Rules and Standards: A Critique of Two Critical Theorists

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Law is politics. That is the familiar claim of the Critical Legal Studies movement, and that is the conclusion of two articles that explore the implications of how we form our legal directives for the nature of legal argument. Duncan Kennedy argues that the two choices for the form of a law, rules and standards, each embody different, conflicting visions of the proper substantive content of law and the social order. That the form of law is a matter for such substantive conflict only indicates for Kennedy that law itself is nothing more than the conflicting policy arguments we make.

Pierre Schlag takes Kennedy’s thesis one step further by suggesting that our arguments concerning legal form have become so formalistic and stereotyped that they cannot be said to be linked to some underlying substantive vision. Under Schlag’s view, legal argument is not even a matter of policy choice. It is, conversely, a matter of choice without policy.

My purpose is to explore and critique these two positions. I conclude that Schlag does not carry the weight of his radical argu-

* John P. Goebel, B.A., Middlebury College; J.D., Harvard Law School. Mr. Goebel is an associate with the law firm of Gardner, Carton & Douglas in Chicago, Illinois and is a member of the Illinois Bar.
ment, and we are left with Duncan Kennedy's quite convincing portrait of the inter-connectedness of form and substance in private law adjudication. However; I take issue with his conclusion that because views regarding the proper form and substance of law differ on both descriptive and prescriptive levels, law then simply becomes the embodiment of the moral, political, and economic choices we make. He fails, I suggest, to adequately confront the claims of one side in the political debate, the individualists, that law as rules is more an example of restraint on choice and policy in law than a manifestation of that choice.

Part I addresses the ways legal commentators have come to view the idea of legal form. It defines the terms, rules and standards, that are part of the most prevalent model of form, and it discusses the various arguments that people have made concerning the substantive ramifications of a choice to frame a legal directive in terms of a rule or a standard. Part II looks at the contribution of Duncan Kennedy to this ongoing debate over form, and Part III summarizes and critiques the views of Pierre Schlag. Finally, Part IV underscores the power of Kennedy's work in light of Schlag's failure. However, it suggests that Kennedy's insight in his analysis of legal form is not repeated in the conclusions he draws from that analysis.

I. Rules and Standards

The terms "rule" and "standard" have arisen as paired opposites within one model that seeks to definitionally categorize law into component parts of shared characteristics. A quest for clarity regarding the specific terms of the model must begin, therefore, with an understanding of where and how the rules/standards model fits within the context of the innumerable other models seeking to explain law.¹

A. Defining the Model and the Terms

One way to categorize law is to distinguish between law that is man-made (i.e. positive or conventional law; law embodied in the constitution, statutes, judicial opinions, and administrative orders) and law that is natural.² Another way to break down the idea of

1. See Lawrence M. Friedman, Legal Rules and the Process of Social Change, 19 Stan L Rev 786, 788 (1967) ("Rules can be classified or analyzed in innumerable ways.").
2. In one sense the distinction presumes a positivist jurisprudence because there is no principle limiting enacted and decisional law to that which coincides with natural law. In
law is to juxtapose the substantive aspects of law with its formal characteristics. Imagining the intersection of these two categorical approaches on our entire legal landscape, the rules/standards model can be said to concern only one part of the resulting four-part classification. That is to say, our model of rules and standards seeks to rationalize only the formal aspects of positive law.

As one may imagine, however, the form of positive law is as amenable to multiple, overlapping, and conflicting models of classification as law itself. One can speak of positive law as general or specific, conditional or absolute, narrow or broad, weak or strong. Positive law can also be analyzed in other ways: those laws which grant rights and those which grant privileges; those which permit and those which forbid; those that say "may" and those that say "shall"; those that are rebuttable presumptions and those that are conclusive presumptions. This vast array of methods to categorize another sense, the distinction can merely be said to be between natural law and natural law that has been given the coercive power of the state. The question whether there is a category of positive law that is not also natural law is at the heart of controversy in jurisprudential debates and beyond the scope of this paper. The important distinction is between the large corpus of enacted and decisional law that both the naturalist and the positivist would call law and natural law that has not been incorporated into man-made law. See Henry J. Abraham, The Judicial Process ch 1 at 6-7 (Oxford, 5th ed 1986); Anita L. Allen, Legal Philosophy, in Stephen Gillers, ed, Looking at Law School 305 (Meridian, 3rd ed 1990).

3. See Friedman, 19 Stan L Rev at 788 (cited in note 1); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv L Rev 1685 (1976). Substance can be in turn broken down into the kinds of conduct the law is directed toward (criminal activity, marriage, business, contract, etc.) or the substantive objective of the law (deterrence, allocation of entitlements, inducement, etc.). Compare Friedman, 19 Stan L Rev at 788 (cited in note 1) with Pierre Schlag, Rules and Standards, 33 UCLA L Rev 379, 381 (1985).


law are ways to speak about differences in form among positive law, and rules and standards are yet another dimension to that debate. Before we can define in just what way those terms offer to explain the form of positive law, however, we must step back and refine our conception of positive law.

All of positive law can be seen as a series of legal directives. The formula for a legal directive is in two parts: the first part identifies some phenomenon (the "trigger") and the second part requires or authorizes a legal consequence when that phenomenon is present (the "response"). The two-part formula should be seen as different in kind from the categorical models cited above. Whereas the models of form based on generality and particularity, strength and weakness, etc., sought to divide the formal aspects of positive law into component parts and label those parts with a particular value, the two-part formula claims to be a statement about the characteristics of the form of a positive law that is universally true. The truthfulness of the assertion need not be challenged; it merely restates our own intuition that for a law to be law, it must in some sense define its context of application and must to some degree be purposive.

Given the formal nature of a legal directive as consisting of a "trigger" and "response," rules and standards are terms that classify legal directives based upon the tendency of the trigger to be more empirical or more evaluative and the tendency of the response to be more determined or more guided. Pound thus defines a rule as those "precepts attaching a definite detailed legal consequence to a definite, detailed state of facts." A standard, on the other hand, is less mandatory and more discretionary in both its trigger and response. Hart and Sacks define a standard as "a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situa-

6. See Schlag, 33 UCLA L Rev at 381 (cited in note 3). See also Friedman, 19 Stan L Rev at 786-87 (cited in note 1).

In general, the word 'rule' is used in law to describe a proposition containing two parts: first, a statement of fact (often in conditional form) and, second, a statement of the consequences that will or may follow upon the existence of that fact, within some normative order or system of governmental control.

7. See Schlag, 33 UCLA L Rev at 382.

8. Pound, 7 Tulane L Rev at 482 (cited in note 5). See also Hart and Sacks, The Legal Process at 155 (cited in note 5). "[A] Rule may be defined as a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events- that is determinations of fact." Id.
The quintessential rule, then, would look something like this: "Any person who drives an automobile at a rate of speed above fifty-five m.p.h. shall be fined fifty dollars." If that speed is above fifty-five, the response calls for the determinate action of fining the person fifty dollars. If the speed is fifty-five or below, the directive indicates by negative implication that no legal action is called for.

The quintessential standard would look something like this: "Any person who drives an automobile at an unreasonable rate of speed shall be punished in a manner proportionate to the offense." The trigger calls not only for an empirical verification of a rate of speed but also for an evaluation as to whether the speed should be considered reasonable or unreasonable. The response requires an equally searching evaluation; instead of the automatic fine that took hold once a speed above fifty-five m.p.h. was determined under the rule, the standard requires the decision-maker to develop a "proportionate punishment."

The examples represent the extremes of determinism and discretion in both aspects of a legal directive. Presumably any legal directive could combine any fixed point on the continuum between an empirical and evaluative trigger with any fixed point on the continuum between a determined and guided response. As a practical matter, however, most directives have a more or less determined response so the real categorical problem arises in determining whether the directive calls merely for a determination of fact or both a determination of fact and a qualitative evaluation of that fact as a prerequisite to the application of the directive's consequences. The call will no doubt be close in some situations, but on the whole we should have minimal difficulty calling a directive a rule or a standard based on the extent to which application of the directive results simply from a factual determination or from both a factual determination and a qualitative evaluation of those facts.

9. Hart and Sacks, The Legal Process at 157 (cited in note 5). See also Pound, 7 Tulane L Rev at 485 (cited in note 5). "[Standards] are general limits of permissible conduct to be applied according to the circumstances of each case." Id.

