The Tyranny of Choice and the Rulification of Standards

FREDERICK SCHAUER*

I.

It is a commonplace that there is a distinction between rules and standards.[1] Although the distinction is a matter of degree, it is generally accepted that what we conventionally call rules are directives that are comparatively precise, with most of the substantive chocies being made by the crafter of the directive at the time of the drafting, and with the interpreters, enforcers, and subjects of the directive making largely mechanical decisions by applying easily ascertainable facts to crisply formulated directives. The typical numerically formulated speed limit is the classic example, for when the directive is "Speed Limit 65," drivers

* Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University. An earlier version of part of the argument here was a portion of *The Convergence of Rules and Standards*, [2003] NEW ZEALAND L. REV. 303, and had earlier been presented when I was Legal Research Foundation Distinguished Visitor at Auckland University, Auckland, New Zealand. Yet earlier versions were presented as a Keynote Addressat the Workshop on Administrative Law of the Association of American Law Schools, as a Faculty Colloquium at the Emory University School of Law, and at the Seminar on New Directions in Regulation at the John F. Kennedy School of Government. In its most recent incarnation, this project formed part of my Willard Pedrick Lecture at the Arizona State University College of Law on January 21, 2004.

1. Highlights of the voluminous literature include LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 29–30 (2001); Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191 (1994); Alan Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Russell Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standard Revisited*, 79 OR. L. REV. 23 (2000); Pierre Schlag, *Rules and Standards*, 22 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term: Foreword; The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1976).

(the subject), police officers (the enforcers), and traffic court judges (the interpreters) all have a pretty good idea as to whether an item of primary behavior does or does not violate the rule. Such rules are of course ubiquitous, and even the briefest glance at the United States Codes or the Code of Federal Regulations reveals items such as section 16(b) of the Securities Exchange Act of 1934,[2] with its prohibitions on "short swing" trading being keyed to the ownership of 10 percent or more of a registered company and the purchase or sale or sale and purchase taking place within a six month period, and the requirement that on all construction sites with "[m]ore than 20" and "fewer than 200" employees there shall be no less than "[o]ne toilet seat and one urinal per 40 employees".[3]

In contrast to rules, which reflect choices made by the rule-maker, what are conventionally called standards leave most of the important choices to be made by the subject, the enforcer, or the interpreter, and leave them to be made at the moment of application. When Congress prohibits any "contract, combination, or conspiracy in restraint of trade," or when the Securities and Exchange Commission proscribes "any device or artiface to defraud," or when the Constitution forbids "unreasonable search and seizures," it is well understood that many determinations are left open. Determining what counts as a combination in restraint of trade, a devide to defraud, or an unreasonable search is left indeterminate by the original crafter of the directive, leaving the details to be worked out upon application by the enforcer or interpreter, presumably in light of all the relevant circumstances of a particular event.

Although this distinction between rules and standards is tediously famililar, far less attention has been paid to the adaptive behavior of enforcers, interpreters, and addressees of both rules and standards when they must work with these differently framed directives. And insofar as there has been attention to the adaptive behavior, almost all has been focused on the rules side of the rules-standards divide. From the American Legal Realists to the present, legal theorist have devoted some attention to the ways in which seeminly crips rules may have their edges rounded upon application, interpretation, or enforcement. Whether it be the ability to engraft exceptions at the moment of application,[4] or draw on extra-rule considerations of particular exigency in order to override the strictures of a rule,[5] or look at the purpose behind a rule when the

2. 15 U.S.C. § 78p(b) (2000).

3. 29 C.F.R. § 1926.65, tbl. D-65.2 (2002).

4. *See* Alfred A. Aman, Jr., *Administrative Equity: An Analysis of Exceptionis to Administrative Rules*, 1982 DUKE L.J. 277.

