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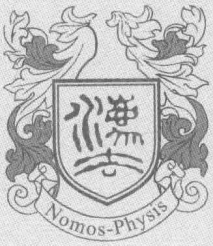
# 法哲学与法社会学论丛

Archives for Legal Philosophy and Sociology of Law
Archiv für Rechtsphilosophie und Rechtssoziologie

二〇一一年第一期（总第十六期）



北京大学出版社
PEKING UNIVERSITY PRESS

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**图书在版编目(CIP)数据**

法哲学与法社会学论丛·二〇一一年第一期(总第十六期)/郑永流主编.
—北京:北京大学出版社,2011.5
ISBN 978-7-301-18820-0

Ⅰ.①法… Ⅱ.①郑… Ⅲ.①法哲学-文集 ②社会法学-文集
Ⅳ.①D90-53

中国版本图书馆 CIP 数据核字(2011)第 070882 号

书　　名:法哲学与法社会学论丛·二〇一一年第一期(总第十六期)
著作责任者:郑永流　主编
责任编辑:白丽丽
标准书号:ISBN 978-7-301-18820-0/D·2844
出版发行:北京大学出版社
地　　址:北京市海淀区成府路 205 号　100871
网　　址:http://www.pup.cn
电　　话:邮购部 62752015　发行部 62750672　编辑部 62752027
　　出版部 62754962
电子邮箱:law@pup.pku.edu.cn
印　刷　者:北京大学印刷厂
经　销　者:新华书店
　　730 毫米×980 毫米　16 开本　11 印张　196 千字
　　2011 年 5 月第 1 版　2011 年 5 月第 1 次印刷
定　　价:25.00 元

# 编辑说明

根据第24届国际法哲学与社会哲学大会组委会的安排，本论丛主编与国际法哲学与社会哲学协会（IVR）司库、英国爱丁堡大学法学院教授 Zenon Bankowski 先生一道，从提交给第24届国际法哲学与社会哲学大会的论文中，选编了这本英文文集，作为论丛第十六辑，与在国内外另行出版的三本会议文集一道，构成了此次 IVR 北京大会正式刊行的文字性成果。

本文集的作者为海外学者和我国港澳台地区学者，而在即将作为 IVR 会刊——《法哲学和社会哲学文汇》的增刊出版的另一大会英文文集的作者中，有数位来自中国大陆，这一刻意安排，旨在增进中外法哲学同仁的相互了解。

本文集的选编还幸得国际法哲学与社会哲学协会秘书长 Claudio Michelon 先生的鼎力支持，谨此对他致以诚挚的感谢！同样的感谢还要送给为编者提供诸多便利的中国法学会和第24届国际法哲学与社会哲学大会的工作人员杨贝小姐、田力男女士、赵洪芳女士和朱明哲先生。

《法哲学与法社会学论丛》编委会

2011年3年11日

# Editor's Foreword

As arranged by the committee of XXIV World Congress of Philosophy of Law and Social Philosophy, the editor-in-chief of this Journal, together with the treasurer of International Association for Philosophy of Law and Social Philosophy(IVR), Professor Zenon Bankowski of Law School of University of Edinburg, UK, compiled this English anthology of selected essays from XXIV World Congress of IVR. The anthology has been edited into the 16th volume of the Journal which contributes to literal products formally published by IVR Beijing Congress with the other three separately published congress journals in and out of China.

The authors of this anthology are overseas scholars and Chinese scholars from Hong Kong and Taiwan, while some authors from mainland of China will present on the other English anthology coming soon as the supplement of *Archives for Philosophy of Law and Social Philosophy* (IVR's journal). This arrangement intends to enhance mutual understanding between Chinese scholars and foreign scholars of philosophy of law.

We owe much gratitude to Claudio Michelon, the Secretary-Genenal of IVR, for his support with the edition of this anthology. We are equally gratefully to China Law Society for its support as well as Miss Yang Bei, Ms. Tian Linan, Ms. Zhao Hongfang and Mr. Zhu Mingzhe for their efforts in the 24th IVR World Congress.

Editorial Committee of *Archives for Legal Philosophy and Sociology of Law*

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

Ofer Raban

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

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* I would like to thank Oliver Beige, Carl Bjerre, William Edmundson, Eric Ghosh, Dan Kahan, Jim Mooney, and Wojciech Zaluski for their helpful comments. The article will appear in the Boston University Public Interest Law Journal.

[1] See, e.g., fn. 2—7.