10. See Ehrlich and Posner, 3 J Legal Stud at 258 (cited in note 5). "The simplest kind of rule, then, takes the form: if X, then Y, where X is a single, simple, determinate fact (e.g., the car's speed) and Y is a definite, unequivocal legal consequence—a judgment of liability or nonliability—that follows directly from proof of X (e.g., driver has violated traffic code). Id.
B. What of Principles and Policies?

There is confusion in the literature of form over the meaning of various words used to represent certain types of legal norms. Most commentators agree that on the continuum representing possible forms of a legal directive, there is at one end a norm designated as a "rule," and rules minimize the discretion of the decision-maker by attaching determinate legal consequences to a definite, detailed state of facts. The difficulty arises as one moves away from rules into types of norms that demand for their application not simply an assessment of the existence or non-existence of a certain set of facts but also a qualitative appraisal or evaluation of the facts as they are found to exist against a value-laden standard that is part of the norm. Many have called the latter type of norm a standard, but other terms, such as "principle" and "policy," have been used to describe what looks to be the very same thing. Are there any meaningful differences between standards, principles, and policies? If so, can those differences be characterized simply in terms of different points on our continuum of legal form, thereby representing differences in degree relative to the amount of discretion accorded the decision-maker and the length of postponement of the decision? Or are the differences more substantial, perhaps representing not simply differences in the form of law but rather differences in the type of law or even differences between law and something else?

Dean Pound and Hart and Sacks have carefully distinguished between standards and principles. Pound\(^11\) defines standards as "general limits of permissible conduct to be applied according to the circumstances of each case."\(^12\) Citing the reasonable prudent man in the law of negligence and the standard of fair conduct of a fiduciary as examples,\(^13\) Pound indicates that standards do not attach a particular threat to any defined state of facts; rather, they are to be applied in view of the facts of each case.\(^14\) Pound defines principles as "authoritative starting points for legal reasoning, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules in the narrower sense."\(^15\) Citing as examples the precepts that one is not to be enriched un-

\(^11\) See Pound, 7 Tulane L Rev 475.
\(^12\) Id at 485.
\(^13\) Id.
\(^14\) Id.
\(^15\) Id at 483.
justly at the expense of another and that as between two persons equally innocent, one of whom must lose, a court of equity will not interfere,16 Pound indicates that principles, like standards, fail to specify with any definiteness either the set of facts that will implicate their application or the type of sanction that will follow.17

The difference for Pound seems to be the distinction between a legal precept and a legal directive. Principles, to be sure, are part of our received positive law; they are the lingual embodiment of the grand ideas of justice and fairness inherent in the common law. Perhaps they will sometimes serve as the norm authorizing the application of legal power to a particular situation, but at their core, principles are "not the work of lawmakers nor of courts."18 They are more properly the reasons and values underlying the formulation of a more specific and administrable norm. Standards, on the other hand, more closely approximate a traditional legal directive where definite consequences are linked to a particular set of facts. A standard can be, no doubt, as opaque in yielding a predictable outcome as any principle, but its tenor is that of law rather than rationale. Pound indicates the distinction in asserting that every standard can be reconceived as "a rule (in the narrower sense) prescribing adherence to the standard and imposing consequences if the standard is not lived up to."19

Hart and Sacks distinguish between standards, policies, and principles. A policy is "simply a statement of objective," such as full employment or national security.20 A principle "also describes a result to be achieved" but differs from a policy in providing, either expressly or by reference to well understood bodies of thought, a statement of the reasons why the objective should be achieved.21 Examples include the proposition that agreements should be observed and the precept that no person should be unjustly enriched.22 The two, policies and principles, differ from rules and standards:

Principles and policies, like rules and standards, are general directive propositions, or elements of them. But unlike rules and standards they are not expressed in terms of the happening or non-happening of physical or mental

16. Id at 484.
17. Id at 483.
18. Id at 484.
19. Id at 485.
21. Id.
22. Id.
events or of qualitative appraisals of such happenings drawn from ordinary human experience. They are on a much higher level of abstraction, and obviously involve a vastly larger postponement of decision. A policy leaves to the addressee the entire job of figuring out how the stated objective is to be achieved, save only as the policy may be limited by rules and standards which mark the outer bounds of permissible choice. A principle gives the addressee only the additional help of a reason for what he is to try to do.\textsuperscript{28}

The difference for Hart and Sacks between standards on the one hand, and principles and policies on the other, then, seems to rest in their appropriateness for different audiences. Hart and Sacks see standards as aligning more with rules in their usefulness as independent guides to proper and improper conduct for private persons.\textsuperscript{24} The utility of principles and policies in this regard "is obviously minimal;" their usefulness becomes apparent as guides to the exercise of a trained and responsible discretion by officials.

Duncan Kennedy and Ronald Dworkin make no such distinction between standards and principles. For Kennedy,\textsuperscript{26} the important formal distinction is between rules and standards, and the genus of legal directives that he signifies with the term "standards" could just as easily be designated as principles or policies: "At the opposite pole from a formally realizable rule is a standard or principle or policy."\textsuperscript{28}

Dworkin as well sees form in terms of bipolarity. On the one hand there are rules, such as the rule that a will is invalid unless signed by three witnesses, and "[r]ules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."\textsuperscript{27} On the other hand there are "... principles, policies, and other sorts of standards,"\textsuperscript{28} which Dworkin refers to generically as "principles." A principle, such as no man may profit from his own wrong, does not "... set out legal consequences that follow automatically when the conditions provided are met."\textsuperscript{29} Rather, a principle "... states a reason that argues in one direction, but does not necessitate a particular decision."\textsuperscript{30}

\textsuperscript{23} Id.
\textsuperscript{24} Id at 160.
\textsuperscript{25} See Kennedy, 89 Harv L Rev 1685 (cited in note 3).
\textsuperscript{26} Id at 1688.
\textsuperscript{27} Dworkin, Taking Rights Seriously at 24 (cited in note 5).
\textsuperscript{28} Id at 22.
\textsuperscript{29} Id at 25.
\textsuperscript{30} Id at 26.
Analyzing the two positions, one which says standards are distinguishable from principles and the other which says the two are co-equal, one confronts two questions. Are the two positions really that different? And even if they are different, is that difference meaningful? The answer to the first question becomes clear when we read Dworkin more closely and discover that he actually speaks of a middle ground between rules and principles, and this middle ground looks very much like what Pound and the Legal Process school would call a standard. Dworkin observes that often a provision will function logically as a rule and substantively as a principle; what results is a hybrid form that is characterized by both the need for judgment and language that confines the judgment to a limited set of values:

Words like ‘reasonable’, ‘negligent’, ‘unjust’, and ‘significant’ often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle. But they do not quite turn the rule into a principle, because even the least confining of these terms restricts the kind of other principles and policies on which the rule depends. If we are bound by a rule that says that ‘unreasonable’ contracts are void, or that grossly ‘unfair’ contracts will not be enforced, much more judgment is required than if the quoted terms were omitted. But suppose a case in which some consideration of policy or principle suggests that a contract should be enforced even though its restraint is not reasonable, or even though it is grossly unfair. Enforcing these contracts would be forbidden by our rules, and thus permitted only if these rules were abandoned or modified. If we were dealing, however, not with a rule but with a policy against enforcing unreasonable contracts, or a principle that unfair contracts ought not to be enforced, the contracts could be enforced without alteration of the law.31

So Dworkin at least seems willing to refine his general account of principles to take into account legal directives that move more toward necessitating a particular decision than sweeping commands such as a wrongdoer should pay for resulting damages. However, we should realize that meaningful distinctions concerning legal form are difficult to make because they inevitably involve subtle differences that may or may not be apparent to all. Is it a far distance between the precept that a wrongdoer should be responsible for damages caused and the standard that people should behave in a reasonably prudent manner taking into account all the circumstances of the situation or pay any resulting damages? In fact, it becomes readily apparent that any qualities we ascribe to a stan-

31. Id at 28.
standard will inevitably be present in a stronger form in a principle. However, distinctions often have to be made, and it is useful to follow Pound and the Legal Process school (and to a certain extent Dworkin) in distinguishing between standards and principles. Our focus here is on the form of legal directives and the extent to which that form has substantive implications for our legal system apart from the substantive content of the norm. It follows that we should focus on those forms that do take the shape of a legal directive, and the work of Pound and Hart and Sacks indicate that principles, though profoundly important norms within our system, function more as reasons supporting more specific legal norms or as directions to officials as to how they should exercise their discretion than concrete legal directives that act directly on the citizenry. I will thus focus on standards and rules as the two forms we may choose to embody the substantive legal directives of our polity.

