispute resurfaces in the attempt to ascertain how such speech is protected against governmental suppression or regulation. One rule-like position is that once speech is found to be protected, it remains protected regardless of the weighty reasons the state might advance to justify suppression or regulation.⁵² A more standard-like approach would insist upon an accommodation of the values served by the first amendment and the state interests; the nature of the accommodation would depend upon the relative importance of the values and the extent to which they are implicated in con-

47. See Schauer, *supra* note 46, at 290-96 (discussing the defamatory, indecent speech, and commercial speech subcategories of the first amendment).

48. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

49. Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. L. REV. 1212, 1228-29 (1983).

50. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

51. *Id.* at 579-80 (Stevens, J., concurring.)

52. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422 (1980); Meiklejohn, *supra* note 44; see also *Konigsberg v. State Bar*, 366 U.S. 36, 56-80 (1961) (Black, J., dissenting).

crete settings.⁵³

The dialectic here traces the so-called balancing v. absolutism debate. This debate is captured in the conflicting views of Frantz and Mendelson.⁵⁴ Mendelson argued that a balancing approach was preferable to absolutist or categorical approaches because balancing requires a particularized justification for a judge's decision. This discourages reliance upon untested prejudices. Moreover, balancing is an economical judicial style because it allows the least interference with legislative choices while maintaining our traditional vision of judicial review. These are classic pro-standard arguments. Frantz's response displays the classic features of anti-standard arguments. Frantz argued that balancing is unlikely to yield uniform and impartial results. Balancing is highly uncertain in that it provides no secure minimum first amendment protection. Moreover, balancing provides no advance notice of whether speech is or is not protected.

In sum, it seems apparent that the rules v. standards dispute can occur at many different levels in the intricate hierarchy of directives and issues known as constitutional law. Obviously, we could go on and identify rules v. standards disputes in constitutional law indefinitely. This is a task I would rather not undertake.

The important thing to recognize is that many controversial issues in constitutional law (and elsewhere) are often cast as disputes over the relative appropriateness of rules and standards. This recognition prompts a nagging and perhaps dispiriting question: Is there any substance to this heady and learned law-talk or is most of the argumentation simply the concrete manifestation of the dialectic in different contexts? The next Part defers this impertinent question and seeks instead to examine the rational accounts that might explain the dialectic.

53. See Schlag, *supra* note 43, at 731-39; Shiffrin, *supra* note 49, at 1251-55. Both articles defend the accommodation of values by contextualization.

54. From here on out the battle of the pro-rule and pro-standard positions traces the Frantz-Mendelson debate on absolutism v. balancing. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

IV. EXPLAINING THE DIALECTIC

Perhaps the most common view of the rules v. standards dialectic ascribes one set of virtues and vices to rules and another set of virtues and vices to standards.⁵⁵ According to this view, the choice between formulating or interpreting a legal directive as a rule or as a standard is a choice between competing values such as certainty or flexibility, uniformity or individualization.⁵⁶ A second explanation, offered by Kennedy, is the structuralist view that the dialectic is associated with deep value rifts between altruist and individualist outlooks.⁵⁷ A third view explains the dialectic in terms of the number of interrelated variables relevant to the resolution of a legal issue. Under this view, standards are more appropriate than rules when an issue is polycentric.⁵⁸ A fourth explanation of the rules v. standards dialectic links the choice between rules or standards with the amount or depth of learning available on any given legal issue.⁵⁹ In terms of this explanation, rules are the optimal form of legal directives and standards merely serve as "standbys" in the absence of knowledge or learning on the issue sufficient to formulate a rule.

None of these explanations is satisfactory.

55. The attempt to rationalize the dichotomy is obviously enticing: Given that it plays such a significant role in legal discourse, a demonstration of its intrinsic rationality becomes important in redeeming legal discourse generally as a rational enterprise.

56. See *infra* text accompanying note 60.

57. Kennedy, *supra* note 12, at 1712-22; see *infra* text accompanying notes 86-92.

58. The argument that standards are more appropriate when an issue is polycentric is *loosely* derived from Fuller's account of the limits of adjudication. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393-405 (1978); *infra* text accompanying notes 93-94.

59. See *infra* notes 95-98 and accompanying text. Such an argument might be teased out of the provocative suggestions of Curtis:

What the author of a legal document is trying to control is the future itself.

. . . You are trying to stabilize a part of the future, set it on a course, make it more foreseeable and more reliable.

. . . But what happens in the future is necessarily uncertain, inchoate, contingent, only partly foreseeable, and you must therefore find some similar and corresponding quality in the words you are using. Briefly, your words should be as flexible, as elastic, indeed as vague, as the future is uncertain and unpredictable. I say *vague*, because both *flexible* and *elastic* imply sharp edge and definite contours.

Curtis, *supra* note 12, at 423-24 (emphasis in original).

A. *Of Vices and Virtues*

Perhaps the most common understanding of the rules v. standards dialectic attempts to explain it in terms of a normative coherence in the legal order. According to this "vices and virtues" view of the world, the choice between adopting a rule or a standard is a choice between competing virtues and vices that we typically associate either with rules or with standards. Rules, for instance, are said to be appropriate when certainty, uniformity, stability, and security are highly valued, whereas standards are seen as more appropriate when flexibility, individualization, open-endedness, and dynamism are important. The set of virtues and vices that are typically associated with rules and standards might be diagrammed as follows:

Rules		Standards	
<i>virtues</i>	<i>vices</i>	<i>virtues</i>	<i>vices</i>
certainty	intransigence	flexibility	manipulability
uniformity	regimentation	individualization	disintegration
stability	rigidity	open-endedness	indeterminacy
security	closure	dynamism	adventurism

No doubt more virtues and vices could be added to the list.⁶⁰

This understanding of rules and standards is neither exotic nor original. Typically, when a legal dispute pits a rule against a standard, we can expect the proponent of the rule to trot out arguments about the importance of such legal virtues as certainty and stability. No doubt, the champion of the rule will add that these virtues are best served by rules. We can also expect the proponent of the standard to retort that rules are rigid and inflexible and that a standard would be more appropriate. In short, we can expect rules v. standards disputes to track the vices and virtues analysis. This correspondence between the vices and virtues view of the world and the dialectic, of course, suggests that the dialectic could be understood in terms of the vices and virtues vision. From the vices and virtues perspective, the choice between rules and standards depends upon which competing virtues

60. The list in the text is an abridged and revised version of one developed by Duncan Kennedy. Kennedy, *supra* note 12, at 1710. It is not necessary to my argument that everyone acquiesce in the distribution of virtues and vices I have made among rules and standards in every case. I do assume, however, that this distribution seems on the whole sensible or familiar to the reader.

(certainty or flexibility) are desired most, or similarly, which alternative vices (rigidity or indeterminacy) are dreaded most.

There is something appealing about this explanation. First, it rings of the familiar: it confirms what we have known all along. Second, the explanation imports a meaningful normative coherence to the choice between rules and standards. A preference for either rules or standards can be seen as a coherent normative choice about which values ought to be preferred in a given context. This is all very comforting.

It is also quite insufficient. After all, most members of the legal community think of "law" as a complex and intricate system that administers or governs an incredibly large variety of matters. If this is what "law" is like, then how could something as simple as the vices and virtues vision explain why our arguments about rules and standards seem to congeal into the equally simple stereotypical patterns of argument that I have dubbed "the dialectic"? Something does not fit here. A belief in the dialectic and the vices and virtues vision is inconsistent with the view of law as complex and intricate. Something has to go.