As we shall soon see, the refutation is so straightforward, and so obviously true, that one may be tempted to doubt whether any serious thinker claims otherwise. To allay this concern, here are a few prominent examples:

"Since the law should strive to balance certainty and reliability against flexibility, it is on the whole wise legal policy to use rules as much as possible for regulating human behavior because they are more certain than [standards]..." Joseph Raz, *Legal Principles and the Limits of Law.*[2]

"[S]tandards... increase the cost and difficulty of prediction [while] rules are defined [by] the ease with which private parties can predict how the law will apply to their conduct..." Louis Kaplow, The General Characteristics of Rules.[3]

"[T]he rule of law...implies (as the name suggests) a preference for rules over standards. Although a legislature, by issuing a standard, announces in advance of the regulated conduct that anyone who engages in that conduct now risks a sanction, in practice this announcement does not amount to much [because it] does not tell people what is permitted and what is not permitted, though it gives them something of an idea." Eric A. Posner, Standards, Rules, and Social Norms.[4]

"[A]nother obvious advantage of establishing as soon as possible [clear and definite rules]: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, The Rule of Law as a Law of Rules.[5]

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

[2] 81 *Yale L. J.* p.823, pp.841—842 (1972).
[3] *Encyclopedia of Law and Economics* (1999).
[4] 21 *Harv. J. L. & Pub. Pol'y*, p.101, p.113 (1997).
[5] 56 *U. Chi. L. Rev.* p.1175, p.1179, p.1183 (1989).

Schauer, *Playing by The Rules*.[6]

"A system committed to the rule of law is...not committed to the unrealistic goal of making every decision according to judgments fully specified in advance. Nonetheless, ...[f]requently a lawmaker adopts rules because rules narrow or even eliminate the...uncertainty faced by people attempting to follow...the law. This step has enormous virtues in terms of promoting predictability and planning..." Cass R. Sunstein, Problems with Rules.[7]

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

I will examine this fallacy in the context of claims that clear legal rules produce the legal certainty and predictability required by capitalism and liberalism. As we shall soon see, the fallacy consists in identifying people's ability to predict the consequences of their actions with lawyers' ability to predict the consequences of applying the law. But the two can easily come apart: what may be perfectly certain and predictable for lawyers or judges applying the law may fly in the face of people's reasonable predictions. In fact, in many areas of the law clear rules are bound to produce less certainty and predictability than vague standards.

Section I articulates the claims that legal certainty and predictability are essential for capitalism and liberalism, and that these systems of economic and social organization therefore require legal rules framed in clear and determinate language. The first part of these claims is left unchallenged; but the assertion that certainty and predictability require bright-line rules is criticized in Section II, which argues that, oftentimes, the best-drafted clear and determinate rules would result in *less* certainty than alternative vague and indeterminate standards. Section IIII explains why things

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[6] (Oxford University Press, 1991) p. 140. In an earlier paragraph Schauer notes that "the argument from reliance [i. e., predictability] ... presupposed a commonality of understanding between the relying addresses [i. e., those subjected to the law] and the enforcers [i. e., judges] on whose actins reliance is placed." That is absolutely correct, and is the reason why the best rules can reduce predictability when compared with vague standards. But instead of drawing the correct conclusion, Schauer moves to commit the fallacy by identifying rules with predictability insofar as addressees and enforcers' share "a common language". At p. 139. This is a typical mistake.

[7] 83 *Cal. L. Rev.*, p. 953 (1995).

are so, arguing that the law is but one of many normative structures; that competing economic, social, or moral standards are often couched in vague and indeterminate terms; and that many of these standards cannot be reduced to clear and determinate rules. A short conclusion follows.

## Ⅰ. Legal Certainty and Clear Legal Rules

We live in a capitalist liberal country, and these forms of economic and social organization obviously impose substantive conditions on the content of our laws: capitalism means that our laws must create and maintain a free and private economic sphere, while liberalism requires a zone of personal privacy free from private or public coercion. But some have claimed that capitalism and liberalism also impose some *formal* requirements on our laws: namely, that they be framed in clear and unambiguous language, and that they be applied in strict compliance with that language. The reason for these requirements, so goes the argument, is the importance of certainty and predictability for capitalism and liberalism.

### Capitalism

The importance of legal certainty to capitalism was famously articulated in Max Weber's classic (posthumous) *Economy and Society*. "Capitalistic enterprise... cannot do without legal security", wrote Weber, because such security was essential for the investment of capital.[8] If an entrepreneur is to build a factory on a piece of land, she needs to be secure in her ownership of the land; she needs to know that the contracts she signs with the contractors are enforceable; she needs to know what taxes she will be asked to pay; in short, she needs to know where she stands vis-à-vis her expected costs and expected income. "[B]ourgeois interests", said Weber, need a legal system that "function[s] in a calculable way"; and calculability meant, in turn "an unambiguous and clear legal system".[9] An economy where private parties own, produce, exchange, and consume articles of

[8] Max Weber, *Economy and Society*, Guenther Roth & Claus Wittich eds., Univ. of California Press, 1978, p. 833.