C. Arguments For and Against

Rules and standards were discussed above in terms of the relative discretion each form conferred on the decision-maker. A judge charged with determining whether a presidential candidate is of sufficient age to hold the office would have little leeway in the decision; if the candidate has not attained the age of thirty-five, the judge would be compelled by the Constitution to disqualify the candidate. If, on the other hand, the relevant constitutional provision provided that presidential candidates should attain "a reasonable age" before vying for the position, the judge would possess a great deal more freedom in both the sources she consults to help guide her decision and in the actual determination. In addition to discretion, other models that have been suggested to facilitate the comparison of rules to standards include specificity, precision, formal realizability, abstraction, and the extent to which the decision is postponed until the matter can be judged from the perspective of the point of application. Although the above models

32. See note 10 and accompanying text.
33. US Const, Art II, § 1, cl 5.
34. Hart and Sacks, The Legal Process at 155 (cited in note 5).
37. Hart and Sacks, The Legal Process at 159.
38. Id at 156-58.
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are helpful in distinguishing between rules and standards, they fall short of outlining the actual positive and negative implications for adopting a rule or a standard as the form for a legal directive. As a way of focusing the debate, legal argumentation has expanded the analysis of the ways a choice of form can have substantive consequences for the composition of our legal system and society. The arguments for and against rules and standards thus become mirror images of the arguments we make concerning such questions as the ends of society and the proper relation between governmental authority and individual freedom. A brief sketch follows of the most common arguments concerning the adoption of rules and standards.\(^9\) The connection of these arguments to the most profound and difficult questions concerning the nature and goals of civil society follows thereafter.

The two great attributes continually put forth for rules in legal argumentation and legal literature are the following: rules restrain official arbitrariness and provide certainty. The first argument speaks to a norm's effect on the decision-maker; because the meaning of a rule is relatively transparent and for the most part accessible to non-professionals,\(^4^0\) the decision-maker must follow the dictates of the rule's language or risk being popularly chastised as a "law-maker" rather than a "law-applier." The second argument, certainty, concerns a norm's effect on the citizenry. If the citizens can accurately predict when and how the law will intervene in their private lives and rules, again because of their transparency and accessibility, can presumably provide this predictive power they will adjust their activities in advance to compensate. The certainty and predictability of rules thus carries the dual benefit of having the citizens follow a desired pattern of activity and allowing the citizens to pursue confidently private actions absent the inhibiting constraints that accompany indefiniteness about the incidence of legal intervention.

Rules, however, are not without faults. Because of the very precision and definiteness of language that are said to be the defining feature of rules, rules have the tendency to become disconnected from the objectives lying behind the rules, the very objectives that

\(^3^9\) The arguments presented stem primarily from Kennedy, 89 Harv L Rev at 1687-1701 (cited in note 3). Rather than repeatedly citing to that work, I acknowledge here its importance to the arguments presented in this section.

\(^4^0\) "Transparency" and "accessibility" are two of the three attributes that Dean Diver outlines as necessary for a rule to be successful in effecting its purpose. See note 41 for the other attribute. See Diver, 93 Yale L J at 67 (cited in note 35).
presumably brought the rules into being in the first place. This
detriment, sometimes termed the mechanical over and underinclu-
siveness of rules, has also been cited as the incongruence between a
rule and its purpose. Both the benefits and detriments of rules
can best be seen through a concrete example.

Take the fifty-five m.p.h. speed limit rule that we spoke of
above. We saw how the empirical trigger of the rule dictated a
determinate response by the decision-maker hard upon a finding of
fact concerning the rate of speed. The decision-maker has little
choice either in the manner in which the rule is applied or in the
result to which it leads. In addition to this curb on discretion or
official arbitrariness, it is also evident how the fifty-five m.p.h.
speed limit yields certainty in the minds of the citizens. They can
freely drive their automobiles at any rate of speed from zero to
fifty-five m.p.h. secure in the knowledge that their actions will not
implicate legal liability. Of course citizens may travel at a rate
equal to fifty-six m.p.h. or greater with equal security, but this se-
curity is founded upon the knowledge that legal liability will follow
directly upon discovery.

To discover our speed rule's defect, we must look to the rule's
underlying objective: to foster a safe, yet speedy automobile trans-
portation system. The first thing that must be noted is that those
two objectives are at odds: "safety" implies reducing speed to the
point of preventing any injuries while "speedy" implies the desire
to increase the speed limit irrespective of the deleterious effect on
safety. Our fifty-five m.p.h. rule seeks to balance the competing
concerns by fixing a point and making that line of demarcation
applicable to all the circumstances coming within the context of
the rule. But because our rule takes as its context the operation of
an automobile whenever and however it occurs, there will inevita-
bly be situations where the balance mandates a different speed
than that dictated by the rule. For example, out in the country,
where there is minimal traffic and long straight roads connecting
the infrequent towns, fifty-five m.p.h. seems unduly restrictive.
However, in the city, where the traffic is congested, the streets are
narrow, and pedestrians are ever-present, a speed limit of fifty-five
seems like a guaranteed prescription for multiple accidents. It is,
thus, in this way that rules are said to be both over and underin-

41. "Congruance" is the third of Diver's attributes that he feels are necessary for a
rule to achieve its purpose. Id.
42. See note 10 and accompanying text.
clusive and out-of-touch with the purposes they seek to achieve.

Standards are said to rectify the very problems created by rules. The two great virtues of standards are the following: (1) standards are transparent to the substantive objectives of the legal order, and (2) they are amenable to individualization to the particular circumstances of a given fact situation. In other words, because of the flexibility inherent in a standard-like norm, a decision-maker can weigh the specific factors of a particular case and issue a result congruent with the substantive purposes embodied in the standard. The point can be seen by looking at our standard-like counterpart to the speed rule: “Any person who drives an automobile at an unreasonable rate of speed shall be punished in a manner proportionate to the offense.” This type of norm can easily accommodate the difficulties we faced in devising a speed rule that could be applied in both the country and the city. Under the standard, a decision-maker would be allowed, or perhaps even required, to consider the location of the automobile as part of a determination regarding the reasonableness of the speed. In effect, our standard mandates that the decision-maker engage in a balancing of the underlying substantive objectives of safety and speed within the particular context of the fact situation at issue.

But what we have gained on one side by transferring our fifty-five m.p.h. speed rule into a “reasonable speed” standard, we have lost on the other, for the discretion that characterizes a standard inevitably yields to the arbitrariness and lack of predictability that we sought to avoid by employing a rule. An “unreasonable rate of speed” can mean many different things to many different people. There is no way for citizens to gauge by reference to the language of the norm whether or not their leaders are adhering to the law, and there is no way for citizens to accurately assess whether their conduct falls within the ambit of the norm.

Therefore, both rules and standards are open to the criticism that they promote arbitrariness. While standards can be said to foster arbitrary decisions because of the discretion accorded the decision-maker, rules yield to the arbitrariness of implicating for legal sanction conduct that was not intended to be so designated and freeing from sanction conduct the restriction of which was the very purpose the rule was adopted in the first place. A choice,

43. Pound first noted this quality: “[Standards] are the chief reliance of modern law for individualization of application and are coming to be applied to conduct and conduct of enterprises over a very wide domain.” Pound, 7 Tulane L Rev at 485 (cited in note 5).
then, between a rule and a standard as the form for a legal directive will inevitably involve a judgment as to the relative importance or threat of the different types of arbitrariness implicated by each form.

