The Convergence of Rules and Standards

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Rules and standards, it is ordinarily assumed, function as alternative forms of directive aimed at serving our regulatory or adjudicative goals. This article presents a "convergence hypothesis" in respect of the two forms of directive, namely, that regardless of the form that regulative directives take — whether they start out as "rules" or as "standards" — there is reason to believe that adaptive behaviour on the part of institutions and individuals entrusted with the interpretation and enforcement of regulative directives will have the effect of pushing "rules" towards "standards", and of pushing "standards" towards "rules", thus in practice collapsing the normal distinction between rules and standards. If this hypothesis is correct, then we may need to rethink the ordinarily assumed importance of the distinction between rules and standards in institutional and regulatory design.

This article is based on a paper delivered at the Legal Research Foundation conference "The Statute: Making and Meaning", held in Auckland in May 2003. Papers and commentaries from that conference will be published in Bigwood (ed), The Statute: Making and Meaning (LexisNexis, forthcoming). The New Zealand Law Review thanks LexisNexis for permission to publish this article here.

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Regulatory directives are a ubiquitous feature of our social existence. Sergeants order privates to stand guard. Parents tell their children to be home by 10. The state of Massachusetts says that drivers must drive at a speed of no more than 65 miles per hour on the Massachusetts Turnpike, but for a three-year period in the 1990s the state of Montana required only that driving should be "reasonable and prudent".\(^1\) The United States Congress instructs the Securities and Exchange Commission to make "rules and regulations governing registration statements and prospectuses",\(^2\) and the Securities and Exchange Commission then directs registrants to file "three copies of the complete registration statement"\(^3\) on "good quality, unglazed, white paper no larger than 8½ x 11 inches in size ...".\(^4\)

The directives we observe in these and countless other instances come in various forms. They may be canonically inscribed, as with the provisions of a written constitution, the enactments of legislature, and the rules of administrative agencies, or they may simply be announced, as with the typical instruction from a parent to a child or a superior to a subordinate. They may be general, as in a standing order governing numerous acts by numerous people, or particular, as with the command given at a particular time to a particular person to perform a particular act. And the directives may be precise, as with the requirements 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",\(^5\) and that "No Person may be Convicted of Treason unless on the Testimony of two Witnesses to the same Overt Act",\(^6\) or they may be vague, as with the directive that visitation rights of grandparents and siblings of children in foster care should be based on "the best interests of the child",\(^7\) and the requirement that "[t]he right of the people to be secure ... against unreasonable searches and seizures ... shall not be violated".\(^8\)

Through all of these permutations in regulatory strategy, a frequently heard theme is that the degree of specificity of the directive is a valuable tool.

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5 29 CFR, §1926.65, Table D-65.2 (2002).
6 US Const Art III, §3, cl 1.
8 US Const, amend IV. Note that generality and vagueness are not the same, nor, therefore, are particularity and precision. The category "insect" is general but (reasonably) precise, while the category "huge bugs" is both significantly smaller (more particular) and substantially vaguer.
in allocating decision-making authority among the rule-maker, the rule-interpreter, the rule-enforcer, and the rule-subject. Specific rules ("Speed Limit 65") allow the rule-maker to make many of the decisions (and thus determine the outcomes) in advance, while vaguer, less specific rules — conventionally called standards ("Drive Carefully") — permit the rule-maker to delegate decisions (and thus outcomes) to the rule-interpreter, the rule-enforcer, or even at times the rule-subject. According to the conventional wisdom, managing the degree of specificity of regulatory directives is an important instrument for managing the degree of discretion to be exercised by those who interpret, enforce, and are subject to rules.

Implicit in the conventional wisdom is a view about the importance of the form of the directive. Manipulating the form of the directive, especially on the dimension of specificity, is thought to be an effective method of managing discretion in a regulatory environment (including but not limited to courts) at the level of institutional design. That such manipulation is possible presupposes that the form of the directive selected by the institutional designer makes a difference, and that it makes a difference because the form of the directive is resistant to the preferences of those who interpret, enforce, and follow rules.

But what if the form of a directive is less resistant than we have imagined? What if directives, regardless of the form in which they are set forth, may themselves be subject to modification in the hands of the very individuals and institutions they are intended to control and constrain? If this is so, then the choice of form may be a less valuable tool of regulatory strategy than is commonly supposed. This is the claim I seek to make here. To use the accepted terminology, I want to suggest that the choice between rules and standards, between specific and vague directives, may not make nearly as much of a difference as is ordinarily assumed. And this is not because there is no difference between rules and standards. There is a difference, but there is also reason to believe that the adaptive behaviour of rule-interpreters and rule-enforcers will push rules towards standards, and push standards towards rules. This is the phenomenon I label convergence, and it is the jurisprudential foundations and empirical occurrence of this phenomenon that provide the focus of this essay. If I am right in what I argue here, then much that we have previously thought about the distinction between rules and standards, and much that we have previously thought about the choice between them as a way of serving regulatory or adjudicative goals, will need to be rethought.

The Basic Distinction

For the sake of familiarity, I refer to the distinction between (comparatively) specific rules and (comparatively) vague ones as the distinction between rules (specific) and standards (vague). The distinction (and its accompanying
terminology) has a wide currency in legal theory, and is no less problematic than similar distinctions. Ronald Dworkin, for example, draws a related distinction between rules (like the Statute of Wills at issue in Riggs v Palmer) and principles (like the "no man may profit from his own wrong" principle that trumped the rule in Riggs), but Dworkin has a curious view about the non-overridability of rules and the necessary overridability of principles that confusingly and mistakenly conflates the dimension of specificity with the dimension of stringency. Some theorists distinguish rules from norms on the basis of their prescriptive force, or on the basis of source rather than of content, but this is an issue of little concern to us here. So although the distinction between rules and standards is not free of difficulties, it will serve well enough for the purposes of this essay.