We can retain the dialectic and the vices and virtues vision if we reconsider the underlying view that law is intricate and complex. We need only make two (quite plausible) assumptions about the character of the legal system in order to rehabilitate the explanatory power of the vices and virtues vision: The number of substantive objectives that can be served by legal directives is very small, and these substantive objectives are ambivalent in that they all bring into play countervailing objectives. Once we admit that this vision of the legal system animates much of legal discourse, then it becomes possible to understand how the vices and virtues vision can yield the dialectic. But first, I must explain the two assumptions. The substantive objectives of the legal system are few and ambivalent:

1. On an abstract level, the set of substantive objectives that a legal directive may serve can be seen as fairly limited:

- deterrence
- allocation
- communication

delegation
inducement⁶¹

Other substantive objectives could no doubt be added to this list, but soon they would begin to overlap and collapse into each other. My point is that any legal directive can arguably be characterized as serving to effect one or a combination of the objectives on the list above. Furthermore, this view of the legal system is not exotic in the least, but rather conforms to widely held (often implicit or subconscious) beliefs within the legal community as to how legal directives function.

2. All of these substantive objectives are ambivalent in the sense that they necessarily bring into play competing objectives. For example, the aim of deterring certain conduct immediately gives rise to the concern that permissible or desirable conduct not be chilled—(empowerment). Likewise, the objective of delegation necessarily brings into play the need to circumscribe that delegation—(control). Thus, the substantive objectives of the legal order are ambivalent in that they necessarily entail countervailing objectives, as follows:

deterrence/empowerment
allocation/retention
communication/silence
delegation/control
inducement/restraint

Because the substantive objectives of the legal order are ambivalent, we may draw the line between the opposed sets of substantive objectives in ways that further . . .

61. One could think of other substantive objectives that a legal order might serve, such as legitimation, *see, e.g.*, Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978), repression, *see, e.g.*, I. BALBUS, *THE DIALECTICS OF LEGAL REPRESSION* (2d ed. 1977), mystification, *see, e.g.*, Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571 (1977), or ludic satisfaction, *see, e.g.*, Leff, *Law and*, 87 YALE L.J. 989, 998-1008 (1978). One could go on indefinitely.

These types of objectives do not belong on my list. I am trying to give a mainstream account of the objectives of the legal system—the sort of objectives that the law student, or lawyer, or law professor might rely upon when acting in their respective role-constrained situations: the exam, the legal argument, the traditional tenure piece.

	<i>Rule virtues</i>		<i>Standard virtues</i>
	certainty		flexibility
either	uniformity	or	individualization
	stability		open-endedness
	security		dynamism

For instance, consider the railroad crossing example mentioned at the beginning of this Article⁶² and assume that the problem is to formulate a directive that will deter negligent behavior while allowing drivers to cross the railroad lines without waste of time or effort. The deterrence/empowerment line can be drawn in either a rule-like or standard-like way. If we want certainty, uniformity, stability, Justice Holmes' "stop and look" rule might seem attractive.⁶³ From a standards perspective, however, this rule is undesirable: Not all railroad crossing situations require that the driver stop and look. Similarly, stopping and looking sometimes is not enough. From the standards perspective, flexibility, individualization, and open-endedness best serve to deter negligence without imposing needless rituals. As this illustration shows, it is possible to draw the line between the competing substantive objectives in either standard-like or rule-like ways.

The number of permutations one can draw in attempting to relate the substantive objectives of directives to the vices and virtues of either rules or standards is limited by the fact that there seems to be a family resemblance among the set of virtues associated with rules and a different family resemblance among the set of virtues associated with standards. If one were taking the Law School Admissions Test and asked to segregate the following list of eight virtues into two groups of four I suspect that a lot of people would organize the eight virtues according to the following pattern:

certainty/uniformity/stability/security . . . (i.e., rule virtues).

flexibility/individualization/open-endedness/dynamism . . . (i.e., standard virtues).

In short, the number of conceptually distinct virtues and vices that can be ascribed to rules or standards is small.

62. See *supra* text accompanying notes 1-5.

63. See *supra* note 2 and accompanying text.

Because the virtues and vices attributed to rules and standards are limited and patterned, and because the substantive objectives of the legal order are seen as limited and ambivalent, the number of possible permutations that can be drawn to relate rules or standards to the substantive objectives is small. In these circumstances, it should come as no surprise that the arguments for and against rules and standards should be stereotyped in the manner of the dialectic. In each case of substantive line drawing there is a rule-like and a standard-like way of drawing the line between the conflicting substantive objectives. The arguments we make for drawing these lines in rule-like or standard-like ways are informed by the vices and virtues ascribed to rules and standards. The arguments themselves are none other than the dialectic.

Thus, given the appropriate view of the legal order, the vices and virtues vision can explain the dialectic—including its stereotyped character. Of course, our initial interest in the vices and virtues vision did not stem merely from its explanatory potential—the vices and virtues vision promised to ground the dialectic in normatively meaningful choices between competing values. Unfortunately, the view of the legal order we have had to adopt to save the explanatory potential of the vices and virtues vision makes that promise illusory. In order to explain the dialectic in terms of the vices and virtues vision, we had to make two assumptions about the character of the legal system, to wit: that the substantive objectives of the legal system are few and ambivalent.

Once one makes these two additional assumptions, the picture of the legal system that emerges is far from flattering. Legal discourse emerges as crude, shallow, and formalistic. And if the dialectic is grounded on such a picture of the legal system (as it may well be) then the dialectic *may* itself be nothing but a highly formalistic exercise bereft of any significant connection to vices or virtues. If so, perhaps we should be suspicious of legal arguments that resemble any part of the dialectic.

Indeed, arguments (fancy and otherwise) that partake of the dialectic (including most of the constitutional law arguments discussed in the last section) may be nothing more

than the contextualized manifestations of formalistic mechanics.

This conclusion is not necessarily correct. If, however, we recognize the stereotypical, patterned character of the dialectic, and if we seek to explain this character, then ultimately, we will have to concede that the actors who invoke the dialectic must necessarily rely, at least implicitly, on a structural view of the legal system that is fairly simple. The assumptions that the substantive objectives of the legal system are few and ambivalent are at once a plausible account of how members of the legal community view the legal system and an account that is sufficiently simple to allow the vices and virtues view of the world to yield the dialectic.

So far, the discussion of the vices and virtues vision has been premised on the undeniably powerful and widely held notion that rules promote certain virtues (or vices) while standards serve other virtues (or vices). The discussion which follows attempts to deconstruct that vision.

It is extremely difficult to shake the view that rules are certain and predictable and that standards are flexible and individualized. We are likely to regard a person suggesting that standards are just as certain as rules and that rules are just as flexible as standards with the withering grimace usually reserved for lunatics who spend their time arguing against tautologies. This, of course, raises an interesting point: If it is mere definitional commitments that make rules certain and standards flexible, then the vices and virtues view of rules and standards is exceedingly shallow. If we are interested in a claim that rules are certain and standards flexible, the proposition has to be true in more than a definitional sense.

My strategy for deconstructing this vices and virtues vision is based on the relentless application of a few simple moves:⁶⁴

1. No rule or standard (or any other piece of text) can control or determine the context within and from which it is interpreted.
2. The interpretation of a rule or a standard (or any

64. The moves in this section are inspired by readings of J. CULLER, *ON DECONSTRUCTION* (1982); J. DERRIDA, *OF GRAMMATOLOGY* (1976); S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980); M. RYAN, *MARXISM AND DECONSTRUCTION* (1982).

other piece of text) varies as the picture of the context is changed or altered.