Other arguments for and against rules and standards can be mentioned briefly. Standards have the advantage of deterring borderline behavior and thus focusing such activity into less offensive types of conduct. Rules, on the other hand, predesign and quantify the magnitude of penalty for well-defined conduct and thus allow Holmes' bad man to walk the line or step over the line and treat the deterrent as a fixed cost of doing business. Yet, standards will inevitably deter desirable as well as undesirable conduct. Moreover, the uncertainty of standards, both in what they mean and how they will be applied, tends to a lower level of social control than would occur if there were a well-defined area within which there was a high probability of even a mild punishment. Finally, rules can be said to take advantage of private vigilance to deter substantively undesirable conduct. The rule of caveat emptor is such and example.44

So the choice between rules and standards can be seen to implicate varying and profound issues including the debate over the proper goals and structure of the legal system. Should we seek to restrain governmental actors and allow individuals to order their private affairs without fear of legal interference? Or perhaps it is more important to organize a legal system in which disputes are resolved according to the balance of the equities in the particular case? Dean Pound has offered one model for integrating rules and standards, and their accompanying attributes and detriments, into

44. The law of caveat emptor, or "buyer beware," can be looked at from different angles. Some may view the body of law that has developed around the original proposition, including the numerous exceptions that have removed the hard edge from the norm, as more standard-like than rule-like. This raises the interesting question of when does a clear, general rule become so clouded with particular exceptions that the rule loses its rule-like qualities of certainty and restraint on discretion. In its place, the body of law takes on the standard-like qualities of flexibility and individuation. The question becomes whether the body of law is better analyzed as one overarching rule with a number of rule-like exceptions or one overarching standard that guides the decision-maker in each particular case. The question seems unanswerable because it is merely a restatement of the intractable problem of affixing imprecise terms to various points on a continuum. For my purposes here, I take the law of caveat emptor to be a rule that attaches definite legal consequences to definite predicate facts with minimal need for judicial discretion. Exceptions that have developed may have the quality of either a rule or a standard, but the important point for the argument here is that caveat emptor is a general rule that incorporates private actors, via the power of contract, into the business of policing misdeeds that society could very well have banned directly through positive sanction.
a unified system of law. We will evaluate his proposal and then take account of the criticism of that effort found in the work of Duncan Kennedy.46

D. **Pound's Synthesis**

We have seen how to generalize on the likely consequences of adopting either a rule or a standard and how those consequences have been incorporated into legal argument for and against rules and standards. Pound46 offers synthesizing principles for when we should be persuaded to use rules and when standards would be the preferable form to accomplish the substantive objectives of the legal directive. He concludes that the subject matter of the directive should be our guide in determining the appropriate form; some areas of law are conducive to rules and some yield more naturally to standards.47 In particular, Pound indicates that the “individualization” of law through the use of standards is more appropriate “to human conduct and to the conduct of enterprises” while “rules of law and legal conceptions which are applied mechanically are more adapted to property and to business.”48 Pound thus calls for a new “process of social engineering” which would represent “... the social order as an organized human endeavor to satisfy a maximum of human wants with a minimum of sacrifice of other wants.”49

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45. See notes 50-83 and accompanying text.  
47. Compare Frederick Schauer, *Rules, The Rule of Law, and the Constitution*, 6 Const Comm 69, 83 (1989) (adoption of a rule depends upon the identity (and therewith the responsibility) of the decision-maker: “If I were to be asked whether the Supreme Court should make constitutional decisions according to a strong sense of rule, I would be tempted to respond with ‘Who wants to know?’.”) (emphasis in original).  
49. Id at 954. His most complete statement of the program is as follows: Social engineering may not expect to meet all its problems with the same machinery. Its tasks are as varied as life and the complicated problems of a complex social order call for a complicated mechanism and a variety of legal implements. This is too large a subject for discussion in the present connection. Suffice it to say that conveyance of land, inheritance and succession, and commercial law have always proved susceptible of legislative statement, while no codification of the law of torts and no juristic or judicial defining of fraud or of fiduciary duties has ever maintained itself. In other words, the social interests in security of acquisitions and security of transactions, which are the economic side of human activity in civilized society, call for rule or conception authoritatively prescribed in advance and mechanically applied. These interests also call peculiarly for judicial justice. Titles to land and the effects of promissory notes or commercial contracts cannot be suffered to depend in any degree on the unique circumstances of the controversies in which they come in question. It is one of the grave faults of our present theory of judicial decision that, covering up all individualization, it sometimes allows individualized application to creep into those situa-
The tools, then, for this social engineering will be none other than the two formal dimensions designated as rules and standards. The attributes of these forms will be matched with the substantive objective of the norm to yield a rational and efficient system in which form both serves and conforms to substance.

II. FORM AS SUBSTANCE: THE CONTRIBUTION OF DUNCAN KENNEDY

In *Form and Substance in Private Law Adjudication*, Duncan Kennedy argues that Pound's subject-matter categorization of form fails to explain the common-sense observation that our choice of form carries powerful overtones of a substantive vision of the universe: "In picking a form through which to achieve some goal, we are almost always making a statement that is independent or at least distinguishable from the statement we make in choosing the goal itself." Kennedy thus moves away from the instrumentalism and tactical orientation that guides Pound's choice whether to use a rule or a standard and attempts to create a theoretical framework in which the two forms are linked to the fundamental substantive visions of the world that they each foster. In Kennedy's words, "[w]hat we need is a way to relate the values intrinsic to form to the values we try to achieve through form."

Kennedy begins this project by listing common emotive or judgmental words, both positive and negative, that everyone associates with rules and standards. Rules can be said to yield such values as neutrality, certainty, and autonomy. But rules could also be said to foster rigidity, compulsiveness, and alienation. Similarly, standards are known for their flexibility, individualization, and spontaneity. But they also could be seen in terms of bias, favoritism, and uncertainty. The list is simply a grouping of one word summations for the various pro and con arguments that we elucidated above.

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51. Kennedy, 89 Harv L Rev at 1710.
52. Id (emphasis in original).
53. The values listed in this and the following three sentences are part of a longer list in Kennedy's article. Id.
54. See notes 32-45 and accompanying text.
Kennedy concludes that "[the] list suggests something that we all know. The preferences for rules or standards is an aspect of opposed substantive positions in family life, art, psychotherapy, education, ethics, politics and economics." It is this deeper dichotomy that Pound failed to discover, and Kennedy asserts that the difficult proposition is that we all are pulled to some degree by both sets of values and therewith by both forms that correspond to those values.

"Indeed, most of the ideas that might serve to dissolve the conflict and make rational choice possible," which are things like morality, freedom, fairness, equality, and realism, "are claimed vociferously by both sides . . . ." Under Pound's formulation, the debate was over which form will best serve commonly accepted goals, so the issue lent itself to empirical verification. Under Kennedy's formulation, however, the debate concerns the nature of the goals and the assumptions about human nature implicit in the means. Such a dichotomy seems unamenable to resolution. "Thus the pro-rules and pro-standards positions are more than an invitation to a positivist investigation of reality. They are also an invitation to choose between sets of values and visions of the universe." The bulk of Kennedy's article, then, is devoted to investigating the character of such a choice. The "premise is that we will have a better understanding of issues of form if we can relate them meaningfully to substantive questions about what we should want and about the nature of humanity and society."

Kennedy argues that the two opposed modes for dealing with form, rules and standards, are linked to two opposed rhetorical modes for dealing with substantive issues, which he calls individualism and altruism. He first elucidates the characteristics of the two competing substantive constructs and then argues that the debate over form is simply a mirror of this substantive dichotomy.

Individualism focuses on self-reliance. Its essence "is the making of a sharp distinction between one's interests and those of others,

55. Kennedy, 89 Harv L Rev at 1710 (cited in note 50). Kennedy has indicated in later writings that he renounces the idea of a pervasive fundamental contradiction in life and law. See Peter Gabel and Duncan Kennedy, Roll Over Beethoven, 36 Stan L Rev 1, 15-16 (1986). However, discussions with Professor Kennedy indicate that he remains attached to the contradiction thesis. See Interview with Professor Kennedy in Cambridge, Mass (April 3, 1991).
57. Id at 1711.
58. Id at 1712.
59. Id.
60. Id at 1685.
combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested.\textsuperscript{61} The function of law for the individualist is grounded in a rights-based protection of one's freedom to pursue self-interested goals consistent with the noninterference in another's similar pursuit. The fundamental premise of individualism consists in liberalism's assertion of the subjectivity of values. What results is the creation of a political structure that avoids any attempt to obtain a group consensus on ends that are by hypothesis irreconcilable. State institutions should seek, rather, to facilitate private ends to the extent they are not socially destructive. Neutrality and rule-application (rules are directives whose predicates are always facts and never values) are the guidelines for the judge. "Since facts are objective rather than subjective, they can be determined, and one can assert that the judge is right or wrong in what he does. The result is both the certainty necessary for private maximization and the exclusion of arbitrary use of state power to further some ends (values) at the expense of others."\textsuperscript{62}