10 22 NE 188 (1890).


12 Dworkin, ibid at 23–28, claims that rules are both specific and applicable in all-or-nothing fashion, while principles are non-specific and have the dimension of weight. But vague standards are sometimes non-overridable (as with the Golden Rule), and specific rules (like speed limits) can sometimes be overridden in exigent circumstances. Thus, Dworkin mistakenly assumes that the sound distinction between the vague and the specific is congruent with the equally sound distinction between the overridable (prima facie) and the absolute, but we have no reason to believe such congruence exists, either conceptually or empirically. See Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991) 12–14; Raz, “Legal Principles and the Limits of Law” (1972) 81 Yale LJ 823; Schauer, “Prescriptions in Three Dimensions” (1997) 82 Iowa L Rev 911; Tapper, “A Note on Principles” (1971) 34 MLR 628.


15 Chief among the difficulties is the way in which the distinction between rules and standards might be taken to suggest that rules are more constraining than standards without reference to the decisions that might otherwise be taken. For a decision-maker inclined always to grant custody to the mother, a directive to make those decisions “in the best interests of the child” can be quite constraining, precluding a large number of otherwise eligible outcomes. Conversely, “Speed Limit 90”, despite its specificity, would for most people be hardly constraining at all, and might even be less constraining than “Drive with Extreme Caution”. Thus, it makes sense to say that a rule is more constraining than a standard only against a background of stipulated equivalence of antecedent preferences for the rule-follower, and only against a background of rough equivalence between the substantive content of the rule and the centre of gravity of the substantive content of the standard. On the larger question of the way in which the behaviour-controlling potential of rules is dependent upon the
Under the standard picture of the distinction between rules and standards, a rule is quite specific, as with "Speed Limit 55", the typical provisions of a tax code, and the fact that the Vice-President of the United States shall become President upon the death, resignation, or removal of the President. Another good example, and a useful comparison with its far less determinate American analogue, is Article 35(1)(d) of the Constitution of South Africa, which provides:

"Everyone who is arrested for allegedly committing an offence has the right ... to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest; or the end of the first court day after the expiry of the 48 hours; if the 48 hours expire outside the ordinary court hours or on a day which is not an ordinary court day."

No rule, of course, can be infinitely specific. Neither our world nor our language can provide an airtight seal against unimagined or even unimaginable contingencies, a phenomenon that has for centuries been a staple of literature. Shakespeare teased us with "No man of woman born." The philosopher J L Austin asked us to imagine what we would say when confronted with an "exploding goldfinch". And for as long as the potential vagueness of even the least vague of language has been a stock subject in literature, so too has it pervaded legal theory. In the sixteenth century Samuel Pufendorf conjectured about what would happen were a surgeon performing an emergency operation to be prosecuted under an anti-duelling law prohibiting "letting blood in the streets". More recently and more famously, Lon Fuller relied on examples like the respectable but tired commuter prosecuted under

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\[16\] US Const, amend XXV, s 1.
\[18\] Macbeth, Act IV, scene I, line 79.
\[19\] Austin, Philosophical Papers (eds Urmson and Warnock, 3rd ed, 1979) 97. For application of the example to questions relating to the potential breakdown of even the crispest legal rules, see Schauer, "On the Supposed Defeasibility of Legal Rules" in Freeman (ed), Current Legal Problems (1999) 223.
\[20\] This is the phenomenon described by the philosopher Friedrich Waismann as "open texture": Waismann, "Verifiability" in Flew (ed), Logic and Language (First Series) (1955) 117, but it is important to emphasise that "open texture" is not a synonym for vagueness, but is, on the contrary, a reference to the possibility of vagueness in unforeseen circumstances for even the most precise language.
\[21\] Pufendorf, De Jure Naturae et Gentium Libri Octo, quoted in United States v Kirby, 74 US (7 Wall) 482, 487 (1868).
a "No Sleeping in the Railway Station" regulation for nodding off while waiting for his train,\(^\text{22}\) the starving explorers prosecuted for murder for conducting a lottery to determine which of their number the others should consume,\(^\text{23}\) and the military truck incorporated into a war memorial that might have been excluded under the "No Vehicles in the Park" rule.\(^\text{24}\) As H L A Hart put it, all rules have a core of settled meaning surrounded by a penumbra of uncertainty.\(^\text{25}\)

Yet though the penumbra of uncertainty that surrounds even the most precise of rules is ineliminable, the comparative specificity of rules remains apparent. There are circumstances under which I might contest the tax authorities over an interpretation at the fringes of the April 15th deadline for filing one’s tax return in the United States, but it would be implausible to imagine that in the normal course of things I could argue that a May 3rd filing was timely. If the deadline were set simply as “as soon as reasonably possible after the close of the tax year”, however, I might have a better case for May 3rd, just as the Internal Revenue Service would have a better case for February 1st being late, even though both of these positions are almost completely precluded by the April 15th rule.