3. There is no privileged (or secure) context from which any rule or standard (or any other piece of text) must be read.

4. Any attempt to use a text to privilege a particular context for the interpretation of a rule or a standard (or any other piece of text) must itself be subject to dispute given (1) above.

5. If rules seem to partake of rule virtues and standards of standard virtues, it is because the context in which they apply has already been characterized as rule-like or standard-like. But given (2) and (3) above there is no reason to think that this picturing is particularly privileged.

These moves are used to show that the vices and virtues vision of the dialectic either lapses into tautology or results in demonstrably untenable views.

What does it mean to say that rules are certain? It might mean something like this: "If a rule is interpreted correctly, then the interpreters can be certain about whether the rule applies in a given case and what the rule requires." The problem with using the frame of reference of "correct interpretation" for rules is that we can say the same thing about standards: "If a standard is interpreted correctly, then the interpreters can be certain about whether the standard applies in a given case and what the standard requires." Using "correct interpretation" as the frame of reference to ascertain what values are served by rules and standards truncates the analysis to the point where it becomes uninteresting. It is arguable that if standards were correctly interpreted, they would exhibit not only all the standard virtues (i.e., flexibility) but also all the rule virtues (i.e., certainty). Under ideal conditions anything is true—but only because ideal conditions make anything true.

We could argue, instead, that the view that rules are certain means that they are more susceptible to correct interpretation than standards. Likewise, the purported flexibility of standards might mean that standards are more likely than rules to allow discretion by the interpreter. But why should this be? Again, one answer is that it is true by definition. But is it true in any more interesting way?

I doubt it. There is no reason to believe that a rule or a standard supplies the context in which it is applied free from the influence of concerns external to that context. In other words, a rule or a standard does not unequivocally point to a perfectly defined context in which the rule or the standard must be applied. On the contrary: the construction of the context in which the rule or the standard should be applied can only be decided in context. Is there then no way to privilege a particular context—no way to say, “Look, stop this nonsense. This, I tell you is the context to which the rule or the standard must be applied?” Certainly, it seems inadequate to use a rule or a standard to identify the context. Such a strategy would merely provoke the cipher of the infinite regress. After all, the question whether a piece of text (such as a rule or a standard) applies to a given context is a function of context.

If a directive does not exercise complete control over the context to which it applies, then there is no reason to suppose that the directive will necessarily or even probably exhibit its abstract, characteristic virtues or vices when applied to that context. Rather, everything depends upon how the context is described. Whether a rule exhibits certainty when applied in a given context depends upon whether the context is described in a way that is hospitable to rule-like treatment. I will give one short and one long example.

I assume that most people consider the *Miranda* rule to be an example of certainty and predictability.⁶⁵ That is probably because they think that if a police officer fails to give *Miranda* warnings during a custodial interrogation any confession and its fruits will be excluded from evidence. And indeed, if one sees the context in which *Miranda* is applied in terms of police officers, interrogations, custody, the warnings on those little cards, and the judge excluding evidence, then indeed the *Miranda* rule is certain and predictable, and maybe even stable. But there is no reason that one should have that particular context in mind. Try this one instead. The *Miranda* rule applies in a context of avoiding coercion by the instrumentalities of the state, furthering procedural fairness, and mitigating inequalities of wealth and education during confrontations between law enforcement

65. *Miranda v. Arizona*, 384 U.S. 436 (1966).

officials and members of less privileged groups.⁶⁶ Now if this is the context in which *Miranda* is applied, it seems transparent that the rule is anything but an example of certainty, predictability, or stability.

Another example helps illustrate the point.⁶⁷ The State Environmental Policy Act of Washington state ("SEPA") requires an environmental impact statement ("EIS") to be included "in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment" ⁶⁸ Pursuant to SEPA, a state agency was directed to promulgate guidelines specifying "categories of governmental actions exempt from" environmental impact statements.⁶⁹ The state agency developed the following exceptions to the environmental impact statement requirement:

The construction or designation of bus stops, loading zones, shelters, access facilities and pullout lanes for taxicabs, transit and school vehicles. . . . The construction or installation of minor road and street improvements such as paving marking, . . . street lighting, guardrail and barricade installation, installation of catch basins and culverts, and reconstruction of existing road bed . . . , including adding or widening of shoulders, addition of bicycle lane, paths and facilities, and pedestrian walks and paths, but not including additional automobile lanes.⁷⁰

This statement of rule-like exceptions to the EIS requirement seems clear enough.

Recently, Seattle made a series of changes to the traffic patterns by altering bus and loading zones, lane markings, sign, and signal changes.⁷¹ These changes appeared to fall within the EIS exceptions. And in a challenge to the city's actions for failure to perform an EIS analysis, a trial court agreed.⁷² So far so good: The EIS exceptions look like

66. This is not a strange or artificial context. These concerns resonate throughout the opinion. *Id.*

67. The example is drawn from *Downtown Traffic Planning Comm. v. Royer*, 26 Wash. App. 156, 612 P.2d 430 (1980).

68. WASH. REV. CODE ANN. § 43.21C.030(2)(c) (1983).

69. WASH. REV. CODE ANN. § 43.21C.110(1)(a) (1983).

70. WASH. ADMIN. CODE R. § 197-10-170(1) (1983).

71. *Downtown Traffic Planning Comm. v. Royer*, 26 Wash. App. 156, 159, 612 P.2d 430, 433 (1980).

72. *Id.* at 158, 612 P.2d at 432.

rules, and at the trial court, they have yielded what rules are supposed to yield—predictability, certainty, and stability.

On appeal, however, the court reversed.⁷³ It turned out that there was another way to describe what Seattle did to its downtown area. Seattle established *exclusive bus lanes* for rush hour traffic on two of its main thoroughfares. Taken together, that is what all those trivial changes produced. Because this was a “major action significantly affecting the quality of the environment,” as defined in SEPA, performance of an EIS seemed to be required.⁷⁴

Certainly, that seemed to be the view of the court of appeals. But what about the EIS exceptions? The court of appeals decided that these were to be interpreted in light of the comprehensive SEPA standard. Specifically, the court directed agencies to apply the comprehensive SEPA standard of “major action significantly affecting the quality of the environment” to determine whether the “legislature intended these exemptions to apply.”⁷⁵

The point of this story is simple. There are two ways of describing what Seattle did: It altered lane markings, bus zones, and sign markings, or it established a rush hour municipal transit system. Both are correct descriptions. If we adopt the first description, then it is clear that the rules (the EIS exceptions) apply and that the rules are certain, predictable, and stable. Once we recognize, however, that the city’s actions can be described in the second way, the rules (the EIS exceptions) are no longer certain, predictable, or stable. If the city’s action can also be described as establishing a rush hour municipal transit system, then arguments can be made either way about whether the actions of the city are covered by the rules or not. It all depends upon how we want to describe the context in which the rules are said to apply: the creation of a series of traffic signal changes or the establishment of a rush hour municipal transit system.