Altruism focuses on sharing and sacrifice. Its essence is the belief that one ought not to indulge a sharp preference for one's own interest over those of others. Rather, we are engaged in a collective enterprise that seeks to break down barriers between individuals and foster a communitarian utopia.\textsuperscript{63} Justice consists of order according to our shared ends.\textsuperscript{64} Law embodies these ends, but the goal is to do away with any need for sanction as the impetus toward moral conduct. Good judging shuns the moral agnosticism of individualism and gladly embraces the direct application of moral norms. Indeed, "[g]ood judging ... means the creation and development of values ... ."\textsuperscript{65}

Kennedy believes that the substantive rhetorical modes of individualism and altruism offer explanatory insight into both our conflicting visions for the world and the tangible dichotomy between rules and standards in the realm of law's form. The arguments that we make for the adoption of a rule as opposed to a standard reflect the individualist faith in neutrality, the rule of law, and the subjectivity of values. The arguments we make for the adoption of a
standard, on the other hand, display the altruist desire to foster a communitarian moral order characterized by the primacy of shared ends. We are, then, deeply divided concerning the proper form of a legal directive and the proper substantive composition of the polity, and those divisions are interconnected through shared conceptions of the universe. However, Kennedy asserts that few of us can comfortably align ourselves on only one side of the spectrum. The opposed formal and rhetorical modes which lawyers use "reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future."66

Kennedy outlines two responses, that of law and economics and the "immanent rationality" school, which attempt to rid the irreconcilable dichotomy of legal argument.67 The law and economics movement seeks to ground judicial decisions in a rational science of resource allocation and therewith to free judges from having to choose one or the other of the rhetorical modes. The problem with this argument, Kennedy asserts, is that it ignores the inevitability of deciding the initial property rules that pre-exist the free-bargaining and efficiency criterion. To acknowledge the necessity of facing the initial formulation of property rules is to admit confrontation with the individualist/altruist dialectic.68

The "immanent rationality" approach "attempts to finesse the confrontation of opposing philosophies by developing a middle ground."69 The belief is that individualism and altruism lead to conflict in only a small number of disputed questions, leaving a large core within which the judiciary can reach reasoned consensus.70 Kennedy admits the logical force of the argument but denies that it is an accurate reflection of reality. "Every occasion for law-making will raise the fundamental conflict of individualism and altruism, on both a substantive and a formal level."71

Kennedy acknowledges methodological problems in the use of constructs like individualism and altruism.72 First, the terms do

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66. Id at 1685 (emphasis added).
67. Id.
68. Id at 1762-63.
69. Id at 1765.
70. Id.
71. Id at 1766.
72. See id at 1722-24.
not correspond to some empirically verifiable set of data. They are, rather, amalgamations of diverse legal, moral, economic, and political writings. Moreover, the terms are so universalizable that it seems impossible to definitively state that either is “responsible” for a particular decision. Yet the terms, Kennedy feels, are useful to indicate the intuitively familiar wholes of thought that they represent. In fact, part of the utility of individualism and altruism stems from their nonfamiliarity in legal circles: “[L]awyers usually believe that their analytic skills can produce explanations of legal rules and decisions more convincing than any that employ such vague, ‘value laden’ concepts.” Lawyers thus cling to the notion that one can move from the law to the outcome in a particular case through a combination of logic and fact-finding. However, most students of legal thought say that this account of adjudication leaves out the important contribution of “policy.” Kennedy’s “hope is that the substantive and formal categories can help in rendering the contribution of ‘policy’ intelligible.” “The ultimate goal,” Kennedy asserts, “is to break down the sense that legal argument is autonomous from moral, economic, and political discourse in general.” Noting that it has been a premise for generations “that it is impossible to construct an autonomous logic of legal rules,” Kennedy asserts that “[w]hat is new in this piece is the attempt to show an orderliness to the debates about ‘policy’ with which we are left after abandonment of the claim of neutrality.” The constructs of individualism and altruism provide that orderliness; “the experience of unresolvable conflict” within ourselves, says Kennedy, indicates the preeminence of policy in our legal discourse and the inevitable equation of law with politics.

III. FORM AS FORM: PIERRE SCHLAG’S RESPONSE

Pierre Schlag challenges Duncan Kennedy’s conception of the rules versus standards debate as a dialogue over the proper form of a legal directive that embodies differing substantive conceptions of

73. Id at 1723.
74. Id at 1722.
75. Id at 1723.
76. Id at 1724.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id at 1712.
the proper structure and goals of the legal system. Schlag contends that any attempt to understand the rules versus standards debate by appeal to external substantive criterion fails because we find in these substantive realms a mere replication of the very debate, rules versus standards, which we are trying to explain. The appeal to substance to explain the debate over form only succeeds in uncovering further debates over form. Schlag concludes that our legal argumentation is devoid of any compelling substantive visions: our arguments are "just part of a game" and "may be nothing more than the contextualized manifestations of formalistic mechanics."

The import of Schlag's contention is nothing short of revolutionary. If he is right, legal argumentation, or debate over the substantive norms and goals that should guide our society, is failing us miserably. We could conceivably be in the midst of a mass self-deception; the picture is that of a people going about their daily lives under the assumption that society's problems are under scrutiny and in the process of being resolved when in fact that process is arrested, nothing more than a spinning record stuck in a groove that shouts out the same tired phrases over and over again.

In the following section, I propose to analyze Schlag's dreary assessment of the status of legal argumentation.

Schlag begins his argument by making two observations. The first is that "disputes that pit a rule against a standard are extremely common in legal discourse." The second is that "arguments... for or against rules or standards [are] pretty much the same regardless of the specific issue involved." "The arguments are drearily predictable, almost routine; they could easily be canned for immediate consumption in a Gilbert's of legal reasoning." Schlag calls the patterned sets of canned pro and con arguments about the value of adopting either rules or standards in a particular context "the dialectic," and he illustrates the arguments of the dialectic within three different substantive objectives of the law. Schlag demonstrates the prevalence of the dialectic by high-

84. Schlag, 33 UCLA L Rev at 419.
85. Id.
86. Id at 404-05.
87. Id at 380.
88. Id.
89. Id.
90. Id at 383-90.
lighting three issues in constitutional law where the arguments track the dialectic.\textsuperscript{91}

From these two observations, Schlag concludes 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."\textsuperscript{92} In order to avoid this "vexing embarrassment," Schlag devotes the bulk of the article to investigating various arguments that attempt to rescue the rules versus standards dispute from its own stereotypical formality by tying the dialectic to substantive norms. Ultimately, however, Schlag concludes that the initial assessment of the status of legal argumentation was correct. "The attempt to tie form to substance is just so much form."\textsuperscript{93}

The most common understanding of the rules versus standards dialectic, and the one into which all the other explanations are subsumed,\textsuperscript{94} grounds the arguments over form in "normatively meaningful choices between competing values."\textsuperscript{95} Under this "vices and virtues" view, "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."\textsuperscript{96} Rules are said to yield certainty, uniformity, stability, and security; "standards are seen as more appropriate when flexibility, individualization, open-endedness, and dynamism are important."\textsuperscript{97} To argue over the proper form of a legal directive is, under this view of the rules versus standards debate, really an argument over the importance of substantive values like certainty and flexibility.

Schlag recognizes how the vices and virtues vision explains the arguments of the dialectic and purports to place those arguments within a meaningful normative framework.\textsuperscript{98} He finds the explanation "insufficient," however, because of a perceived incongruity between the simple vision of vices and virtues, where the arguments, like the dialectic, are limited and patterned, and a view of "law" as a "complex and intricate system that administers or governs an incredibly large variety of matters."\textsuperscript{99} Schlag then observes that the
explanatory power of the vices and virtues vision can be retained if we abandon the view of law as intricate and complex and replace it with the assumptions that the substantive objectives of the legal system are few and that these objectives are ambivalent in that they all bring into play countervailing objectives. The dialectic, then, mediates between the limited and patterned virtues and vices and the limited and ambivalent substantive objectives of the legal order. What results is a dialectical debate over whether a legal directive should be formed as a rule or a standard that is grounded in the substantive virtues and vices of those two forms.

