BEHAVIORAL ANALYSIS AND LEGAL FORM: RULES VS. STANDARDS REVISITED

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[Excerpts and Footnotes Omitted]

When lawmakers make legal pronouncements, they must decide not only on the substance of the pronouncements, but also on their form. The choice of legal form has long been described as a choice between "rules" and "standards."[1] Rules state a determinate legal result that follows from one or more triggering facts.[2] The 65 mile per hour (mph) speed limit is a rule. If a driver travels faster than 65 mph, he has violated the law. If he travels at 65 mph or less, he has not violated the law. No other circumstances are relevant to the legal consequences of the driver's act. Standards, in contrast, require legal decision makers to apply a background principle or set of principles to a particularized set of facts in order to reach a legal conclusion.[3] A law requiring drivers to travel "no faster than is reasonable" is a standard. To determine whether the driver has or has not violated the law, an adjudicator must investigate the range of relevant driving conditions and apply the background principle of reasonableness to the situation.

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Legal pronouncements can be classified as rules or standards on the basis of their clarity prior to an incident that invokes the legal system either directly through adjudication or indirectly through negotiations that take place in the shadow of the possible resort to adjudication. Rules establish legal boundaries based on the presence or absence of well-specified triggering facts. Consequently, under a rule it is possible for citizens (with good legal advice[7]) to know the legal status of their actions with reasonable certainty ex ante. Standards, in contrast, require adjudicators (usually judges, juries, or administrators) to incorporate into the legal pronouncement a range of facts that are too broad, ***26** too variable, or too unpredictable to be cobbled into a rule. Consequently, under a standard, citizens cannot know with certainty ex ante where a legal boundary would be drawn in the event a set of specified facts come to pass.[8] Stated in these simple terms, rules and standards can be viewed as dichotomous forms of legal pronouncements. For example, the pronouncement that "mothers are entitled to custody of minor children in the event of divorce" is a rule, whereas the pronouncement that "custody is determined based on the best interests of the child" is a standard.

In real world situations, however, the distinction between rules and standards is often less extreme, and the two types of legal forms are better understood, as a descriptive matter, as endpoints of a spectrum than as dichotomous categories. A rule that is applied consistently without variation can be called a "pure rule."[9] Most rules have qualifications or exceptions, which is to say that certain triggering facts may invoke the rule but additional, second-level triggering facts may negate the rule. The mere presence of exceptions may be said to make the rule complex, and it may be argued that complexity alone does not reduce a rule's purity per se.[10] For example, a pronouncement that "a divorcing mother is entitled to child custody except when she is addicted to drugs, in which case the father is entitled to custody" would be complex because of the exception to the general rule, but it would still be a rule. The legal entitlement of custody can be discovered ex ante even under the more complex rule, at least assuming competent legal advice, with the caveat that language is always subject to some ambiguities on the margin (e.g., what is "addiction" ?).

The more qualifications and exceptions a rule has, however, the more likely it will be applied unpredictably. When adjudicators ***27** frequently develop new exceptions to rules, the legal consequences of actions become less predictable ex ante and, by definition, the rules themselves are less pure.[11] If lawmakers announce unpredictable exceptions to a rule infrequently, the law may still be classified as "rule-like" in nature, although shading somewhat toward the "standard" end of the legal form spectrum. For example, if exceeding the 65 mph speed limit is usually seen as a per se violation of the law, but courts occasionally excuse drivers who speed to avoid striking another car or to deliver a sick friend to the hospital, the speed limit is still properly labeled a rule, although it isn't a pure rule. As the frequency of unpredictable exceptions to a rule increases, however, the law comes to resemble a standard more and more (such as when the speed limit is 65 mph except in frequent cases in which judges excuse faster driving), and eventually disappears into a "gray area," in which it is difficult to classify the law as a rule or a standard.[12] At the extreme, when a rule is enforced rarely or randomly, it can be said that the law's form has migrated across the legal form spectrum and become a standard. For example, if courts will enforce a rule that mothers are entitled to custody only after reviewing all the unique circumstances of a divorce and determining that the rule should not be abrogated for some reason, it is more appropriate to classify the law as a standard.