Of course, we can deploy strategies to privilege one of the two contexts. For instance, the court of appeals thought that the regulations, even though framed as exemptions to SEPA, should be subservient to the comprehensive SEPA

73. *Id.*

74. WASH. REV. CODE ANN. § 43.21C.030(2)(c) (1983).

75. 26 Wash. App. at 165, 612 P.2d at 436.

standard. This is a hierarchy of sources of law argument. But there is nothing conclusive about this argument. To suggest that a SEPA *statute* is superior to SEPA *regulations* and that the former controls the latter is hardly determinative of the issue here. It can, no doubt, be argued that the statute authorized the issuance of the exemptions at issue here.⁷⁶ There are other strategies that can be deployed to privilege one description of the context above another. But none of these strategies is completely successful. They merely defer the choice of how to describe the context back to another level. This is an example of the infinite regress mentioned earlier.

The inadequacy of the vices and virtues vision can be demonstrated from another angle. Consider what rules and standards would have to accomplish in order to exhibit their respective sets of virtues and vices. In order to be certain, a directive would have to cordon off that section of the social world which it governs, and it would have to subdivide that world according to an invariant matrix and attach determinate consequences to each fraction of the subdivision. I do not believe we think this is possible. It is not possible for the simple reason that parts cannot determine their relation to the whole. To put it another way, the text cannot define its context.⁷⁷ If we concede that the sector of the social world cordoned off by directive can be affected by the external world, then the only way in which a directive can be certain is if it is sufficiently flexible to accommodate the effects of the external world. This is tantamount to an admission that in order to be certain, a rule must be flexible. At that point, however, the rule-like character of the directive becomes contaminated with standard-like qualities.

The same point can be made with respect to standards. A standard is open-ended only to the degree that it is stable. Standards are open-ended in that they do not create rigid boundaries and can be applied to new and unforeseen situations. Yet if the meaning or content of the standard does

76. SEPA states that the state agency shall promulgate guidelines specifying "[c]ategories of governmental actions which normally are to be considered as potential major actions significantly affecting the quality of the environment as well as categories of actions exempt from such classification" WASH. REV. CODE ANN. § 43.21C.110(1)(a) (1983).

77. Fish, *supra* note 64, at 316, 330-31.

not remain in some sense fixed, the standard will not be open-ended at all. If there is no constancy to the standard, if it is fully open, has no boundaries, can apply to any situation, then it will not be open-ended. It will be meaningless. Consider, for instance, Justice Douglas' penumbral emanations in *Griswold v. Connecticut*.⁷⁸ They were not open-ended because they were not stable. They were not stable because no one knew how far the constitutional clouds might drift. The emanations were quickly cabined by his Brethren.⁷⁹

This line of reasoning quickly eliminates the possibility of attributing specific virtues only to standards or only to rules. As we have just seen, in order to be certain, a rule has to be flexible. Similarly, in order to be open-ended, a standard has to be stable. These observations quickly collapse into mischievously ambivalent propositions: Rules are certain when they are appropriately flexible; standards are open-ended when they are appropriately stable. Once we introduce flexibility in order to achieve certainty, and stability in order to achieve open-endedness, it is hard to know where to stop. What degree of flexibility is appropriate for a rule to be certain? What degree of stability is appropriate for a standard to be open-ended? These questions are unanswerable. But the very fact that they are unanswerable suggests that we lack any basis for claims such as "rules provide more certainty than standards," or "standards are more open-ended than rules."

Just as there are ways of seeing rules as certain and stable and standards as flexible and individualized, there are ways of seeing just the opposite. Rules produce a great deal of certainty within their scope of application by banishing troublesome concerns. This banishment or deferment creates uncertainty elsewhere. Consider the Seattle bus zone case again.⁸⁰ There, the fact that the EIS exceptions seemed to exempt a major environmental change from SEPA statutory requirements resulted in a great deal of uncertainty.⁸¹

78. 381 U.S. 479 (1965).

79. Mr. Justice Douglas' constitutional clouds were not open-ended in the sense that they did not give rise to recognition of an overwhelming number of "new" constitutional rights. The emanations were sealed off from the start: The other members of the majority articulated different grounds for their decision. *Id.*

80. *Downtown Traffic Planning Comm. v. Royer*, 26 Wash. App. 156, 612 P.2d 430 (1980); see *supra* notes 67-76 and accompanying text.

81. This uncertainty stemmed from the fact that the city's action seemed to be

On one level, it is possible to say that the appellate court's treatment of the issue provides yet another example in which rules (the EIS exceptions) are certain and stable⁸² and all the uncertainty is created by the flexibility and manipulability of a standard (the SEPA requirement). But this account misses something: The court's resort to something like the SEPA standards to resolve the issue was not surprising. In fact, this move could have been foreseen when the EIS exceptions were first formulated. The very rule form of those exceptions postponed the problem of what would happen when an activity fell clearly within the EIS exceptions, but produced a major environmental change. This sort of deferment is not an idiosyncratic characteristic of the EIS exceptions; it is a characteristic feature of rules.

The foregoing example might be construed as suggesting that rules produce a great deal of uncertainty outside the clear scope of their application. But we should not think that because the uncertainty occurs *outside* rather than *inside* the clear scope of application that rules therefore can be said to produce certainty. There are two reasons why such a position is inadequate. First, as the Seattle case illustrates, we often care as much about the effects of a rule *outside* its field of application as *inside*. Second, the inside/outside distinction is not fixed. The determination of what might count as the "clear field of application" of a rule is subject to dispute. For instance, prior to the court of appeals' decision in the Seattle case, it was arguable that the EIS exceptions exempted *any* traffic sign or lane changes from the SEPA requirements. The court of appeals decision, however, confirmed that this position was merely argu-

both a major environmental change and to fall within the EIS exemptions. *See supra* notes 71-76 and accompanying text.

82. Certainly that is what respondents argued:

The SEPA Guidelines themselves state at WAC 197-10-020(2), "These guidelines were developed to establish methods and means of implementing SEPA § [sic] in a manner which reduces duplicative and wasteful practices, establishes effective and uniform procedures, encourages public involvement and *promotes certainty* with respect to the requirements of the act." Certainty is not promoted when the plain meaning of the regulations cannot be relied upon by local government for obviously "minor new construction."

Brief of Additional Respondents at 13, Downtown Traffic Planning Comm. v. Royer, 26 Wash. App. 156, 612 P.2d 430 (1980) (copy on file at *UCLA Law Review*).

able, not necessarily correct.⁸³ Because rules do not determine their own fields of application, these fields remain contestable and contingent. In sum, rules necessarily entail uncertainty—but this uncertainty is often difficult to see in concrete situations because we typically defer or exteriorize the uncertainty.

The same pattern of deferment and exteriorization occurs in our interpretation of standards. In accordance with the vices and virtues vision, we tend to see standards as flexible. But there is a sense in which standards are not flexible at all. Consider, for instance, the “balancing” or “totality of circumstances” tests that are often used in constitutional law.⁸⁴ These tests viewed in isolation look very flexible. But as soon as we consider how they are applied by judges, it becomes apparent that these tests merely defer the constraints on judicial decision making to some external source such as precedent. In other words, the very flexibility of balancing and totality of circumstances tests refers litigants and judges to other stable norms to inform decision making. This precedent boundedness is inflexible. But we tend not to see this inflexibility as an aspect of the standard. Rather, we see the inflexibility as external: If judges and litigants pay too much attention to the facts of precedent, that is their own choice, not something attributable to the standard form of balancing or totality of circumstances tests—or so the argument goes. I think this is wrong: Inflexibility is just as much a part of standards as their supposed flexibility.