But Schlag asserts that in simplifying our view of the substantive objectives of the legal system, we have retained the power of the vices and virtues vision to explain the dialectic while sacrificing the possibility of grounding the dialectic in normatively meaningful choices between competing values. Once one assumes that the substantive objectives of the legal system are few and ambivalent, "[l]egal discourse emerges as crude, shallow, and formalistic," Schlag reasons that a dialectic grounded on such a superficial and formalistic legal system may itself "be nothing but a highly formalistic exercise bereft of any significant connection to vices or virtues." Legal arguments, then, that partake of the dialectic might themselves be as form-bound and substance-lacking as the legal system from which they emanate.

The crucial move in the argument for Schlag, and the move that I believe cannot be rationally defended, is the equation of a legal system where the substantive objectives are few and ambivalent to a legal system where legal discourse is "crude, shallow, and formalistic." The complexity or substance-oriented nature of a legal system can never be said to depend on the mere number of objectives guiding the legal system. Rather, complexity seems more closely related to the persuasiveness of the various substantive objectives and the extent to which those objectives are in conflict. Under such a model, Schlag's own assumption that the objectives of the simplified legal system are ambivalent indicates the pres-

100. Id.
101. Id at 404.
102. Id.
103. Id.
104. Id.
105. Id.
106. Id.
ence of exactly what Schlag attempts to show is lacking, a debate in the realm of substance. Moreover, in addition to the ambiguity within the different legal objectives, there may well be tensions among the objectives that would lead to further debate in the substantive realm. So Schlag fails to envision a legal system devoid of compelling substantive tensions; by premising his argument that the dialectic and the vices and virtues explanation of the dialectic lack substance on their connection to a formalistic and shallow legal system, the argument collapses when we discover absolutely no proof that a legal system with limited and ambivalent objectives is in fact formalistic. The substantive grounding of the rules versus standards debate in the vices and virtues is left intact and must be approached from a different angle. Schlag seems to understand the failure of this line of argument in his assertion that the "conclusion is not necessarily correct." 107

Schlag's next attempt at undermining the vices and virtues explanation of the dialectic focuses not on the legal system in which they operate but rather on the asserted connections between the form (i.e., a rule or a standard) and the substance (i.e., the virtues and vices). 108 He first questions what it could mean to say that a rule is certain, and he concludes that one possible meaning could premise certainty as to whether the rule applies and certainty as to what the rule requires on "correct interpretation." 109 The problem with using "correct interpretation" as a frame of reference, Schlag asserts, is that the same frame of reference will yield certainty with a standard as well. 110 We thus have standards exhibiting what is unquestionably a rule-like virtue and we begin to wonder about the power of the vices and virtues model.

But it seems misleading to grasp onto "correct interpretation" as the proper context to determine the relative certainty of a rule or standard. Schlag is no doubt correct that both would exhibit certainty if interpreted correctly. But the same result would not occur if one measured certainty not in terms of "correct interpretation" but rather in terms of 1) predictability and 2) capacity to be interpreted correctly relative to the actual terms of the norm (hereinafter called "internal correctness"). If predictability and internal correctness are the guideposts for measuring certainty, then rules do seem to exhibit the certainty they are reputed to possess while

107. Id at 405.
108. Id.
109. Id at 406.
110. Id.
standards appear to be lacking in that quality.

The point can be seen by looking at the examples Schlag suggests as a representative rule and standard. The directive that "sounds above 70 decibels shall be punished by a ten dollar fine is an example of a rule."[111] "The directive that 'excessive loudness shall be enjoined upon a showing of irreparable harm,' is an example of a standard."[112] If one assumes a fact situation involving an 80 decibel sound, it is predictable that a decision-maker, in applying the rule, will punish the noise with a $10 fine. That would also be the internally correct result given the language of the rule, so certainty seems to be a quality of the rule given the predictability of its application and its amenability to the objective assessment of whether or not the application was "correct" relative to the language of the rule. Under the standard, however, it would be unclear whether the noise would be enjoined; one could not predict the outcome because the criterion is less objective and more dependent upon the decision-maker's own perception of what constitutes "excessive loudness." Internal correctness is equally unattainable with the standard for the same reason; the language of the standard lacks objective criteria upon which to judge the result.

Schlag would retort to this apparent validation of at least one connection between a supposed virtue (certainty) and its characteristic form (a rule) that one illustration does not make the two universally connectable in all contexts. In fact, because a directive can never unequivocally determine the context to which it applies, "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."[113] 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."[114]

Schlag points to the Miranda rule[115] to explain his point. Most people would consider the rule to be an example of certainty and predictability, Schlag asserts, and that no doubt is the case "if one sees the context in which Miranda is applied in terms of police officers, interrogations, custody, the warnings on those little cards,

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111. Id at 383.
112. Id.
113. Id at 407.
114. Id.
and the judge excluding evidence . . . ."\textsuperscript{116} But Schlag says "there is no reason that one should have that particular context in mind."\textsuperscript{117} Schlag asks that we change the context in which the \textit{Miranda} rule applies to "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 officials and members of less privileged groups."\textsuperscript{118} Schlag concludes that within the new context "it seems transparent that the rule is anything but an example of certainty, predictability, or stability."\textsuperscript{119}

Schlag's change in context no doubt alters the certainty with which the \textit{Miranda} rule would be applied. But Schlag seems to overlook the fact that the \textit{Miranda} rule says absolutely nothing about being applied in a context of coercion, hierarchy, and inequalities of wealth and education. The Court held in \textit{Miranda} that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."\textsuperscript{120} The rule delimits the context of application as "custodial interrogation," and although the meaning of "custodial interrogation" can be debated, in general everyone understands that if the police are preventing you from leaving by your own free will and at the same time they are asking you questions, that is "custodial interrogation." In order to change the certainty that emanates from that rule, Schlag has to change the context which the rule mandates; he in effect has to change the rule to a standard in order to move from certainty and predictability to their opposites. Thus, Schlag proves with his own example two things he has set out to negate. First, the \textit{Miranda} rule is a quintessential example of a context-determining norm; the language of the rule delimits in an understandable and generally definable way its context of application. Moreover, Schlag illustrates the force of the virtues and vices vision. What better proof can one find that rules and standards do align themselves with their qualities (their vices and virtues) than Schlag's move. In order to shed the rule-like virtues of the \textit{Miranda} rule and attain standard-like virtues, he had to change the

\begin{itemize}
  \item \textsuperscript{116} Schlag, 33 UCLA L Rev at 407 (cited in note 83).
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id at 407-08.
  \item \textsuperscript{119} Id at 408.
  \item \textsuperscript{120} \textit{Miranda}, 384 US at 444.
\end{itemize}
underlying directive from a rule to a standard.

Schlag offers another example to help illustrate his point that context and not any necessary connection between values and form is responsible for rules and standards exhibiting the virtues and vices attributed to them. 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 . . . ."\textsuperscript{121} SEPA instructed a state agency to "promulgate guidelines specifying 'categories of governmental actions exempt from' environmental impact statements."\textsuperscript{122} The agency adopted a set of rule-like exceptions that included various specific acts of minor road construction.\textsuperscript{123} Problems arose when Seattle made a series of changes to the traffic pattern; Seattle did not file an EIS because it looked as though each distinct act of construction was covered by one of the agency exemptions.\textsuperscript{124} However, when taken as a whole, the construction established "exclusive bus lanes for rush hour traffic" on two of Seattle's main thoroughfares.\textsuperscript{125} Framed in this manner, the construction would seem to require an EIS as a "major action[] significantly affecting the quality of the environment."\textsuperscript{126} Schlag derives from the example the central importance of context in determining whether rules and standards exhibit their reputed virtues and vices. If one describes the construction as the creation of a series of traffic signal changes, then the rule-like exceptions would apply and display certainty, predictability, and stability.\textsuperscript{127} But if one describes the context as the establishment of a rush hour municipal transit system, then the rules lose their characteristic virtues because "arguments can be made either way about whether the actions of the city are covered by the rules or not."\textsuperscript{128} Once the virtues and vices of a particular form depend upon how one describes the context of application, the necessary connection between form and substance is severed.

Schlag's point seems persuasive here until we realize the confu-
sion over the connection between form and substance, rules and standards, and their virtues and vices in the given example stems not from the mutability of context but rather from the presence of two norms with overlapping jurisdiction. The point can be seen by positing the same construction twice where the first situation is governed exclusively by the agency's rule-like exceptions and the second situation is governed exclusively by SEPA's standard-like norm for when environmental impact statements are required. In the first situation, we apply the rules to the fact situation and conclude that no environmental impact statement is required because each distinct act of construction falls within one of the rule-like exceptions. The rules thus exhibit the characteristic virtues of certainty, predictability, and stability, but they also exhibit in the inability to comprehend the larger impact of the construction the characteristic vices of intransigence and rigidity. In the second situation, we apply the SEPA standards calling for impact statements for "actions significantly affecting the quality of the environment" and discover the presence of the traditional standard virtues of flexibility and individualization and also the traditional vices of indeterminacy and excessive discretion.