In contrast to rules, what are commonly called “standards” make few of the decisions at the rule-making level, leaving most to be made at the point and time of application to a concrete set of facts. Famously, the Constitution of the United States contains relatively few rules but numerous standards. Unlike the highly precise criminal procedure rules in the South African Constitution, one of which is quoted above, the analogous provisions in the United States Constitution rely on elements such as “unreasonable searches and seizures”, “due process of law”, “speedy and public trial”, “excessive bail”, and “cruel and unusual punishments”. Other parts of the Constitution prohibit the “establishment of religion” and “abridging the freedom of speech”, and guarantee the “Privileges and Immunities” of citizens of the United States and “the equal protection of the laws”. Similarly, the common directive to judges and other officials in American child custody cases instructs those judges to make the decision that is “in the best interests of the child”, the Sherman Antitrust Act outlaws “[e]very contract, combination ... or conspiracy, in restraint of trade or commerce ...”,\(^\text{26}\) and Rule 15(a) of the Federal Rules of Civil Procedure permits leave to amend a court filing when “justice so requires”.

\(^{22}\) Fuller, “Positivism and Fidelity to Law — A Reply to Professor Hart” (1957) 71 Harv L Rev 630, 664.

\(^{23}\) Fuller, “The Case of the Speluncean Explorers” (1949) 62 Harv L Rev 616.

\(^{24}\) Fuller, above note 22, 663.


\(^{26}\) 15 USC, §1 (2002).
Just as rules are not infinitely precise, nor are standards infinitely vague. “In the best interests of the child” is more constraining than “the best decision, all things considered”; prohibitions on “unreasonable searches and seizures” and “excessive bail” have more specific content than a simple mandate to do “justice” in criminal proceedings; and the vague proscriptions of the Sherman Act are less vague than a simple prohibition on “unfair” business dealings. But although rules are not infinitely precise, and standards not infinitely vague, the distinction between rules and standards can be understood as the extremes of a continuous spectrum of “ruleness”, with rules representing the maximum and standards the minimum. And although there are of course intermediate cases, the existence of cases at the borderline between rules and standards no more undercuts the distinction between them than the existence of dusk undercuts the distinction between night and day.

Rules, Standards, and Regulation — the Conventional Wisdom

The choice of rules over standards, or standards over rules, is often thought to be an important part of the regulatory toolbox. More accurately, selecting the optimal point on the rules—standards spectrum is widely understood to be a crucial decision in institutional design.27 One reason that this is so, less important here, is that rules made in advance tend to be blunt instruments, grouping the virtually inexhaustible variation of human experience under easily accessible headings. “Speed Limit 65” dampens relevant variations in driving ability, traffic, weather, and road conditions, but people are still on notice as to what is required. Consequently, rules are typically thought to bring the virtues of predictability and simple application at some cost to producing the optimal result or optimal justice in the individual case. Conversely, standards are said to facilitate the ease of case-by-case optimisation, but at some cost to the possibility of predicting in advance what the result is likely to be.28

More importantly, however, rules are commonly thought to be instruments of constraining discretion, while standards are the devices by which we grant it.29 A judge instructed to reach the decision that is “in the best interests of the

child” is permitted to determine custody on the basis of his or her own judgment about what factors would advance the best interests of a child and the extent to which those factors were present in a particular case before the court. A police officer authorised to cite those drivers who are driving unsafely has considerable freedom to decide which driving behaviours under which conditions will count as unsafe. And an administrative agency whose congressional mandate is phrased as a standard, such as the mandate to the Secretary of Labor in the Occupational Safety and Health Act of 1970\textsuperscript{30} to “promulgate the standard which assures the greatest protection of the safety or health of the affected employees”,\textsuperscript{31} entrusts the Secretary with wide scope in determining the content and shape of the safety-advancing rules that will be issued.

Conversely, the conventional picture of rules is one in which the rule-maker makes the important substantive decisions at the rule-making level, leaving little discretion to those who would implement the rules. Under this conventional picture, a judge bound by a rule to award custody to the mother in all cases other than those in which the mother is declared officially unfit has little discretion to decide what will be in the best interests of the child; the police officer told not to cite anyone driving under ten miles per hour over the posted speed limit has little freedom to determine that speeds below that figure are unsafe; and an administrative agency authorised to enforce a rule disallowing a bar or liquor store within 500 feet of a school or church loses the discretion to decide more broadly which locations for bars and liquor stores will best strike the balance among community tranquillity and safety, consumer preferences, and commercial needs.

According to the conventional wisdom, therefore, the choice between rules and standards, or the selection of a location on the rules–standards continuum, is an important and powerful implement of institutional design, determining much of who decides what in a complex and multi-institutional society. When standards are employed, then important decisions are delegated to those who would apply them, allowing the decision-maker under a standard to look at each decision individually and to tailor the outcome to the needs of the particular situation. But when rules are in force, the rule-making institution has made the important substantive decisions itself and in advance for large classes of events, even though individual events within the class might at the time of application present important complexities peculiar to the individual case.

\textsuperscript{31} 29 USC, §655(a) (2002).
Implicit in the conventional wisdom is the assumption that decisions about the degree of precision, complexity, or rulefulness of legal directives have much the desired effect. Although there is a literature demonstrating that there is slippage between the content of the rule and the behaviour that is generated — some caused by the behavioural predispositions of the rule-subjects and some caused by external forces that influence the rule-subjects as much as the rules (or standards) do — the widespread and unchallenged assumption is that the choice between rules and standards is one that rule-makers and institutional designers can and do make, and that when made is largely effective. In other words, the conventional wisdom is that rule-makers can actually make the choice between rules and standards.