[9] Ibid., p. 847.

value, free from public or private coercion, must provide private actors with a clear and certain delimitations of their economic rights and duties; and these delimitations necessitate clear and determinate legal rules. Indeed Weber believed that Western law's facilitation of capitalism was a function of the fact that it operates "like a slot machine into which one just drops facts... in order to have it spew out decisions".[10] As others have since elaborated this thesis, "markets cannot function without a clear and precise definition of who owns what (property rights), who may do what to whom (civil and criminal law), and who must pay whom to protect their interests (contract law)".[11] The idea that capitalism requires clear and determinate legal rules (as opposed to vague and indeterminate standards) is widely accepted today.

### Liberalism

An analogous claim has been made about liberalism—namely, that clear and determinate legal rules are essential for freedom. Friedrich Hayek explained the thesis as follows: "The law tells what facts [the individual] may count on[,] and thereby extends the range within which he can predict the consequences of his actions."[12] "[T]he coercive acts of government become data on which the individual can base his own plans... so that in most instances the individual need never be coerced unless he has placed himself in a position where he knows he will be coerced."[13] Consequently, "freedom is dependent upon certain attributes of the law, its generality and certainty, and the restrictions it places on the discretion of authority".[14] "[A]ll coercive action of government must be unambiguously determined", proclaimed Hayek.[15] And he strongly condemned the use of vague legal standards like "reasonableness" or "fairness": "One could write a history of the decline of the rule of Law", he wrote, "in terms of the progressive introduction of these vague for-

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[10] Ibid., p. 886.

[11] Daniel W. Bromley, *Economic Interests and Institutions: the Conceptual Basis of Public Policy*, 1989.

[12] Friedrich Hayek, *The Constitution of Liberty*, 1978, pp. 156—157.

[13] Ibid., p. 21.

[14] Ibid., p. 167.

[15] Ibid., p. 222.

mulas into legislation and jurisdiction, and of the increasing arbitrariness and uncertainty of... the law and the judicature".[16]

Let me exemplify Hayek's insight with a personal anecdote. A couple of years ago I participated in an academic conference in a European city I was keen to explore. Carefully examining the conference's program, I marked for myself those presentations I planned to attend, expecting to spend the hours between them sightseeing. Alas, the person responsible for keeping the schedule was an Italian national with the insouciant sense of time common to his people: sessions regularly began late, regularly ended late, and last-minute changes in the program were not uncommon. As per Hayek, this uncertainty ruined my ability to maximize my freedom. To give another analogy: if stones fall down from the sky in an unpredictable pattern, one's freedom of movement is seriously constrained; but if they fall down in a pre-determined pattern, one can avoid the times and places where they fall, and walk freely anytime and everywhere else. Clear and determinate legal rules allow people to know where they stand (and where they should not stand) and therefore allow them to maximize their freedom.

**Legal Interpretation**

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

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[16] Hayek, *The Road to Serfdom*, 1944, p. 78.

[17] See, e. g., Frank H. Easterbrook, "Text, History, and Structure in Statutory Interpretation", 17 *Harv. J. L. & Pub. Pol'y* p. 61, p. 63 (1994); "Textualism and the Equity of the Statute", 101 *Colum. L. Rev.* 1, p. 58 (2001).

## Ⅱ. The Fallacy of Legal Certainty

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

### Capitalism

Contract law lies at the heart capitalism's legal framework, and disputes over the best contract doctrines often implicate issues of predictability. One such famous dispute concerns the admissibility of external evidence bearing on the interpretation of clear and unambiguous contractual provisions. According to the traditional rule, if a contractual provision is clear and unambiguous, no extrinsic evidence—like evidence of oral promises, implicit understandings, or industry practice—can be brought to support a different interpretation. This is a clear and unambiguous contracts rule that—say its advocates—provides contractual parties the certainty and predictability they need. But a minority of courts adopted a much vaguer standard, one that admits extrinsic evidence if "the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible".[18] Thus, even if a contractual provision appears perfectly clear, a party can introduce external evidence showing that the parties intended a different meaning if that meaning is a reasonable one.

For example, in the case referenced above the plaintiff entered into a contract to remove and replace the upper metal cover of the defendant's steam turbine. A contractual provision declared that the plaintiff agreed to indemnify the defendant "a-

[18] PG&E v. G. W. Thomas Draynage & Rigging Co., 69 Cal. 2d 33 (1968).

gainst all loss, damage, expense and liability resulting from... injury to property, arising out of or in any way connected with the performance of this contract". During the work, a piece of metal fell and damaged the turbine. The defendant claimed that the plaintiff had to indemnify for the damage; but the plaintiff offered to introduce extrinsic evidence showing that the indemnity clause was meant to cover only injury to the property of third parties, not plaintiff. The trial court adhered to the traditional rule and held that since the relevant contractual provision was clear and unambiguous, that was the end of the matter. But the California Supreme Court reversed: the Court replaced the traditional rule with the vaguer "extrinsic evidence" standard, and held that, under the new standard, the evidence should be admitted.[19]