5. On rules as presumptive in just this way, see FREDERICK SCHAUER, PLAYING

language appears to produce the wrong result,[6] or make decisions that appear reasonable even if they are in some tension with a rule's language,[7] such legitimate[8] techniques of rule-avoidance are a routine part of the (especially American) legal environment, the consequences of which is that even at the extreme rules end of the rules-standards continuum rules turn out to be considerably less ruly than a strictly formal and linguistic account of rules would accept.

What has attracted far less attention, however, it the opposite phenomenon. We know that rules may become more standard-like in application, but what of standards? At first blush we might suspect that standards are commonly perceived as being just right as they are. After all, the driving force behind virtually all of the academic glorification of the softening of rules is that judges, especially, and also most other interpreters and enforcers, prefer to make their own choices and thus bridle against rule that would deprive them of choice and that would lead them to decisions other than the best all-things-considered decisions they would otherwise have reached. If this is so, then we might supsect that when standards say to enforcers and interpreters that they should simply do what they think best under the circumstances, or some variation on that theme, then those enforcers and interpreters would in essence say, "Thank you," using the mandate of a standard to engage in persistent discretionary, context-specific, and case-specific decisions-making.

Although this embrace of standards on the part of interpreters and enforcers is what we might expect, it turns out that in a vast number of cases that this is not what has transpired. Rather than embracing standards as the logical corollary to resisting rules, interpreters and enforcers have systematically resisted standards almost as much as they have resisted rules, sharpening the soft edges of standards just as they have rounded off the crisp corners of rules. Whether it be by importing

---

BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

6. *See* Aharon Barak, Purposive Interpretation in Law (unpublished manuscript 2002).

7. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

8. To repeat, my sense of legitimacy here is neither normative nor moral. It is simply the question of what decision-makers can do wthout being widely regarded as departing from their role or their professional obligations. A Supreme Court Justice who relies on purpose even at the expense of statutory plain m eaning is, at least in the United States, acting legitimately in this sense, but a Justice who reaches the same result on authority of astrological tables is not.

rules from elsewhere,[9] or imposing rules of some sort on their own otherwise unconstrained decision-making, or filling decisional voids with three- and four-part tests, interpreters and enforcers of standards have tried to convert those standards into rules to a surprising degree, surprising especially because the effect of such action is to constrain the very choices that those interpreters and enforcers would otherwise have had, and thus in part to falsify the belief throughout modern American legal theory that enforcers and interpreters relish choice, and the more the better.

My goal here is to examin and explain this phenomenon. And in terms of explanation, I will spend relatively litte time on questions of strategic interaction, although such considerations obviously play a role in explaining this phenomenon of self-limitation. But largely because it is less familiar, I will spend more time on the psychology of choice, and on applying recent work in social psychology that suggests that for many people their optimal range of choice is narrower than is often supposed, and that ordinary people resist excess choice as much as they resist excessively constrained choice. If such impulses affect the enforcers and interpreters of rules as much as they affect ordinary people in their daily lives, then we may be able to glimpse part of th reason why standards have tunred out to be as unstable as rules, and why the rulification of standards is as common a phenomenon as is the standardization of rules.

II.

The phenomenon I seek to explain exists in numerous regulatory environments. Some of the classic examples of standards come from federal regulatory law, where it is not uncommon for regulatory directive to be set out, initially, in broad and standard-like terms. The Sherman Antitrust Act prohibits "[e]very contract, combination, . . .or conspiracy, in restraint of trade or commerce."[10] Rule 10b-5, promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, makes it unlawful, *inter alia*, "[t]o employ any device, scheme or artiface to defraud."[11] And even outside of the federal regulatory law, standards are ubiquitous. For three years in the 1990's, Montana relinquished speed limits in favor a a requirement that driving should be "reasonable and prudent."[12] Most states require that custody

9. As with the importation of a statute of limitations for an analogous area when a statute does creating a cause of action is silent on the limitations question.

10. 15 U.S.C. § 1 (2000).

11. 17 C.F.R. § 240.10b-5 (2002).