**Challenging the Conventional Wisdom — the Convergence Hypothesis**

But what if the conventional wisdom is wrong? What if the choice between rules and standards, or a point on the rules–standards continuum, is largely inconsequential? If that were the case, then the ability of the distinction between rules and standards to serve as a device for the allocation of discretion and decision-making authority would be significantly undercut, and the very importance of the distinction between rules and standards would be in jeopardy.

The possibility that much of the distinction between rules and standards collapses in practice has nothing to do, I repeat, with any weakness or incoherence in the distinction itself. Rules and standards are different, and the difference is carried substantially on the shoulders of the degree of determinacy of the language in which a rule or standard is written. Still, what

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I call the *convergence* hypothesis is a function of the adaptive behaviour\textsuperscript{34} of those who are “given” rules or standards. When authorised to act in accordance with rules, rule-subjects will tend to convert rules into standards by employing a battery of rule-avoiding devices that serve to soften the hard edges of rules. Moreover, the ability to employ (or not to employ) those rule-avoiding devices gives rule-subjects precisely the discretion that it was the intention of the rule-maker to retain.

Conversely, the adaptive behaviour of rule-subjects when given a standard goes in the opposite direction. These rule-subjects, when given few rules in the rules–standards sense, will make them themselves, and apply them to their own allegedly discretionary behaviour, thus limiting significantly the case-sensitive discretion that it was the intention of the rule-maker to grant. And because this adaptive tendency to make standards into rules goes in the opposite direction from the tendency to adapt standards into rules, the resultant phenomenon is one fittingly labelled “convergence”.

The foregoing paragraphs are of course bald assertion. The time has come, therefore, to explain the theoretical plausibility of the convergence hypothesis, before turning in the following section to a series of examples that, taken together, lend strong support to the view that the convergence hypothesis is not only plausible but also true.

*The avoidance of rules*

Let us first take up the more familiar possibility that rules will tend towards standards. The chief vehicle for this transformation, although not the only one, is the process by which, as a contingent feature of many regulatory environments, even the most specific of rules may be avoided. One way for this to occur is for the rule-enforcer or rule-interpreter to engraft an exception to the rule at the moment of its application.\textsuperscript{35} So if a faculty’s rules require all of its members to have doctoral degrees, and if an extraordinarily successful candidate embarked on what has become a prize-winning academic career before completing her dissertation, the faculty might be willing, when faced with the decision regarding this candidate, and even when there is no apparent authorisation for making an exception, to create an exception in just this case, the faculty promising to itself that it will never again, or almost never

\textsuperscript{34} For a differently focused effort to look at rules and standards through the lens of decision-maker behavior, see Korobkin, above note 9. See also Langevoort, “Monitoring: The Behavioral Economics of Inducing Agents’ Compliance with Legal Rules” (2001) USC Center for Law, Economics & Organization Research Paper No C01-7.

again, make an exception to its rules. Thus, insofar as even facially exceptionless rules are understood in a decision-making environment to be permissibly open to the creation of ad hoc exceptions when the exception-less rule confronts a case not envisaged by the rule itself, and in which the rule would generate what appears at the time of application to be an erroneous outcome, then what looks on its face like a crisp and rigid rule is in practice less rigid and less crisp — and therefore more standard-like — just because of the discretion on the part of the interpreter or applier to determine whether an exception will be made.36

Now it is of course possible that avoiding a rule in this way would not be permitted, and that those who attempted such a manoeuvre would be subject to punishment or criticism. But in many decision-making environments, the practice is entirely permissible. What makes it potentially permissible is the familiar adage that rules do not determine their own application.37 Just as an arrow on a road sign does not indicate whether one should drive in the direction of the point or the tail, so too does a rule not indicate whether its strictures should be taken as conclusive or subject to the making of exceptions should the result indicated by the rule itself appear to the interpreter or applier as unpalatable. In those environments — American judicial practice being an extreme example38 — in which such rule-avoidance is authorised or at least tolerated, rule interpreters and rule avoiders have the capacity to soften the hard edges of a rule and thus to convert a rule into something much more like a standard.

The ability to create ad hoc exceptions is by no means the only technique of rule-avoidance. Even more common is to understand all rules as being subject to an implicit “reasonableness” qualification. The Delaney Clause, a United States federal statutory provision famous in the contemporary literature on statutory interpretation, appears on its face to prohibit the use as food additives all substances that produce any increase in the likelihood of cancer, but some believe that an absolute prohibition on substances that increase the

37 The obligatory citation for this point is Ludwig Wittgenstein, Philosophical Investigations (G E M Anscombe trans, 1974) ¶¶ 143–242, and perhaps also Kripke, Wittgenstein on Rules and Private Language: An Elementary Exposition (1982), but the literature is extensive, the analysis complex, and the controversies legion. For a glimpse of some of the issues as they pertain to law, see Patterson (ed), Wittgenstein and Legal Theory (1992). For pre-legal (or extra-legal) analyses, see Baker and Hacker, Skepticism, Rules, and Language (1984); Baker and Hacker Wittgenstein: Understanding and Meaning (1980); McGinn, Wittgenstein on Meaning (1984).
risk by only a minuscule amount is so unreasonable that it should not be interpreted as literally written.\textsuperscript{39} To the extent that rule-enforcers and rule-interpreters may permissibly interpret rules to avoid an unreasonable application,\textsuperscript{40} even to the point of interpreting against the literal meaning of the rule in order to make an older rule more suitable to contemporary problems,\textsuperscript{41} and to the extent that there is a wide understanding of what may count as an “unreasonable” application,\textsuperscript{42} then the implicit authorisation to rule-enforcers and rule-interpreters to test the rules against a reasonableness standard turns out to grant rule-enforcers and rule-interpreters a wide range of discretion.