Standards also harbor inflexibility in their unremittingly expansionist tendencies. Standards have a constant tendency to extend their dominion over an increasingly larger territory. Consider, for instance, the example of a standard I gave at the beginning of this Article: Excessive loudness shall be enjoined upon a showing of irreparable harm.⁸⁵ Most likely this standard refers to noises or sounds. It does, also, arguably, have something to say about building color schemes, manner of dress, advertising signs, and undue intensity in the run of life generally. Again, it is often difficult to see this inflexibility of standards because it is deferred or

83. *Downtown Traffic Planning Comm. v. Royer*, 26 Wash. App. 156, 165, 612 P.2d 430, 436 (1980).

84. See *supra* text accompanying notes 31, 53.

85. See *supra* text accompanying note 18.

exteriorized. The imperialistic tendencies of standards are often seen as external to the standards, as a failure to constrain standards from the outside—a failure to exercise “good judgment” or a failure to formulate external limits. But the possibility of making such judgments depends upon the possibility of grounding an inside/outside distinction—something that is not possible.

In short, rules and standards partake of certain virtues only to the extent that they partake in the negations of those virtues. Thus, rules can be said to provide more certainty or stability, for instance, than standards, but this is correct only in one part of the universe, *here*, where certainty and stability are served by rules which provide uncertainty and instability *elsewhere*. Now, if rules produce certainty and stability *here* only by producing uncertainty and instability *elsewhere*, are we to say that rules produce certainty or uncertainty, stability or instability? The answer to the question, of course, depends upon whether we are concerned with what happens *here* or what happens *elsewhere*. More importantly, perhaps, the question is who gets to decide what “here” and “elsewhere” might mean. Of course, the definition accorded to “here” and “elsewhere” depends upon where one stands. The point is that unless we are given some criteria to determine which effects of rule or standard application are relevant, there is no way to tie a particular set of virtues to rules or to standards.

The foregoing attempt to deconstruct the vices and virtues vision of rules and standards is conceptual and abstract. These very features of my deconstructive attempts may leave the reader with the suspicion that, although the vices and virtues vision is inadequate from a theoretical perspective, it works pretty well in practice. As we look at the body of decisional law created by courts and agencies, rules seem certain and stable whereas standards seem flexible and individuated. I have two basic answers to that contention.

The short answer is that if we are willing to look at the body of court and agency decisional law in this way, we do so because we are willing to supply the contextualization that makes the rules seem certain and stable and makes the standards seem flexible and individuated. As members of the legal community, we have learned not just a wealth of directives, but also a series of pictures (contexts) that correspond

(albeit loosely) to these directives. It is often much easier for us to shake commitments to existing directives than it is for us to imagine different ways of picturing the contexts in which the directives apply.

For instance, it seems difficult to imagine replacing the "reasonable prudent person" standard in tort law with a rule to define the standard of care. The immediate objection to such a proposal is that a rule could not possibly be an adequate substitute for the reasonable person standard given the multitude of varied situations in which that standard applies. This seems true enough. But notice what has happened here: The reason we can say that a rule cannot adequately substitute for the reasonable person standard is that we have left the context unchanged. The context remains "the multitude of varied situations" in which the reasonable person standard applies. If we redescribed the context by breaking it down into component parts, for instance, automobile accidents, professional services, recreational activities, and so on, the possibility of establishing a regime of rules seems much more plausible.

There is a longer answer to the contention that, in practice, rules and standards exhibit their stereotyped virtues. When rules and standards fail to exhibit their stereotyped virtues, we call into play two basic "avoidance strategies" to help us conclude that this failure is not attributable to the rule or the standard itself, but to some external factor.

One such "avoidance" strategy is the claim that uncertainty in rules and inflexibility in standards stem not from the form of the directives, but rather from their substance. The wrong rule or standard was chosen for the particular situation. This is a tidy way of preserving the integrity of the vices and virtues vision by banishing all nonconforming data to the foreign realm of substance. One problem with this tidy solution is that it begs the question. Since we are not furnished any criteria to distinguish the realm of *substance* from the realm of *form*, it seems a bit suspicious to automatically explain away all nonconforming data by reference to the substance of the directives. Moreover, the introduction of *substance* to explain data that do not conform to the vices and virtues model of the world destroys the intellectual power of that model. Once we explain the deviation of rules and standards from the vices and virtues model by reference

to the substance of those rules and standards, we have introduced a limitation that threatens to swallow the model. Once the applicability of the vices and virtues model is limited by the content of the rules and standards, the vision becomes entirely subordinate to considerations of substance. The model becomes useless because its application is dependent upon that which we cannot a priori say anything about: substance.

Another avoidance strategy used to explain deviations from the vices and virtues vision is the notion that these deviations stem from misinterpretation of rules and standards. If only the rules and standards were correctly interpreted, they would exhibit their stereotyped vices and virtues. As will be seen, this explanation ultimately fails as an avoidance strategy. Nonetheless, it is worth considering in greater detail before disposal.

A number of familiar reasons can be advanced to explain why rules or standards are misinterpreted. Imagine that a large federal agency is charged with enforcing Rule A by adjudication. At first blush Rule A seems very clear and readily comprehensible, but when applied by the agency it appears quite uncertain, unstable, and insecure. Two basic reasons can explain why Rule A fails to exhibit its stereotyped virtues. The first reason is agency hostility to the rule. Such hostility might be inspired by moral conviction, political bias, vested interests, and so on. The second reason is that agency decision makers might be incapable of understanding or administering the rule. The rule might require expertise that they do not possess or evidence that is unavailable. Additionally, the decision makers might not have "learned" the rule because of overload or lack of ready access to the rule.

There are a number of classic techniques available to prevent the rule from exhibiting its stereotyped virtues in practice:

1. *Factual Distortion.* The facts of a case can be characterized or distorted so that the rule does not apply or applies in some unexpected manner.
2. *Procedural Machinations.* By tinkering with procedural mechanisms such as jurisdictional prerequisites, evidentiary rules, timing of hearings, and timing of deci-

sions, the decision makers can avoid having to apply the rule, or can apply it in some truncated manner.

3. *Doctrinal Manipulation.* By situating the rule in the context of a hierarchy of directives, the decision makers can narrow the field of application for the rule or distort its meaning—even to the point where the rule is applied as if it were a standard.

4. *Creation of Subdirectives.* Decision makers can thwart implementation of a rule by arrogating to themselves the authority to create subrules or substandards that may be inconsistent with the rule. One common strategy involves reference to the decisional law under the rule rather than the rule itself.

5. *Circumvention by Appeal to Ultimate Directives.* By situating the rule in a grander purposive scheme, decision makers can redefine the rule. Strategies for accomplishing such reinterpretation include appeal to: (a) the drafters' intentions, (b) the ostensible functions or policies behind the rule, (c) ultimate norms such as coherence, consistency, and equality, (d) classic mediating devices for interpretation such as consequentialism, utilitarianism, and majoritarianism.

6. *Insubordination.*

These techniques for subverting the rule form of directives are also available to prevent standards from exhibiting their stereotyped virtues.