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

> The problem with using extrinsic evidence to establish that the plain meaning of a term in a contract is not, in fact, its meaning is that the use of the extrinsic evidence for such a purpose creates uncertainty. The primary basis of contract law is to provide certainty to the contracting parties. Court decisions eliminating this certainty do not aid [contractual parties]. Neither party can be sure that express, plain terms will be enforced. If either party can convince the fact-finder that the intent was something other than what the plain terms suggest, these plain terms will be ignored. This is the opposite of certainty.[20]

Many courts agree with this assessment—including, to name some of the more prominent ones, the 9th Circuit Court of Appeals, the Canadian Supreme Court, and

[19] Other courts soon followed suits. See, e. g., William Blair & Co. v. FI Liquidation Corp., 830 N. E. 2d 760,773—774 (Ill. App. Ct. 2004); Cafeteria Operators, L. P. v. Coronado-Santa Fe Assocs., L. P., 952 P. 2d 435,446 (N. M. Ct. App. 1997); Taylor v. State Farm Mut. Auto. Ins. Co., 854 P. 2d 1134, 1140—1141 (Ariz. 1993) (en banc); Denny's Rests., Inc. v. Sec. Union Title Ins. Co., 859 P. 2d 619,626 (Wash. Ct. App. 1993); Admiral Builders Sav. & Loan Assoc. v. South River Landing, Inc., 502 A. 2d 1096,1099 (Md. Ct. Spec. App. 1986); Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P. 2d 767,771 n. 1 (Alaska 1982).

[20] David F. Tavella, "Are Insurance Policies Still Contracts?", 42 *Creighton L. Rev.* p. 157 (2009).

the English House of Lords.[21] While the traditional rule ("clear and unambiguous contractual provisions are enforced as written") allows parties to easily predict the consequences of their contractual provisions, the new standard—so goes the claim—introduces a great measure of uncertainty by making the meaning of contractual provisions depend on whether other "reasonable" interpretations can be demonstrated.

But in fact, and rather obviously so, the *very purpose* of the new standard is to accord with people's predictions and expectations. After all, if there really was an understanding between the parties that indemnification was due only in case of damage to third parties, the expectations of the parties would be frustrated by the traditional rule. But differently, people do not simply expect their contractual provisions to be enforced, they expect *their understandings of these provisions* to be enforced; and the introduction of external evidence allows them to prove such understandings in cases where these diverge from the contract's literal language. The traditional bright-line rule allows more certainty and predictability *for the lawyers and judges who apply the law*, but not for the economic actors who engage in contractual transactions.

Faced with the obvious fact that the predictions of economic actors may be frustrated rather than enhanced by the traditional rule—and may be better-respected under the new and vaguer standard—the advocates of the traditional rule fall back on a related argument: they insist that although predictability may suffer in this particular case, *overall predictability* nonetheless improves when courts refuse to open up the meaning of clear and unambiguous provisions to challenges by other "reasonable" in-

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

terpretations. After all, allowing such challenges makes it more difficult to predict what a contractual provision might be read to mean, and thus reduces the ability of *most* contractual parties to predict the consequences of their contracts.

The claim has little to support it. First, this is an *empirical* claim, a claim whose accuracy cannot be derived from the thesis (indeed the truism) that the application of clear and unambiguous rules is more predictable than the application of vague standards. The claim asserts that, *as an empirical matter*, most economic actors would have a better shot at predicting the meaning of their contractual provisions if these were enforced literally and not allowed to be challenged by alternative "reasonable" interpretations. The veracity of this allegation depends, therefore, on answers to a number of empirical questions, including:

—How many contract disputes involve attempts to introduce extrinsic evidence in support of interpretations that were never in fact agreed to?

—How many of these attempts succeed?

—How many people in fact rely on oral promises or industry practices, so that a literal reading of their contracts may not accurately reflect their agreements?

—How many people can we expect to be aware of a legal rule that refuses to consider claims of oral promises or industry practices?

—What is the extent to which people can draft contracts whose literal texts accurately reflect their agreements (often in contexts they did not explicitly contemplate)?

These are some of the questions that those who claim that the traditional rule advances "overall predictability" never bother to ask, let alone answer; but the answers are essential for their claim. There can be no automatic transition from the predictability of a legal rule to the predictability we actually care about—that of contractual obligations. A legal rule that is perfectly certain and predictable to the lawyers and judges applying it may be perfectly harmful to the certainty and predictability required by capitalism.

In fact, the likelihood that the traditional rule *harms* overall certainty and predictability is substantial. Whether we consider external evidence or whether we blindly follow the literal text, we always stand the risk of frustrating the parties' predictions and expectations; but in the former case we at least consciously deliberate about our decision: we consciously seek to align the legal outcome with the parties'