A third strategy of rule-avoidance is to take even the most specific rule to be subject to override by considerations external to the rule itself. When the police officer who stops me for driving at 75 miles per hour in a 55 miles per hour zone observes that I have an injured person in the car and that I am heading for the hospital, he is likely to take the emergency, even if nowhere specified in the rules he is charged to enforce, as overriding the rules that he is assigned to enforce and that I am ordered to obey. When the Supreme Court of the United States announces that even the facially non-overridable mandates of equal protection of the laws may be overridden in cases of “compelling interest”,\textsuperscript{43} it is similarly recognising that in some legal environments it is permissible to treat all rules as subject to override in exigent circumstances, even if the possibility and permissibility of override is nowhere mentioned in the formal law.\textsuperscript{44}

Fourth, rule-enforcers and rule-interpreters will often depart from the specificity of a rule in order to rely on its less specific purpose. Now it is not always the case that the purpose (or justification, or rationale) behind a rule is less specific than the rule itself. Sometimes the rationale may be based on a concrete example, and a less concrete rule is written in order to make the rule itself broader than the concrete example that inspired it.\textsuperscript{45} More commonly,
however, specific rules embody less specific purposes, as when, canonically, the “No Vehicles in the Park” rule is written in order to instantiate a more general purpose of achieving quiet and decorum in public parks.\textsuperscript{46} But when in such cases the rule-enforcer or rule-interpreter is permitted to expand (noisy non-vehicles) or contract (non-noisy vehicles) the rule by reference to its purpose, it turns out that the purpose and not the rule is doing the work.\textsuperscript{47} When this happens, it is fair to conclude that the recourse to purpose is still another way of avoiding the crispness and determinacy often associated with rules themselves.

This catalogue of rule-avoiding strategies is illustrative and not exhaustive. There are others, and my point is only that in various circumstances we can imagine a rule-enforcer, rule-interpreter, or rule-applier using one or more of these rule-avoiding strategies or devices to ameliorate what might otherwise be the stringent effect of a rule in a particular case. Insofar as these strategies or devices are available — that is, insofar as a rule-interpreter or rule-enforcer is understood to be acting permissibly or legitimately or professionally in using such a device — it then turns out that what might otherwise look like a discretion-constraining rule is in practice more of a discretion-permitting standard. When these various rule-avoiding strategies are permissible, therefore, rules may resemble standards, or, more precisely, be adapted to operate as standards, far more than may be apparent from the face of the rule itself.

\textit{The concretisation of standards}

Now let us consider the opposite phenomenon, where broad and vague standards may in practice come to operate more like rules. The origin of the phenomenon is the way in which standards may appear to many decision-makers to have an uncomfortable vagueness about them. Standards leave discretion, to be sure, but they give little guidance, and require even a discretion-appreciating rule-applier to engage in a less bounded and less structured set of calculations and assessments in each case than he or she might at times wish. Not every decision-maker wishes maximum freedom,\textsuperscript{48} and here a series of recent psychological and behavioural economic studies on the “tyranny of

\textsuperscript{46} Hart, above note 25, 126.
\textsuperscript{48} See, among numerous explorations of the circumstances in which freedom may be seen by people to be a mixed blessing, Dostoevsky, “The Grand Inquisitor” in Matlaw (ed), \textit{Notes from Underground and Grand Inquisitor} (1960).
choice” are illuminating.\textsuperscript{49} If we might prefer to choose among six rather than 30 flavours of chocolate, or feel overwhelmed by having to select among “roughly 250 different varieties of mustard, 75 different varieties of olive oil and over 300 varieties of jam”,\textsuperscript{50} then we might well prefer to restructure our choice set to make it manageable, enabling us to focus with more care on a smaller range of options. More choice is not always better than less,\textsuperscript{51} and not every decision-maker has the time, energy, or inclination to engage in the “from the ground up” process that unconstrained discretion and unspecified standards require. For the decision-maker concerned about efficiency, docket-clearing (even in a non-judicial context), allocation of his or her own competence to its highest and best use, and apportioning time between more and less important decisions, a way of narrowing the range of factors to be considered from what might be available under an open-ended “justice” or “reasonableness” standard is highly appealing.

The foregoing list of reasons why decision-makers might wish less choice than they have, and less discretion than that granted to them, is of course abbreviated. But the important point here is only the kinds of reasons that might lead a decision-maker to narrow the range of his or her own decisional options, and thus to narrow the range of factors potentially available under the typical standard. As a consequence of the numerous reasons of time, energy, efficiency, comparative advantage, and psychological makeup that would lead nominally unconstrained decision-makers to constrain themselves more than others would wish to constrain them, it is thus possible that rule-enforcers, rule-interpreters, and rule-appliers, even if they in theory enjoy the considerable discretion granted to them, will supplement the standards with more specific “guidelines” or “rules of thumb” that in practice have all of the characteristics of rules. Just as the shopper in the supermarket aisle will quickly devise a heuristic to reduce the mustard choices to manageable proportions, so too can we expect totally unconstrained decision-makers, especially when the underlying issues are less salient and less substantively important to them, to devise heuristics to make the decision more focused, and the decisional options consequently narrower. When faced with the vagueness of the Sherman


\textsuperscript{50} Iyengar and Lepper, above note 49, 354. See also the song by The Bobs entitled “Plastic or Paper?”, which makes the same point, and can be found at www.bobs.com.