12. MONT. CODE ANN. 61-8-303 (1996).

and related decisions be made simply "in the best interest of the child." The Constitution of the United States, famously, contains numerous standards, including "equal protection of the laws," "due process of law," "unreasonable serach and seizures," "cruel and unusual punishments," and "commerce among the several states." And until relatively recently most criminal sentencing was largely unconstrained by specific rules, with judges authorized in standard-like fashion simply to impose, within wide ranges, the sentence they thought best in light of the multiple goals of deterrence, rehabiliation, and retribution.

What is surpising in such cases, however, is just how unstable as standards these standards are. Courts have imposed on the standards of the Sherman Act a series of "per se rules" against, for example, price-fixing,[13] tying arrangements,[14] and resale price maintenance,[15] the effect of which is to replace the very open-endedness and context sensitivity of the original standard with the far more mechanical and acontextual application of the per se rule. Although standards pervade the Constitution, the Supreme Court has often converted those standards into comparatively crisp rules, as with the extraordinary explicit directions for police warnings in *Miranda v. Arizona*,[16] the proliferation of three—part and occasionally four-part tests in free speech and freedom of religion adjudication,[17] and the use of discrete categories of suspect and almost-suspect classifications in equal protection analysis,[18] against the objections of those Justices who would have preferred to retain a standard-like sliding scale approach.[19] The "best interests of the child" standard as

13. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

14. Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); United States v. United Shoe Machinery Co., 247 U.S. 32 (1918).

15. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1976); Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

16. 384 U.S. 436 (1966).

17. Central Hudson Gas & Elec. Co. v. Public Service Comm'n, 447 U.S. 557 (1980) (four part commercial speech test); Miller v. California, 413 U.S. 15 (1973) (three-part test for obscenity); United States v. O'Brien, 391 U.S. 367 (1968) (three-part test for symbolic speech); Lemon v. Kurtzman, 403 U.S. 602 (1971) (three-part test to determine impermissible establishments of religion).

18. Loving v. Virginia, 388 U.S. 1 (1967) (race); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (gender); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy).

19. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 326 (1976) (Marshall, J., dissenting); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 468 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

been made increasingly more precise, both by courts and law reform institutions.[20] And Montana, after three years, abandoned the "reasonable and prudent" experiment and reverted to a crisp numerical speed limit for its highways.[21]

Although these examples are non-randomly selected in order to help identify and phenomenon and to assist in formulating a genuinely testable hypotheses, we can imagine engaging in this inquiry in a more systematic way. We might, for example, code all new laws or new directives in some environment at Time 1 on a rules versus standards scale, and then examine all of those directives at Time 2 and recode them, as applied, and then determine whether the phenomenon of shifts of standards into rules was greater than the phenomenon of shifts of rules into standards. Or we might test the hypothesis in a more experimental way, giving one group of decisionmakers a rule on some topic, giving another similarly constituted group a standard on the same topic, and them asking both groups to make decisions on the same array of factual scenarios and to record the decision-making processes, as a way of trying to determine whether the phenomenon of the migration of standards to rules was more frequent and more powerful than the admittedly occurent phenomenon of the migration of rules to standards.

Just to make clear my claim, I do not now purport to have engaged, even roughly, in anything like the foregoing serious empirical test. Nevertheless, a preliminary look at the domain of regulation and at the domain of rules and standards leads to a formulation of a hypothesis about the adaptive behavior of interpreters, enforcers, and addressees or rules, one in which I hypothesize the phenomenon of skewed convergence, such that rules migrate to standards and standards migrate to rules, approaching a point of convergence,[22] but that, at least assuming starting points roughly resembling the starting points we find in the American legal environment, we will find that the point of convergence is much closer to the rules ends of the rules-standards continuum than to the standards end. In other words, I offer the hypothesis that there are forces pushing standards towards rules that are stronger than the forces pushing

---

20. *See* Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855 (1999).