A "pure standard" is a legal pronouncement that specifies no triggering facts that have defined legal consequences.[13] The basic negligence requirement of acting as would a "reasonable person" is close to a pure standard. The legal pronouncement specifies no facts that would automatically trigger a finding of negligence, and no facts that would trigger a finding of non-negligence. Furthermore, ***28** the standard does not even identify facts that would be evidentiary of either outcome.

Multi-factor balancing tests are less pure and more rule-like than requirements of "reasonableness" because they specify ex ante (to a greater or lesser degree of specificity) what facts are relevant to the legal determination. They still fall on the "standard" side of the spectrum, however, because they do not specify how adjudicators should weight the relevant factors.[14] Consequently, citizens often cannot know with certainty ex ante whether a particular action will be classified ex post as within or beyond the legal boundaries.

Consider, for example, the famous case of Tunkl v. Regents of the University of California, in which the court pronounced that it would not enforce a contract clause that exculpates the negligence of a service provider when doing so violates public policy.[15] Had the Tunkl court announced only this principle, it would have established a pure standard, one with no fact-specific guidance. The Tunkl court, however, specified six factual characteristics relevant to a finding that an exculpatory clause would violate public policy.[16] The presence of the "Tunkl factors" moves the legal pronouncement out of the realm of a pure standard, because the factors identify the types of facts that are relevant to the determination. This means that in some ***29** circumstances, i.e., when none of the Tunkl factors are present, adjudicators can resolve disputes without resort to general principles. But Tunkl is still appropriately labeled a "standard" because in most circumstances the pronouncement alone does not clearly resolve whether courts will enforce an exculpatory clause.

Just as a pure rule can become standard-like through unpredictable exceptions, a pure standard can become rule-like through the judicial reliance on precedent. Imagine a pure standard that specifies landlords must provide "habitable" apartments, and that, based on this standard, a court rules that a landlord who did not provide heat has failed to meet the standard. If a second court, and even a third and a fourth, reaches the same result under identical facts based on its de novo interpretation of the standard, the legal pronouncement remains a standard, albeit one that has been applied consistently. But if the second court relies on the first court's decision for the proposition that apartments without heat are per se uninhabitable, the standard has become modified by a rule when a certain triggering fact is present.[17]

The extent to which the legal pronouncement may still properly be termed a standard depends on the extent to which other facts are also relevant to the habitability determination. If insect infestation, inconsistent running water, and leaky roofs may or may not violate the law, depending on the circumstances, the habitability requirement is still predominantly a standard, although not a "pure" one; triggering facts are determinant in one circumstance (temperature control), but otherwise fact-intensive investigation is necessary. If the presence or absence of a violation of the habitability requirement is always determined by reference to the presence or absence of specified triggering facts, what might have begun its life as a pure standard can be said to have crossed the spectrum and become nearly a pure rule.

***30** The legal forms of rules and standards, then, are better understood as spanning a spectrum rather than as being dichotomous variables.[18] Not all rules are pure rules; exceptions can render them standard-like in some circumstances. Similarly, not all standards are pure; reliance on precedent can make standards partially rule-like. At a certain point, rules can become so riddled with unpredictable exceptions that they are as much standard as rule, and standards can become so determinate that they are as much rule as standard; these composites reside in the "gray area" at the center of the spectrum. In more extreme cases, standards can become so determinate that they are transformed into rules, and rules so unpredictable that they are transformed into standards.[19]

Despite this fluidity, however, it is possible to classify most legal pronouncements as standards or rules, based on their core characteristics. Under rules, outcomes are determined by the presence or absence of triggering facts that can be specified ex ante; under standards, outcomes require situation-specific factual inquiries and/or balancing of competing factors. These different core characteristics of rules and standards translate into different costs and benefits that policy makers should consider when selecting a legal form.