Antitrust Act, for example, courts have developed a series of “per se rules”, such as the rules against price-fixing, tying arrangements, and resale price maintenance, that both provided guidance and limited discretion far more than would have been the case with direct application of the vague language of the Sherman Act to each individual case. Similarly, the United States Supreme Court’s decision in *Miranda v Arizona*, which requires that those arrested be explicitly warned of their right to remain silent and of their right to an attorney, comes very close to specifying the exact language that police officers should use when making an arrest; and the Supreme Court’s frequent use of three- (and sometimes four-) part tests in freedom of speech and freedom of religion cases exemplifies an urge to make things more concrete, more specific, and more rule-like than the standard-like constitutional text would otherwise indicate. In practice, therefore, and when filtered through the adaptive behaviour of the judges who enforce and interpret them, both the Constitution of the United States and the Sherman Act are far more affairs of rules than one would think by looking only at the primary texts.

Standards may come to resemble rules in less direct ways as well. When a court holds that a vague standard incorporates the common law on its
subject,60 or incorporates a statute dealing with similar subject matter,61 it is in effect importing a specific rule from outside of the non-specific standard in order to make the non-specific standard more specific. Similarly, when Justice Hugo Black maintained that the quite non-specific Due Process Clause of the Fourteenth Amendment incorporated by reference all and only the (relatively) more specific guarantees of the Bill of Rights,62 he was indulging his own preference for specificity by finding in the Bill of Rights something more specific that ameliorated his discomfort with the less specific standard in the Due Process Clause he had been asked to interpret. And when American courts hold that a legislative remedy containing no statute of limitations is to be understood as importing the statute of limitations from a similar cause of action63 it is again using something external to a standard to make the standard come to resemble a rule.

Standards also transform themselves into rules when decisions made under standards are taken as having precedential effect for future decisions under the same standard. If standards were truly the devices of maximal discretion, decisions under those standards would not constrain future decisions, because constraint by precedent is itself a form of constraint by rule.64 Indeed, this is recognised in the arbitration process, where the general rule is that arbitration operates in a milieu without precedent,65 thereby ensuring maximum flexibility — the goals of standards, after all — for each arbitrator. But when standards are supplemented by precedential constraint, as is the normal practice outside of the arbitration process, that constraint serves to convert the original naked standard into a standard instantiated by the decisions under it, and this instantiation, insofar as it has precedential weight, makes the standard more like a rule.

60 A good example is the way in which the standard-like Rule 10b-5 under the Securities and Exchange Act of 1934, 17 CFR, §240.10b-5 (2002), has been held to incorporate much of the well-developed, and by now quite rule-like, common law of fraud. See Hazen, The Law of Securities Regulation (2nd ed, 1990) 683–700.
61 A frequent instance is the way in which courts use state and federal regulatory statutes, even ones no longer or not yet in force, to make the duties under a vague negligence standard substantially more precise. See, for example, Hammond v International Harvester Co, 691 F 2d 646 (1982); Clinkscales v Carver, 22 Cal 2d 72, 136 P 2d 777 (1943) (Traynor J).
63 For some time this was the approach under Rule 10b-5, 17 CFR, §240.10b-5 (2002). See United California Bank v Salik, 481 F 2d 1012 (1973); Klein v Auchenloss, Parker & Redpath, 436 F 2d 339 (1971), although current practice tends more towards achieving a similar goal by employing the most analogous federal statute. See In re Data Access Systems Securities Litigation, 843 F 2d 1537 (1988).
In the previous subsection we surveyed some of the various ways in which rules may, in the hands of their appliers, interpreters, and enforcers, transform themselves into standards. And here we have seen how, for different but equally plausible reasons, and with equally plausible legal mandate, standards may transform themselves into rules. With these phenomena identified, it is time to turn to the implications of the two phenomena operating simultaneously.

The Potential for Convergence

Implicit in all of the foregoing is the possibility, and I describe it so far only as a possibility, of what we can call convergence. If the adaptive behaviour of rule-appliers, rule-followers, rule-enforcers, and rule-interpreters can make rules more standard-like than they appear, and if different adaptive behaviours by the very same decision-makers can also make standards more rule-like than they appear, then the possibility is open that rule-appliers, rule-followers, rule-enforcers, and rule-interpreters would approach (although probably not reach) the same point on the rules–standards continuum regardless of whether they were given rules or standards as their starting raw material. The convergence hypothesis offers as a theory that this convergence, this gravitation towards the same degree of ruleness (or standardness, if you will), regardless of the starting point, will occur, and that convergence will produce a world in which the choice between rules and standards makes far less difference than is generally believed to be the case. And if this is so, then it may be that the tool of regulatory specificity as a way of managing discretion is less a part of the toolbox of regulatory strategy and institutional design than has historically been thought to be the case as well.

But although the possibility I describe appears plausible, is there any reason to believe that the convergence hypothesis is true? One reason starts with the fact that there are identifiably differences among legal cultures in views about the desirability and rigidity of rules. In some legal cultures, it is generally understood that rules should be read literally, that the appliers and interpreters of rules should not be empowered to modify the rules at the point of application, that judges should interpret rules according to their ordinary meaning except in the most egregious cases, and that the virtues of specificity and predictability are more important, especially within the legal system,

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66 The parallels with the Coase Theorem (Coase, "The Problem of Social Cost" (1960) 3 J L & Econ 1) should be apparent, although my claim that the starting point on the rules–standards spectrum may make less of a difference to the location of the ending point than people have previously thought is not based on a Coasian explanation.