The identification and description of these techniques for subverting the meaning of rules and standards cannot help save the vices and virtues vision. The reason is simple: These techniques are used not only to *subvert*, but to *preserve* the meaning of rules and standards. Indeed these techniques are just as much incidents of legitimate interpretation as they are vehicles of misinterpretation. This can be seen quite clearly if we consider the way in which these techniques are characterized. Indeed, the techniques of misinterpretation are not so different from the techniques of legitimate interpretation:

Misinterpretation Techniques

Factual distortion
 Procedural machinations
 Doctrinal manipulation

 Creation of subdirectives
 Circumvention by appeal to
 ultimate directives
 Insubordination

Interpretation Techniques

Factual characterization
 Procedural ordering
 Doctrinal rationalization
 Elaboration by
 subdirectives
 Justification by appeal to
 ultimate directives
 Initiative

The point is quite simply that, in the abstract, there is no way to distinguish the misinterpretation techniques of the left hand column from the interpretation techniques of the right hand column. (Indeed, we might go so far as to say that the *techniques* of interpretation and misinterpretation are one and the same.) If the distinction between the techniques of interpretation and misinterpretation is so treacherous, it seems arbitrary to claim that data which do not conform to the vices and virtues vision can be explained on the grounds that they have been produced by misinterpretation. We could make that claim, but there is little to recommend it other than definitional fiat.

Despite all this, we do tend to think in terms of the vices and virtues vision. The deconstruction of this vision suggests that there is less substance to this vision than it originally seemed to promise. The deconstruction also reveals that there is nothing inexorable or inescapable about the vices and virtues vision. The claim that rules are certain and standards are flexible is just part of a game. This game (in and of itself) need not be taken seriously. The foregoing furnishes some techniques for avoiding the outcomes that the game seems to predetermine.

I will now examine some variations on the vices and virtues vision that are used to explain the rules v. standards dialectic. After examining each account, I will give my reasons for thinking that they are only slight variations on the vices and virtues vision.

B. *Of Individualism and Altruism*

Kennedy suggests that attempts to make sense of the rules v. standards dialectic in terms of strategic choices of which activities, acts, or persons we want to favor, deter, or

authorize will necessarily be incomplete.⁸⁶ He claims that such an instrumentalist account of choices between rules and standards leaves out the common sense intuition that the choice for a particular form exhibits or contains commitments to a certain substantive vision of the world.⁸⁷ Form is never purely form, but an anticipation of substance. Kennedy then suggests that there is a structural similarity between the relation of rules to standards and the relation of "individualism" to "altruism."⁸⁸

I think Kennedy is right in suggesting that the rules v. standards dialectic cannot be explained in instrumentalist terms alone. My reasons, however, are different from his. The instrumentalist account of rules v. standards presupposes that goals and objectives, as well as the formulation of strategic choices or issues, logically or temporally precedes confrontation with the rules v. standards dialectic. This presupposition is wrong. The very statement of goals or objectives and the very framing of strategic choices is colored and formed by the dialectic, and vice versa. An instrumentalist account cannot explain choices between rules and standards because, arguably, instrumentalist thinking itself depends upon the formulation of choices and goals in rule-oriented or standard-oriented terms.

Kennedy attempts to understand the dialectic by tying it to substantive visions of the world which go under the rubrics of altruism and individualism. These two aspects of political consciousness entail opposed values.

Individualism entails:

sharp distinction
between one's
interests and those
of others

self-reliance
autonomy
facilitation
self-determination

Altruism entails:

community and
continuity of interests
between self and others

sharing, sacrifice
community
regulation
paternalism

Kennedy attempts to show that arguments for rules bear a striking resemblance to arguments for individualism and

86. Kennedy, *supra* note 12, at 1710.

87. *Id.* at 1766-76.

88. *Id.* at 1713-22.

that arguments for standards bear a striking resemblance to arguments for altruism.⁸⁹ In addition, Kennedy suggests that proponents of rules often rely on the imagery surrounding the individualist vision whereas the proponent of standards often refers to imageries drawn from the altruist vision.⁹⁰ He concludes that “[t]here is a connection, in the rhetoric of private law between individualism and a preference for rules, and between altruism and a preference for standards.”⁹¹ But the argument breaks down.

Both altruism and individualism can generate arguments for both rules and standards. The belief in standards as appropriate can have two sources. The altruist basis for standards is the belief that there is a community of values between the issuer of the directive and the parties addressed, or that the standard, by asserting its normativity, can create such a community of values. The individualist basis for standards is the view that the world is so disorganized and fragmented that the individual can only be given his due by a system of standards.

Likewise, the commitment to rules has both an altruist and an individualist basis. The individualist basis for rules is the view that the world is really a fairly simple place to taxonomize, that everyone is capable of understanding this taxonomy, and that it need only be set forth clearly in order to enhance the pursuit of individual ends. The altruist basis for rules is the view that the world is hopelessly complex, but that, if one is going to subject the social morass to collective goals and overcome fragmentation, rules may well be necessary.

Both individualism and altruism will at various times require arguments for both rules and standards. Hopeful individualism and despairing altruism both provide bases for arguing for rules. Hopeful altruism and despairing individualism both provide bases for arguing for standards.⁹²

89. *Id.* at 1713-76.

90. *Id.*

91. *Id.* at 1776.

92. This is not to say that in an individualist heaven there would be only rules and in an altruist heaven there would be only standards. Both individualism and altruism remain in a paradoxical relation to law. The rule of law denies and prevents the realization of both individualist and altruist utopias. Rules are the necessary yet antagonistic condition of individual self-realization. Rules deny the individualist project by limiting the options of self-realization from the start. On

Ultimately, Kennedy's account is not so different from the vices and virtues vision. Like that vision, his account seeks to rationalize an aspect of form (the dialectic) by reference to an aspect of *substance* (the conflict between altruist and individualist visions). The interesting question is whether we should look at it the other way around: Perhaps the conflict between altruism and individualism can be explained in terms of the dialectic. In other words, perhaps the altruism v. individualism controversy is what emerges when we project the dialectic onto the political plane.

What is the relation of Kennedy's structuralist account of the dialectic to the vices and virtues vision? Kennedy's account is distinguishable in that he refuses to accord normative coherence to the dialectic. In common with the vices and virtues vision, he continues to endow the dialectic with normative (or political) significance, but in contrast to that vision, he embraces the oppositional character of the dialectic. The oppositional character of the dialectic for Kennedy is a manifestation of some greater political or normative schism that has its seat in the structural configurations of political consciousness.

In short, Kennedy acknowledges the irreconcilable character of the dialectic and seeks to account for it with a greater and grander irreconcilable: a schism of political consciousness. The structure of this account is a classic one. Phenomena (such as the dialectic) are understood by placing them in a grander or greater context.

The classic problem with this move is that the greater or grander context may well not be greater or grander at all. For instance, Kennedy's strategy risks lapsing into a near tautological replication of the rules v. standards dichotomy by translating the dialectic into the language of political con-

the other hand, rules create a sphere within which the self is protected from interference. Standards are the necessary yet contradictory condition of altruism. Standards are necessary to enforce altruist projects. On the other hand, the need to enforce an altruist project by means of a coercive apparatus aimed at regulating *social* life, such as liberal legalism, ultimately belies the existence of the altruist project. Coercive authority, even if clothed in the garb of normative language such as standards, does not for that reason lose its authoritarian character.

From the perspective of either utopia, both rules and standards are unacceptable. The negation of individualism by rules and the negation of altruism by standards yields not just contradiction, but irony. The revolt of altruism against rules (but not standards) and the rebellion of individualism against standards (but not rules) would be, on this account, false consciousness.

sciousness. Kennedy's models of altruism and individualism might be nothing more than an illustration of what happens when the dialectic is projected into political consciousness. The dialectic may be the greater and grander context that accounts for altruism and individualism rather than the other way around: The dialectic might well be primordial.