So again Schlag's chosen example actually proves the power of the vices and virtues vision. An independent application of the two forms of directives illustrates substantive consequences. It is only when the SEPA standard and the agency rule-like exceptions are combined to be applied to the same fact situation that we become unclear (not of how the two norms will be applied individually to the facts) but which of the two norms should trump. Again we see the text, both the standard and the rule, defining its context perfectly. The problem is they both define the same context. The solution to such problems of dual application is not an endorsement of the contextualized subjectivity of the vices and virtues account but rather a method for prioritizing the norms. That is the solution the Appeals Court chooses to resolve the SEPA dispute,129 and that is the solution that resolves any complications, within the context of the application of both a rule and a standard to the same fact situation, to the view that a choice of form is also a choice of substantive values inherently connected to that form.

In addition to one more attempt at illustrating the context-bound nature of any substantive attributes we may ascribe to the

129. Id.
different forms of a legal directive,130 Schlag concludes his deconstruction of the vices and virtues vision by attempting to show the indeterminacy of any correlation between substance and form "from another angle."131 This angle uncovers the necessity that rules and standards, in order to exhibit the primary substantive qualities attributed to each, must also contain tendencies toward the opposite of those characteristics. For rules, certainty requires the language of the rule to delineate a field of application and attach determinate consequences to that application.132 But 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."133 Thus we see the rule-like quality of certainty having its origin in, or at least coexisting alongside with, the more standard-like quality of flexibility. Similarly, rules can be said to be certain within their scope of application, but this banishment or deferment must create uncertainty outside the rule's scope of application. To say a rule produces certainty, then, is to privilege the rule's effects on one sector of the social world without taking into account its opposite effects on the remaining part of the social world.134

Standards suffer a similar fate. Standards are said to be open-ended, but if the meaning or content of the standard does not in some sense remain fixed and reflect some degree of constancy, the standard quickly moves from being open-ended to being meaningless.135 Additionally, we champion the flexibility of standards, and this flexibility is often manifested in such standard-like constructs as "balancing" or "totality of the circumstances" tests.136 But a

130. Schlag asserts that we support the use of the reasonable person standard in torts because of the need to have a norm adaptable to the multitude of varied situations found in tort law. But Schlag asserts that we could just as easily reframe the variety of situations as different component parts, such as automobile accidents and recreational activities, and then we could frame rules to govern each of these subdivisions. How you frame the context, Schlag argues, determines the attributes of the norm. Yet, the example of strict liability as an alternative rule to replace the reasonable person standard, and the use of a standard within the component parts that Schlag says are more amenable to rules, indicates that context has very little to do with the attributes connected to the form of a norm we choose. Id at 415.
132. See id.
133. Id.
134. Id at 414.
135. Id at 411.
136. Id at 413.
closer look at how these tests are actually applied by judges reveals that their very flexibility leads decision-makers to fall back upon stable norms such as precedent, and "precedent boundedness is inflexible."\textsuperscript{137}

Schlag concludes that once we introduce flexibility in order to achieve certainty and stability in order to achieve open-endedness, the original core attributes of rules and standards become so clouded with their opposites that "we lack any basis for claims such as 'rules provide more certainty than standards,' or 'standards are more open-ended than rules'."\textsuperscript{138} Schlag's claim, however, represents nothing more than a frontal assault on a "straw man" via the tool of absurd reductionism.

No one would doubt that a rule has to be flexible enough to be applied to more than one fact situation; otherwise the directive would lack generality and fall outside the definition of law. Similarly, a rule by definition does not control the sector of the social world outside its field of application, and that sector could be filled with uncertainty as a result if no other rules are directed to controlling that sector. Standards no doubt embody some degree of stability and constancy or risk being as indeterminate as the absence of a norm altogether. Moreover, inflexible precedent will always be a part of law whether the norm is a rule or a standard. But to argue as Schlag does that the above observations necessarily undermine any attempt to generalize about tendencies and probabilities in the correlation of substantive values to form is to embrace the slippery slope in the face of strong practical and logical considerations that counsel otherwise. Values such as certainty and flexibility are not fixed points to be attained or lost. Rather, they are values that exist on a continuum. Schlag's mistake is to confuse adjustments within the framework of a particular value's continuum as a transfer from one value continuum to another.

For example, to say that standards have to have some degree of certainty and stability in addition to their traditional characteristic of flexibility could mean one of two things. We could be making an adjustment on the continuum of flexibility from the original position, designated as "more flexible," to the modified position, designated as "a little less flexible." Alternatively, we could actually be making a gigantic leap from the continuum of flexibility to the continuum of certainty. The latter is Schlag's position, but its only

\textsuperscript{137} Id.
\textsuperscript{138} Id at 411.
Critical Theorists claim to truth lies in some rarified theoretical field because an analysis of concrete rules and standards, like Schlag's own example of the two forms controlling noise, shows that they remain affixed to the values we associate with them. Through this prudential observation of what in fact results, we can reason back that any adjustment from certainty to flexibility with regard to rules, and vice versa with regard to standards, was in fact an adjustment within the single continuum rather than a jump to the opposite value's continuum. Perhaps Schlag's analysis leads us to adjust our views on the amount of certainty that can be attributed to rules and the amount of flexibility that can be attributed to standards, but we emphatically retain our ability to make relative assessments concerning which form displays more of which value.

IV. OF LAW AND POLITICS

Schlag presents a convincing argument for the pervasiveness and intractability of the rules versus standards debate. It is indeed an arrested dialectic. But Schlag's conclusions regarding the implication of that debate for the quality of legal argumentation seem much less persuasive. Rather than deriving a sense of futility, shallowness, and formalism from legal argument, it seems that the rules versus standards debate concerning the form of a legal directive is a fissure that begins in the realm of form but runs to the very core of substantive conceptions of society and our own lives.

We thus return to Kennedy's thesis and embrace the proposition that the forms we choose to convey our substantive legal norms are not mere neutral vessels. Rather, the forms themselves display close affinities to the very substantive arguments that we put forth for and against the substantive content of those norms. So, for example, we may have a debate through our political process over the appropriateness of government subsidies for an ailing corporation like Chrysler. The individualist argues that it is beyond both the moral and practical duties of the "nightwatchman state" to bail out a failure of the marketplace. Sanctioning such governmental intervention is an abandonment of the principle of governmental neutrality toward conduct and activity that is patently non-threatening to community safety and order. When government becomes involved in the economic marketplace, private choices are displaced by the collective will of the state. We as individuals no longer act as arbiters of our ends; rather, we are subjected to the

139. See notes 111-12 and accompanying text.
tyranny of "group consensus" about ends and therewith sacrifice our standing as autonomous beings. 140

The altruist counters that we exist as a political association to cultivate common bonds and explore the deeper contours of connectedness. To fail to offer help to an ailing comrade (here the sympathy is not for the mega-corporation but rather for the neighbor who will lose her job) is a rejection of our common quest for a more humane, just, and moral existence.

This debate within our political process over substantive policy, it is argued, replicates, or is replicated in, our arguments over whether to frame a norm as a rule or a standard. That debate over form would contain similar allusions to the principles of the competing rhetorical modes. Rules, it would be said, provide the clarity, predictability, and certainty to allow private actors to determine the spheres where their activity would be allowed to proceed without legal interference. This same certainty of language limits the judge's discretion in deciding the case; citizens are thus subject to the rule of law 141 rather than the whims of a fellow human being. Standards, it would be countered, yield the flexibility and open-endedness necessary to deal properly with the many and varied situations and conflicts that arise in social life. Only through standards can we hope to secure the equitable justice and moral imperatives that we all feel and strive for as human beings.

Kennedy, thus, makes a powerful argument for the interconnectedness of legal argument about form and substance. We are also pulled by his assertion of the irreconcilability between the individualist/rules mode and the altruist/standards mode. Each one of us no doubt feels the need for certainty and predictability concerning the incidence of legal intervention as well as the impor-

140. For example, Paul M. Weyrich and William S. Lind, The Quiet American Revolution, Boston Globe 23 (Feb 2, 1991). "[I]n the past several years, we have been going through a second American Revolution. It has been a quiet revolution, but it is a revolution that abandons individual rights in favor of group rights." Id.