67 That it makes no difference at all can almost certainly not be established, and I do not make that claim here.
than the virtues of flexibility in the face of changing or unforeseen circumstances. In these societies, the devices of rule-amelioration are either absent or scorned.

In other legal systems, by contrast, the virtues of rulenesse and formality are less apparent, and it is widely accepted that reaching the correct outcome in the individual case is more important than the virtues brought by rigid obedience to specific rules. In these societies, the rule-ameliorating devices, rather than being scorned, are celebrated, and rule-interpreters, rule-enforcers, and rule-appliers who refuse to employ these devices are typically castigated with epithets like "mechanistic" and "formalistic".

As should be apparent, there is a widespread view, supported by some moderately serious research, that the United States is the best example of the latter, and that most other advanced legal systems are at least somewhat closer to the former than is the United States. Indeed, an anecdotal example of this is provided by Guido Calabresi's *A Common Law for the Age of Statutes*, in which Calabresi argued that judges have (or should have) the power to update obsolete statutes, even at some affront to the language of those statutes, if updating would make the statutes better able to handle current problems not imagined at the time of drafting. The important thing about Calabresi's book is not whether it is right or wrong, either descriptively or prescriptively. Rather, it is that the author, at the time of writing the Dean of the Yale Law School, is now a Judge of the United States Court of Appeals for the Second Circuit. Even holding the nomination and confirmation procedures constant, it is hardly unlikely that, in numerous countries throughout the world, writing a book with this message would have been a permanent disqualification from the judiciary, yet the example of Judge Calabresi shows that is plainly not the case in the United States.

For present purposes, my characterisation of the United States, or any other legal culture for that matter, is relatively unimportant. What is important is the idea that if countries can vary in their legal cultures' attitudes about the appropriate degree of rulenesse, then it would not be surprising to discover that within a legal culture there were prevailing views, independent of the goals and substance of particular rules or regulatory schemes, about where on the rules–standards continuum it would be good to wind up. In other words,

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69 Calabresi, above note 41.
it may well be the case that rule-appliers, rule-enforcers, and rule-interpreters within a given legal (or regulatory) culture would have a set of background beliefs about the extent to which rules as opposed to standards are a good thing, and thus a set of background beliefs about the desirability of making standards more specific, and rules more flexible. Consequently, it would be plausible to imagine that rule-enforcers, rule-interpreters, and rule-appliers, when confronted with a rule, would try to make it conform to their background views about flexibility, and when confronted with a standard would try to make it conform to their background views about the appropriate degree of rigidity, specificity, and inflexibility.

Examining the Convergence Hypothesis

That which is logically possible and empirically plausible is still not necessarily true. Yet an examination of some widely different arenas in which rules and standards exist appears strongly to suggest that the convergence hypothesis is true. Although such a non-complete survey will not demonstrate conclusively the truth of the convergence hypothesis, and although counter-examples may well exist, examining some widely different areas may at least create a presumption that the convergence hypothesis is an accurate depiction of regulatory reality.

Ideally, it would be desirable, within a given legal culture, to be able to examine a rule and a standard in order to determine whether the standard had been made more rule-like in application, and the rule more standard-like in application. And, ideally, it would be desirable to try to do this with substantively equivalent statutes applied by the same appliers to the same behaviours at the same time, in order to control for as much variation other than the difference between rules and standards as possible, and in order to exclude the possibility that rule-interpreters would think that rules are appropriate for one form of regulation and standards appropriate for another. But since it would be hard to imagine why any legal culture would have two different types of directives for the same problem, it is obvious that this optimal case study is not going to be found.

In the United States, however, there is at least one paired set of legal directives that, because of their seeming redundancy, might work as a plausible substitute. Consider first s 16(b) of the Securities and Exchange Act of 1934.\textsuperscript{71} In order to deal with the particular form of insider trading known as “short-swing profits”, this provision, designed to prevent “the unfair use of information which may have been obtained by [a] beneficial owner, director,

\textsuperscript{71} 15 USC, §78p(b) (2002).
or officer by reason of his relationship to the issuer”, requires individuals in these categories to relinquish any profits made by virtue of a purchase and sale or sale and purchase of the company’s securities within a six-month period. For our purposes here, what is most important about this provision is its stark rule-like quality. Described even in the 1934 congressional hearings that led to its passage as a “crude rule of thumb”, this provision defines short-swing profits as a profit made as a result of a purchase and sale or sale and purchase “within any period of less than six months ... irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months”. Moreover, the provision applies to all officers, all directors, and anyone “who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any [registered] security”. According to the language of s 16, all officers, directors, and ten per cent owners are prohibited from taking profits in a period of less than six months, regardless of actual insider knowledge, and regardless of intent. If the owner of 9.9 per cent of the stock, not being an officer or director, trades on inside information with the intention of capitalising on the ignorance of others, there is no violation. So too if an officer, director, or ten per cent owner buys and sells or sells and buys in six months and one day. And if the owner of 10.1 per cent of the stock, having no inside information, buys and sells or sells and buys in a period of one day less than six months, the statute is violated.