21. MONT. STAT. ANN. 61-8-303 (1999). There was in the intervening period a court decision invalidating the "reasonable and prudent" standard on vagueness grounds, State v. Stanko, 974 P.2d 1132 (Mont. 1998), but the full context makes it clear that this decision is best seen as a consequence of growing dissatisfaction with the standard rather than as substantially casusal. *See* King and Sunsteing, *Doing Without Speed Limits*, 79 B.U. L. REV. 155 (1999).

22. Implicit in what I say here is that I do not believe that the point of convergence is the efficiency-based, see Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

rules towards standards, despite the fact that the conventional wisdom appears to be just the opposite.[23] At this point, therefore, it may be appropriate to hypothesize, again in advance of serious hypothesis-testing, as to what those forces might be.

III.

If we are looking to see why standards might migrate to rules, a range of strategic considerations come initially to mind.[24] It is true that a decision-maker who converts a standard into a rule is reducing her own discretion and her own choice in future cases, and it would appear that this is against her own interst. But, as is well-known, decision-makers have the potentioal to, and may often, limit their own choices for any number of strategic reasons, one of the most important of which is the combined effect of two different but related phenomena, path dependence and precedent. So when a court, say, makes a standard more precise and limits the choices available to that court in future cases, it also limits the choices available to future courts in future cases. If the current court anticipates that the future court will make more mistaken (from the perspective of the current court) decisions under a standard than the current court anticipates that it will itself be constrained by its own rules to make mistaken decisions, then it will have good reason, assuming its

23. Assuming I am right, the reason for the conventional wisdom being mistaken likely has a great deal to do with the selection effect and the cases or instances whose observation has produced that conventional wisdom. The occasion for converting a rule into a standard is almost always an occasion in which the argument from the rule will be sufficiently obvious that litigation or an otherwise observable and recordable dispute will take place. But the same does not hold for the conversion of a standard into a rule, and thus the frequency of litigation will be less for the conversion of standards into rules than of the conversion or fules into standards. And since the availability (in the Kahnemann/ Tversky "availability heuristic" sense) of litigation ensures that litigation will be more noticed and more written about and more theorized about than non-litigated events, the conventional wisdom, if mistaken, may simply be one more example of the pitfalls of theorizing about the operation of law from the skewed sample of cases that happen to wind up in the appellate courts.

24. I remain agnostic on the empirical question of how often Supreme Court Justices, lower court judges, and various other decision-makers engage in their own immediate-choice-limiting strategic behavior based on the dynamics of interaction with other institutions, or with the future incarnations of their own institutions. *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1977).

interest is in maximizing it own policy preferences over time,[25] in imposing a rule-based costraint on itself. We could formalize this (more accurately, someone else could formalize this), discounting for the fact that neither precedent nor path dependence are insurmountable. Likely going in the other direction, however, is the fact that the court at Time 1 may, if it overestimates its own creativity and underestimates the creativity of others just as it is underestimating its own likelihood of mistakes as it overestimates the likelihood of mistakes of others,[26] assume that the constraint it is imposing on itself by converting a standard into a rule is less than the constraint it is imposing on future courts at Times 2. . .n, even recognizing the slippage in the future of what it is doing now. Although the court at time 1 is very likely mistaken in these beliefts (or at least there is no reason to believe as a formal proposition that the powers of a court at Time 1 are different from the powers of susequent courts at Times 2. . .n), as an explanation of why, psychologically, standards may be converted into rules it works much better than an explanation of the good reasons for converting standards into rules.

Obviously this is not only about courts, and much the same could be said about other decision-makers and other decision-making environments. The phenomenon may be stronger with respect to courts because of the acknowledged constraints of precedent, constraints that other decision-making environments often do not share (even though they share the phenomenon of path dependence), but the phenomenon of decision-makers imposing constraints on themselves in order indirectly to impose those constraints on their less able and less trustworthy successors is widespread, and may explain part of why standards are likely to be converted into rules. Morever, we may now see why the opposite phenomenon is less frequent. Not only is it rare for decision-makers to trust the judgment of their successors more than they trust their own, but decision-makers, like the rest of us, are likely to exaggerate the harms of (others') bad decisions and minimize the benefits of good ones. So although in the abstract we might imagine that our successors will produce some array of false positives and false negatives—decisions made in error and decisions not made that should have been—we are likely to see the former as worse than the latter and thus be more willing

25. This is a widely accepted understanding in the literature, although it is likely somewhere between exaggerated and flat-out wrong. *See* Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000).