141. The individualist will not endorse the argument that the only legitimate law is that created by the legislature. Judges make law, but it is important for the individualist that the law the judge makes be in the form of a rule in order that future judges will be constrained by that rule and not be free to take advantage of the flexibility of a standard. See Scalia, 56 U Chi L Rev at 1178-80 (cited in note 5) (arguing that while standards tend to yield the "right" answer in particular cases, perfection is just one of a number of competing values, including the appearance of equal treatment, predictability, judicial restraint, and judicial courage, and rules are better suited to secure these other values). But see Robin West, The Supreme Court, 1989 Term- Forward: Taking Freedom Seriously, 104 Harv L Rev 43, 45 (1990) (classifying Scalia's focus on the need for certainty and order in social relations as "antiliberal").
tance of flexibility and individualization in striving for a more just social order. Kennedy concludes from the persuasiveness of both sides of the debate that the characteristic feature of legal argument is not "reasoned elaboration" or resort to some other meta-norm. Rather, law is at its core an experience of choice. As Kennedy asserts, his project "is to break down the sense that legal argument is autonomous from moral, economic, and political discourse in general." Individualism and altruism are, for Kennedy, tools to reveal the preeminence of policy in formal and substantive legal arguments. And Kennedy illustrates his faith in this conception of our legal universe by exercising his own choice in aligning himself with the altruists: "I believe that there is value as well as an element of real nobility in the judicial decision to throw out, every time the opportunity arises, consumer contracts designed to perpetuate the exploitation of the poorest class of buyers on credit."

We are reminded of the arbitrariness of our choice about law by Kennedy's action, for his own choice of alignment does not follow from a reasoned elaboration of his position. Rather, the whole article is devoted to fairly relating the attributes of the two rhetorical modes that Kennedy believes inform moral, political, economic, and legal life in our country. So Kennedy's position in this article, as in life, derives from desire, not reason: when one is faced with an option involving two equally compelling alternatives, the role of reason loses its importance because it is precisely the purview of reason to attack the notion of equality by making distinctions based on logic. If one assumes or empirically verifies the equality between the options from the outset, reason loses its utility and is replaced by desire.

But I do not believe Kennedy carries the weight of his argument. To be sure, we are much in debt for the explanatory power of his rhetorical modes of individualism and altruism in synthesizing the two most common positions in intellectual, political, and economic life. Moreover, Kennedy's assertion that the arguments we give for the adoption of norms in the form of rules and standards correspond to these two rhetorical modes seems extremely persuasive.

142. Kennedy, 89 Harv L Rev at 1724 (cited in note 50).
143. Id at 1777.
144. Indeed, the literature supports Kennedy's asserted tension between rules and standards and the substantive arguments we put forth in support of each. For analyses suggesting that the tension creates a cyclical alternation in law between the two forms, see Rose, 40 Stan L Rev at 580 (cited in note 5) ("[t]his paper is about the blurring of clear and distinct property rules with the muddy doctrines of 'maybe or maybe not,' and about the
Yet, we must consider closely his conclusion from the reality of competing visions that law is nothing more than an extension of the policy arguments that we make in the fields of morality, economics, and politics. In fact, what Kennedy has done is to attribute one of the tenets of altruism (law is and should be a matter of moral and political choice) to the entire debate between individualism and altruism. That move may by itself be accurate, but Kennedy then assumes without proving the final step in the argument that law is politics: the critique of the internal logic of individualism. For it is the strongly held belief of individualists that law can be determinate and neutral; it is not a matter of contingency or choice. For Kennedy to succeed in his quest, it is not sufficient to say that the individualist position on the nature of form and substance in legal argument is part of a larger debate with altruism, a debate where we all assertedly feel sympathetic to both sides. That point merely restates the obvious central feature of a democratic system that for law to become law, for society to bind itself to a substantive norm and agree to abide by its sanction, we as a people must politically choose it in a more or less majoritarian way. The foundational point of individualism remains intact. Once we choose our law and frame it as a rule, the wide gulf of choice that Kennedy says characterizes legal argument disappears. We can certainly quibble about the amount of discretion involved in the application of our legal rules, the individualist would say, but even if one assumes a fairly broad spectrum of results within which a decision-maker could come up with a reasonable decision given the language of the norm, that process is a long way from the mere replication through legal argument of one’s political or moral will.

reverse tendency to try to clear up the blur with new crystalline rules”) and Richard A. Epstein, Property and Necessity, 13 Harv J L & Pub Pol 2 (1990) (arguing that property law is best understood as a dynamic between exclusive rights and basic first possession rules and exceptions to those rules based upon necessity and which are “a little bit frayed at the edges”). For a more linear perspective, see Henry Sumner Maine, Ancient Law (J Murray, 1915) (“the movement of progressive societies has hitherto been a movement from status [i.e. standards] to contract [i.e. rules]”) and P. S. Atiyah, From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law, 65 Iowa L Rev 1248 (1980) (arguing that we are moving away from a rule-oriented, hortatory function for law toward a more standard-oriented, dispute resolution function). For a discussion of the tension as it is displayed literarily through Shakespeare’s The Merchant of Venice, see Roberto Mangabeira Unger, Knowledge and Politics, ch 2 (Free Press, 1975), Charles Fried, Contract as Promise: A Theory of Contractual Obligation 90-91 (Harvard, 1981), and Richard A. Posner, Law and Literature: A Misunderstood Relation 91-99, 107-08 (Harvard, 1988).

145. For example, Ken Kress, Legal Indeterminacy, 77 Calif L Rev 283 (1989) (arguing that critical legal scholars’ arguments for radical indeterminacy are unfounded and that moderate indeterminacy does not undermine the law’s legitimacy).
The structure of Kennedy's error can be seen more clearly through an analogy. Assume two chefs want to create a dish of cole slaw. But they differ in what each asserts to be the proper recipe. One chef says that cole slaw consists only of cabbage and mayonnaise. The other chef disagrees, asserting that a much broader range of ingredients goes into the creation of the dish. Then a culinary reporter, writing a story on the disagreement, concludes that the proper recipe for cole slaw must be the common denominator between the two competing recipes. The common denominator becomes the more complicated recipe for cole slaw because it incorporates everything in the simpler recipe and more.

The minimalist recipe is the individualist position on law. Law is simply a matter of the words of the norm, and to be clear about those words we should adopt rules rather than standards, combined with a process of reasoned elaboration to discover and implement the meaning of those words. The more complicated recipe is the altruist position on law. Far from being result-determining, the words of a norm can be interpreted in multiple ways. And we should foster that aspect of law by framing our norms as standards rather than rules, because law should be an affair of choice. It should represent the amalgamation of society's moral and political beliefs as applied to a particular legal incident. Kennedy is the culinary reporter, gleaning from the dispute over the "is" and "ought" of law that law is really a matter of policy choice. If it is simply a matter of policy, we might as well choose the conception of law that tastes the best. Thus we see Kennedy endorsing judicial nullification of contracts that involve wide class disparities between the parties.

Perhaps Kennedy believes that his work illustrating the connection between the form of a legal directive and the substantive modes of individualism and altruism supports his conclusion that legal discourse is merely policy discourse. And it seems convincing that if rules are connected to the political, moral, and economic arguments of individualism, and if standards are linked to the counterarguments of altruism, then law is merely a porous medium for those very policies. However, to say that rules derive from and yield individualist policies is simply to state the proposition that rules are and should be distinct from those very policies. That is to say, the substantive content of rules undoubtedly embodies the policy preferences of our community. But the individualist project is to have those policy preferences applied in a way that is apolitical, and rules provide the lingual constraint on the decision-maker.
necessary to accomplish that objective. So for Kennedy to be successful in arguing that law is politics, he would have to attack the underlying assumptions of individualism that the language of the law is a constraint on the exercise of the policy preferences of the decision-maker. Kennedy and other Critical Legal Studies critics of liberal law have made such arguments elsewhere. Whether he has been successful in such a project goes beyond the scope of this work. I wish to propose here that Kennedy's insight regarding the connectedness of legal form, of rules and standards, to the fundamental visions of how we should live does not accomplish the goal.

146. For example, Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U Pa L Rev 1349 (1982).