Another classic problem with Kennedy's strategy is that in privileging a particular realm (here, political consciousness) the description of what does or does not belong in that realm becomes problematic. In his article, Kennedy has *sub silentio* failed to import the dialectic into the realm of political consciousness. Thus, while individualism and altruism reside, so to speak, in the privileged domain of political consciousness, the dialectic remains outside. The dialectic is banished from the realm of political consciousness so that the latter can explain the nature of the dialectic. But why doesn't the dialectic also "reside" in that privileged domain called political consciousness?

Of course, in one sense the dialectic does "reside" in political consciousness—it is there in the form of the irreconcilable constructs, of individualism and altruism. The problem for Kennedy, then, is to relate individualism and altruism on the one hand to the dialectic on the other. When the work of deconstruction is through, as we have seen, no clear relation can be established. Rules can serve altruism as well as individualism and standards can serve individualism as well as altruism. The reason for the absence of any clear relation is that the dialectic mediates its own relation to the constructs of altruism and individualism.

It does no good to explain the dialectic in terms of consciousness—political or otherwise. Once we privilege consciousness, there is as good a reason to find there any one thing as any other. And the question of what gets privileged is merely replicated within the language used to describe consciousness.

C. *Of Polycentrism and Issues of One Variable*

One possible account of the rules v. standards dialectic is based on the notion that standards are more appropriate when a legal issue involves a multitude of interrelated variables and that rules are more appropriate when the legal issue involves merely drawing a line between two competing

concerns.⁹³ This explanation is weakened at the outset by the recognition that the rules v. standards dialectic can arise even when there are only two competing concerns. Indeed, the standardized pro-con arguments about rules and standards were presented in the context of rigid dualities.⁹⁴

Still, there might be something to the claim that when a multitude of interrelated variables must be taken into account, standards are more appropriate than rules. The argument is that in these circumstances, only a standard can allow for the trade-offs and balancing required. The appeal of this argument rests very much on the supposition that the choice is between one rule and one standard. This underlying imagery suggests that while *one* rule must perforce be simple, one standard can partake of infinite complexity.

But this underlying imagery must be questioned. If one rule means simply the attachment of an either/or consequence to the presence or absence of one empirical phenomenon, then indeed standards might be more appropriate than rules when the issue seems polycentric. This is a pyrrhic conceptual victory, however, because there is no reason to suppose that one standard is more appropriate in dealing with a polycentric issue than a collection of rules. Furthermore, even this point seems weak—what entitles us to call an issue polycentric? To suggest that an issue is polycentric bespeaks a standard-like way of framing the issue: The rule-like response is that the assertion of polycentricity in any given context stems from an improper amalgamation of conceptually distinct issues.

This approach based on a polycentric/unicentric distinction is also a variation on the vices and virtues vision. While it refuses to rationalize the dialectic by connecting it to normative values, this approach offers the minimal ration-

93. See *supra* note 58.

94. See *supra* notes 20–22 and accompanying text. Moreover, the view that the world and human beings are exceedingly diverse and complex does not lead to a total commitment to governance by standards. For instance, Shiffrin, who is committed to an intuitionist political philosophy and an intuitionist approach to freedom of speech, is not for that reason committed to standard forms of governance. Rather, he advances an “eclectic approach” that encompasses aspects of ad hoc judgments and definitional balancings, as well as more rule-like categorical approaches. See Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. REV. 1103, 1192–1217 (1983). The point is obvious, and that likely makes it worth stating: One can adopt a standard-oriented approach that, because of strategic concerns, will yield rules in practice.

ality of *formal coherence*. Thus, the notion that standards are appropriate when issues are polycentric and rules appropriate when issues are not polycentric can inform our choices about whether to adopt rules and standards by making a connection between the dialectic and another formal dimension of legal issues (poly- v. unicentricity). While more modest than the vices and virtues vision, this approach allows judgments about what to do based on the view that there is a normative coherence among various formal dimensions. This, too, is a classic move. While we can rarely say anything about how form relates to substance, we, at least, can say intelligent things about how forms relate to other forms.

One classic problem with this approach is deciding which form should be privileged? Which form should serve to explain the other? Initially, we attempted to explain the dialectic in terms of the poly- or unicentricity of the issue. But then it became apparent that this description was backward and something like the reverse might be more accurate. We may be compelled to picture any given legal issue in rule-oriented or standard-oriented ways before we can decide whether the issue is polycentric or not.

This brings us to another problem with this “formal coherence” approach. It cannot spark our interest unless formal coherence has some ascertainable relation to substance. But by retreating to notions of formal coherence, we have deprived ourselves of the ability to say anything about how form relates to substance. Why would we ever be interested in formal coherence for its own sake?

D. *The Epistemological Twist*

One last attempt to explain the rules v. standards dialectic would be to suggest that standards are most appropriate when we lack knowledge or information about an issue. Thus, we can picture the development of a particular legal standard, such as the reasonable person in tort law, leading to the development of specific rules.⁹⁵ As the standard is applied to an increasing number of situations, more knowledge is gained concerning its meaning and slowly it is trans-

95. Kennedy notes that this pattern is frequent. Kennedy, *supra* note 12, at 1690.

formed into a collection of rules.⁹⁶

Certainly, we have seen examples of this transubstantiation of standards into rules.⁹⁷ But, there are equally obvious counterexamples. Article 9 of the Uniform Commercial Code, for instance, transformed a field of law once governed by a meticulous architecture of rules into a domain of standards.⁹⁸ Quite obviously, the more counterexamples we develop, the more the epistemological twist seems inadequate.

The explanation fails for another reason. Upon closer inspection, it turns out that standards are most appropriate, not when we lack knowledge generally, but when we lack *certain kinds* of knowledge. Specifically, when we have difficulties evaluating the normative character of actions (but agree about values), we are more likely to use standards. By contrast, when we lack knowledge (or consensus) about normative values, we are more likely to cast directives in the form of rules.

There is an intuitive appeal to this more refined epistemological view—the economy of legal form it describes seems plausible. Sometimes the type of knowledge we possess on a given issue will allow standards to work well and compel rules to fail, whereas with other issues, the situation might be reversed. With any given issue the appropriateness of rules or standards depends upon the comparative status of our knowledge: Do we know more about how to evaluate the facts or do we know more about what values to pursue?

There is, however, another way to restate the prongs of the distinction: is it the facts that we cannot evaluate? (if so, use a standard); or is our problem a lack of knowledge about values? (if so, use a rule). Restated in this manner, the distinction collapses. There is no place outside the dialectic that would allow us to decide this issue. Here, too, the dialectic seems primordial.

96. Prosser's treatise on torts and its intensive specification of tort rules give the lie to the idea that negligence is defined by some grand standard such as the reasonable man test or the Learned Hand test of *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). See PROSSER AND KEETON ON THE LAW OF TORTS 173-217 (W.P. Keeton, D. Dobbs, R. Keeton, D. Owen 5th ed. 1984). For a discussion of the reverse rebellion of courts against the freezing of negligence in mechanical rules, see *id.* at 217-19.

97. See *supra* note 96 and accompanying text.

98. U.C.C. art. 9 (1977); see Gilmore, *supra* note 19.

The epistemological twist is a specific illustration of a classic move to reconcile oppositions in the face of imperfect knowledge: the *comparative scheme*. The classic problem with using comparative schemes to reconcile nonfungible oppositions, such as rules and standards, is that there is no single language that can do justice to both of the oppositions. In the very process of adopting a comparative scheme, one is without a metaposition and one must necessarily prefer one conception to the other. The adoption of a comparative scheme is an attempt to temporize the irreconcilable oppositions. It fails because the irreconcilability of the oppositions resurfaces in the attempt to develop a place from which to implement the comparative scheme.