26. The work of the sociologist Guillermina Jasso [citations to come] on the way in which estimations of status influence our assessment of the capabilities of unknown others is highly relevant here.

to constrain ourselves in order to prevent disasters by our successors.

All of this assumes that decision-makers who convert standards into rules are thinking only of the same decision-making institution over time, but similar consequences may occurr when we take into account this existence of other, and expecially subordinate, institutions. When the Supreme Court, for example crystallizes its holding in *Miranda v. Arizona* in more-or-less exact instructions for police officers to follow, or embodies its views about obscenity into what it properly understands to be language capable of finding its way into a state stattue and the jury instructions in a criminal prosecution, or announces a per se antitrust rule whose content will eventually be made known to corporate executives, it is taking the position (which it should do far more often, in my view) that the guidance it offers to others—addressees, interpreters in lower courts, enforcers in the police and administratives agencies—is an essential part of its function. From this perspective, a Supreme Court that binds itself in antitrust cases by announcing a per se rule is giving up a small amount of its own future decisional freedom (especially small in areas, like antitrust, in which decisional occasions for the Supreme Court are infrequent) in exchange for considerable guidance to and binding of a far larger number of others at various levels and in numerous future decisional settings. Indulging again in the assumption that influencing policy is a significant part of the motivations of an appellat court, an appellate court that ties its own hands in this way may simply be buying influence on policy at the cost of its own freedomw of future choice.

IV.

Yet however true these and related explanations may be for the phenomenon of the conversion of standards into rules, there is another that may have been the most neglgected. And this is simply the fact that having a great deal of choice—having few constraints on making an all-things-considered decision with as many decisional options as possible—is arguable less desirable to decision-makers themselves than the classic picture assumes.

Consider in this regard some recent research on what nowadays goes by the name of "the tyranny of choice."[27] The basic point is that people desire choice less than is often thought, that excess choice can be disturbing and paralyzing, that having too many options is frustrating

27. *See* BARRY SCHWARTZ, THE PARADOX OF CHOICE, WHY MORE IS LESS (2004).

and suboptimal, and that when faced with too much choice people will seek to narrow the range of choices by quick heuristics. We want decisional guidance, we want a smaller number of options, and we want to have our decisional processes structured. So, to take some amusing examples from recent research,[28] when consumers are confronted in the supermarket with 250 varieties of mustard, 75 kinds of olive oil, and 300 types of jam, they turn out to buy less than if their choice set is smaller. In the abstract they might say that more choice is good, and perhaps might even choose a larger choice set to a smaller one, but they tend to buy less with the larger choice set with the smaller. When in the 1990s Proctor and Gamble reduced the number of varieties of Head and Shoulders shampoo from 26 to 15, both its sales and market share rose dramatically. And when investors are given the option of whether they want a larger or smaller number of options in their retirement plans, they systematically choose smaller.[29] As we now see, and as Dostoevsky's Grand Inquisitor saw more than a century ago,[30] more choice is not necessarily better than less,[31] and decision-makers more than we appreciate, and more than much of the literature on judicial decision-making aprreciates, seek to limite their own choices in the service of numerous objectives.

These objectives are mutliple. At times decision-makers narrow the range of their own choices in part because their preferences among the outcomes are weak. In the context of courts, for example, judges may have strong preferences as between the constitutionality and unconstitutionality of affirmative action, as between the permissibility and impermissibility of flag-burning, and between the availability and the illegality of abortion, but the same cannot be said, as I have explored previously, of the ordinary stuff of statutory interpretation.[32] As a strictly empirical and not evaluative hypothesis, the typical Supreme Court Justice, for example, is more likely to care about the choice between pro-choice and pro-choice positions, or even about the relative merits of George Bush or Al Gore as Preseident, then about this or that interpretation of the Federal

---

28. *See* Sheena Iyengar & Mark Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOCIAL PSYCH. 995 (2000); Sheena Iyengar & Mark Lepper, *Rethinking the Value of Choice: A Cultural Perspective on Intrinsic Motivation*, 76 J. PERSONALITY & SOCIAL PSYCH. 349 (1999).