I have surveyed a number of attempts to rationalize or understand the dialectic. There is power in each of the visions reviewed. There is also inadequacy in some crucial respects. The next Part is an attempt to come to grips with the dialectic by explaining why it cannot be explained.

V. THE IRREDUCIBILITY OF THE DIALECTIC

The dialectic is irreducible. We cannot make sense of it in terms other than its own. Attempts to explain the dialectic founder for two reasons.

First, attempts to explain the dialectic in terms of substantive legal values, or other dimensions of legal form, or in terms of political consciousness, succeed only in replicating the dialectic in these other domains.⁹⁹ This yields the suspicion that these other domains, rather than explaining the dialectic, can themselves be understood in terms of the dialectic. There is a rather vexing reversal going on here. In trying to explain the dialectic by reference to substantive values or political schisms, and so on, we end up doing quite the opposite. It turns out that the dialectic seems primordial and these other domains derivative.¹⁰⁰

But there is more—the second reason we cannot explain the dialectic. The dialectic not only seems to replicate itself in any domain we choose to use as the basis for explanation, but also seems to mediate the very relation of the

99. See *supra* text accompanying notes 64–98.

100. See *supra* text accompanying notes 64–98.

dialectic to these fields. In other words, the relation of the dialectic to these other fields is itself colored by the dialectic.

Both of these problems can be restated in simpler and more abstract terms. I think it is worthwhile to state the propositions in this more general and abstract manner, not only for the sake of clarity, but also because their application goes beyond the understanding of the dialectic. Indeed, the foregoing attempts to understand the dialectic illustrate the general problems inherent in the enterprise of explaining aspects of form by reference to substance.

The more abstract version goes like this. The dialectic is an aspect of form. Legal scholars and lawyers typically try to explain or understand form by relating it to substance. To varying degrees, that is what the vices and virtues vision and its variations attempt to do. There are two problems with this approach.

The first problem is that every time we explain a form (the dialectic) in terms of substance, we do not encounter substance, but rather more form. In fact, we encounter the very same form (the dialectic). This leads to two conclusions. The first is that we are engaged in tautologies. The second is that substance does not explain form, but rather, it is more likely the other way around. Form appears primordial.

The second problem that we encounter in trying to explain form (the dialectic) by reference to substance is that the relation between form and substance seems to be itself colored by the form (the dialectic). The relation of form to substance appears to be a question of form.

Why should these problems recur in our attempts to understand the dialectic? Consider this speculative answer. First, all knowledges that might serve to explain the dialectic are themselves entrapped in a dialectic of their own. In other words, economics, psychology, sociology, and the other social or human sciences are each internally split along the lines of the dialectic. Second, very few people in law or in other disciplines are firmly committed to any position within the dialectic. In other words, virtually no one is committed to just the rule perspective or just the standard perspective.

Within any of the social or human sciences, it is possible to see a more rule-like or a more standard-like vision of the

theoretical base or crucial tenets of the science. A rule-like vision of the science uses a well-developed matrix of empirical categories to organize phenomena. The conclusions reached by means of these categories seem mechanistic, pre-ordained. Vulgar Marxism, or popular understandings of Freud, for instance, might be examples of rule-like knowledges. The methodology of rule-like knowledges is conceptualist. It operates by defining and redefining categories and classifying phenomena into predetermined classifications. Standard-like knowledges, by contrast, do not have well defined conceptual grids. Rather, these knowledges are heuristic and open-ended. The categories are not really categories at all. Rather, the structure of standard-like knowledges is based upon evaluative parameters or variables that overlap and seem fuzzy. Standard-like knowledges are self-consciously evaluative. The methodology of these knowledges operates by identifying relations, tendencies, and directions.

There are serious objections to both of these types of knowledges. Rule-like knowledges seem too simplistic. The grids are too rigid. One has the feeling that phenomena are crammed into the taxonomies whether they fit or not. Rule-like knowledges truncate much of what we would like explained by defining or classifying it away. Standard-like knowledges fare differently, but no better. These knowledges seem so tentative, so epistemologically insecure, that they furnish little in the way of learning. These knowledges place too much importance on context: Everything becomes a question of context. The evaluative parameters are too many and too conflicting to be able to yield any predictions about human behavior.

So here we are: caught between the *violent and random naming* of rule-like knowledges and the *ineffective groundless evaluation* of standard-like knowledges. If this vision of the social or human sciences is correct, then these knowledges cannot help us explain the dialectic. For one thing, the dialectic is replicated in the very structure of these knowledges. For another, we are epistemologically dissatisfied with the ruleness or the standardness of these knowledges. We already know the objections.

Indeed, our dissatisfaction with both rule-oriented and standard-oriented approaches is reflected in the tendency of

rules to evolve or degenerate, depending upon our perspective, into standards, and standards to evolve or degenerate into rules. This tendency towards refinement or entropy occurs via some routine patterns:

1. Standards tend to become concretized by means of specific rules. (The meaning of a general standard is found in its specific applications.)

2. Rules tend to yield specific exceptions that are generated by appeal to other standards. (The meaning of a general rule is found in the standards limiting its application.)

3. When discrete sets of rules and rule-like exceptions grow too large, they tend to be replaced by standards under the guise of rationalizing the law. (Excessive "ruleness" yields an attempt to rationalize by means of standards.)

4. When discrete sets of standards grow too large they are ordered by means of overarching rules that prioritize the standards and define rigidly their jurisdictional application. (Standards must be ranked and prioritized.)

5. Terms which originally required standard-like thinking become frozen and are treated as rule-like names. (Even language that on its face smacks of evaluation may eventually have a naming function.)

6. Terms that originally served as names in rule-like constructs are redefined in terms of evaluative goals. (Even language that seems clearly to refer to empirical phenomena may become a term of art.)

7. Finally, of course, we get some radical breaks: A whole set of issues previously subject to rule-like directives is by fiat subject to a standard regime or vice versa.

CONCLUSION

A conclusion in a law review article is usually a tidy summation of what has transpired during the course of the reading. The virtue of a conclusion is that it ties together all the various strands of the article and synthesizes the various parts into a sensible bit of legal wisdom, complete, finished, and, in appearance at least, unassailable. There is something comical about this ritual. For if we are convinced of anything, it is that there are no conclusions, that things go on, and that everything will always be revised.

A conclusion here would be particularly ironic. After

all, this Article is about a dialectic I claim is omnipresent, yet bereft of any synthesis. What to say? Here are a couple of possibilities:

The mainstream message is that much of our legal argumentation seems to track a dialectic that is incapable of resolution. The steps in this argumentation are patterned and predictable. We cannot be sure whether the argumentation reflects anything of substance or not. Therefore, it behooves us to be on our guard when we find ourselves making these arguments and to consider whether they truly do reflect concerns of substance or not. The danger of the dialectic is that we may think we are discovering something about substance, when in fact we are only discovering something about form.

A less mainstream conclusion might go like this. Much of legal argument tracks the dialectic. This dialectic cannot be anchored in matters of substance. Indeed, the very attempt to explain this aspect of form in terms of substance succeeds in doing quite the reverse: It puts us on the road to explaining substance by means of form. The short of it is that much of legal argumentation is simply an exercise in the formalistic mechanics of a dialectic which doesn't go anywhere. The point of further study ought to be to ascertain why and how it is that we allow such silly games to have such serious consequences.