29. *See* Benartzi & Thaler, *How Much is Investor Autonomy Worth?*, 57 J. FINANCE 1593 (2002).

30. Fyodor Dostoevsky, *The Grand Inquisitor*, *in* NOTES FROM THE UNDERGROUND AND GRAND INQUISITOR 119 (Ralph E. Matlaw, ed., 1960).

31. *See* Gerald Dworkin, *Is More Choice Better than Less?*, *in* THE THEORY OF PRACTICE OF AUTONOMY 66 (G. Dworkin, ed., 1988).

32. Frederick Schauer, *Statutory Construction and the Coordinating Effect of Plain Meaning,* 1990 SUP. CT. REV. 231.

Fungicide, Insecticide, and Rodenticide Act, or one or another understanding of the implications of some section of the Employees Retirement Income Security Act. Now it may be that Supreme Court Justices (and many of the rest of us) are wrong to allocate our interests and our decisional capacity in this way. Resolving contested ERISA determinations may be far more consequential than resolving disputes about whether the First Amendment permits restrictions on flag desecration or public displays of Christmas symbols. But if the issue is not the normative one of what decision-makers ought to be interested in but rather the empirical one of what they are interested in, we should not be surprised to discover that they are interested in some things more than others, and that the topicss they find less interesting (or more complex, or both) are topics expecially susceptible to various choice-limiting heuristics. I have argued before that the recourse to plain meaning may be one of these, but it is also possible that this is just one from among various techniques, all of which might plausibly be put under the general heading of reducing choice, and thus, in many instances, of converting standards into rules.

Even if the decisions are preceived to be important, the lessons of the supermarket aisle are still with us. Decision-makers, even for decisions they themselves perceive to be important, believe that they can decide better and with less anguish if they have fewer options and fewer factors to take into account. To the extent that this belief guides the way in which they shape their own decision-making environments and ther own decision-making algorithms, decision-makers are likely to look for ways to focus their decisions in ways that standards do not and rules do. In seeking to explain why decision-makers appear so often to convey standards into rules, we may need to examine more closely which factors the rules emphasize, and which probably but not certanly irrelevant factors are discarded by the conversion. It may turn out, therefore, that the conversion of standards into rules not only reflects the desire of decision-makers to conserve their decisional resources and thus to make unimportant (to them) decisions more routinized, but also reflect the desire of those same decisions-makers to concentrate their attention and wisdom even within a single decision. When this is so, and I offer it here as litte more than a hopefully testable hypothesis, these decision-makers may bridle at standards and convert them into rules not necessarily to eliminate all of their own choice, and not to reduce their choice set to one, but at least to narrow their range of choices, and narrow the range of factors they need consider, in the service not of makng decisions easier, but of making decisions better.

V.

I conclude with a brief research proposal. We know that, even prior to the introduction of the Federal Sentencing Guidelines, judges in highly discretionary sentencing contexts made rules for themselves, constrained their own discretion, and produced a degree of consistency that was improved, but far less than many people had predicted, by the introduction of formal and highly precise (and highly annoying to the judges) sentencing guidelines. Given that this context is one in which data is highly available, in which strategic interaction with other branches is minimal, in which strategic interaction with future judges is minimal (most of these self-imposed rules being quite formal), many of the standard explanations for imposing self-made rules on a standard-based decisional environment would drop out. Given this, a close look at sentencing decisions will, I predict, provide perhaps the most fruitful arena for testing some of the hypotheses I have tentatively offerend in this paper.