Now compare a quite different provision designed also to deal with the problem of insider trading, the Securities and Exchange Commission’s Rule 10b-5, promulgated under the Securities and Exchange Act of 1934. This provision, although intended to deal with problems not dissimilar to the problems at which s 16(b) is aimed, is drafted in a very different way. One of its three brief operative provisions makes it unlawful “to employ any device, scheme, or artifice to defraud”, and another makes it unlawful “to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person”. Even the remaining provision is not much more specific, making it unlawful “to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading”. Just as s 16(b) is close to the rules end of the rules-standards continuum, so is Rule 10b-5 just as close to the standards end.

If the conventional picture of the consequences of choosing rules over standards, or vice versa, were correct, we would expect not to see much.

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72 See Hazen, above note 60, 627.
74 15 USC, §78j(b) (2002).
litigation under s 16(b), and to see decisions by both the primary interpreter (the Securities and Exchange Commission) and the courts (although less frequently\(^75\)) that tracked the mechanistic nature of the statute. And we would expect to see not only more litigation under Rule 10b-5, but also decisions under the rule that were largely case-specific, much like the largely case-specific decisions we see under something like the “best interests of the child” standard.

It turns out, however, that just the opposite is the case. With respect to s 16(b), there is far more litigation than one would expect from such a precise statute, even taking into account the special incentives to litigation produced by an enforcement scheme that relies heavily on a variant of the privately initiated stockholder derivative suit. And, more importantly, both the Securities and Exchange Commission (“SEC”) and the courts appear actively to be pressing against the rigidity of the statute, the effect being that the rule is operating more as a standard than might have been predicted in, say, 1934. For example, the SEC has administratively added a number of exceptions to the operation of the statute, almost all of which appear designed to prevent penalising innocent shareholders whose stock transactions are part of employee benefit plans, large block transactions in connection with a distribution of securities, various stock conversions, many transactions that are part of mergers and acquisitions, and numerous other transactions that would have been covered by the “crude rule of thumb” had it not been for the proclivity of the SEC to make continuous exceptions when they become aware that the rigidity of the rule is reaching a transaction not likely to involve trading on inside information.

This same tendency to ameliorate the rulelessness of s 16(b) appears to exist in the courts as well. “Notwithstanding the clear congressional intent to provide a catch-all, prophylactic remedy, not requiring proof of actual misconduct, the statute is not always strictly applied.”\(^76\) For example, whenever the transaction is the least bit unorthodox,\(^77\) or whenever there is even the slightest question about the application of the relevant time periods,\(^78\) the courts have abandoned the rule-based approach and have instead looked at the individual

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75 If rules operate in practice as they should in theory, the rule will decide in advance most of the expected controversies lying within its coverage, consequently producing less litigation. See Priest and Klein, “The Selection of Disputes for Litigation” (1984) 13 J Leg Stud 1. See also Priest, “Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes” (1985) 14 J Leg Stud 215.


77 For example, Kern County Land Co v Occidental Petroleum Corp, 411 US 582, 594, n 24 (1973); Pier I Imports of Georgia Inc v Wilson, 529 F Supp 239 (1981).

transaction in order to determine whether there has actually been some risk or realisation of speculation on inside information. In defining “officer” and “director”, the courts have tended not to look at who holds the formal title within the organisation, but rather have looked in a more functional way at what various individuals actually do\textsuperscript{79} — an approach that brings the benefits of fairness in individual cases, but at the cost of the very rulefulness that s 16(b) was originally designed to achieve. Indeed, the entire history of s 16(b) litigation has been one of pressing against, and at times abandoning, the rule-based approach, substituting an approach that numerous commentators have labelled “pragmatic”.\textsuperscript{80} In practice, therefore, s 16(b), designed as a rule, has been increasingly taking on all of the earmarks of a standard.

When we look at Rule 10b-5, we see a different phenomenon. The courts have filled in the rule’s uncertainty about standards of liability with relatively concrete references to common law standards of intentional wrongdoing.\textsuperscript{81} So too with the importation of common law ideas, much more historically well-developed than Rule 10b-5 standards, about causation, reliance, and materiality.\textsuperscript{82} Indeed, the much-discussed “fraud on the market” theory\textsuperscript{83} can be understood, in part, as a rule-based approach that avoids the necessity of the kind of individualised proof that one would expect under a more standards-based approach. In assessing damages, the courts have looked to create moderately consistent rules,\textsuperscript{84} and so too with many of the “procedural” dimensions of application of Rule 10b-5. Even more importantly, the application of Rule 10b-5 to insider trading issues has been marked by attempts to define in or out of the scope of the rule various classes of people and various classes of information, the effect of which is to move Rule 10b-5 rapidly in the direction of a rule, with all of the caveats, qualifications, exceptions, and definitions that we normally associate with rules but do not associate with standards.

Section 16(b) and Rule 10b-5 have obviously not become identical. They operate in different ways, and there is at least some path-dependence in the development of the doctrines that surround them. Still, it is hard to deny that

\textsuperscript{79} See Colby v Klune, 178 F 2d 872 (1949); Selas Corp of America v Voogd, 365 F Supp 1268 (1973).

\textsuperscript{80} See Bateman, “The Pragmatic Interpretation of Section 16(b) and the Need for Clarification” (1971) 45 St John’s L Rev 772; Hazen, “The New Pragmatism Under Section 16(b) of the Securities Exchange Act” (1975) 54 N C L Rev 1.


\textsuperscript{82} See List v Fashion Park Inc, 340 F 2d 457 (1965).

\textsuperscript{83} See Zweig v Hearst Corp, 594 F 2d 1261 (1979).

\textsuperscript{84} For example, Osofsky v Zipf, 645 F 2d 107 (1981).
the general trend of interpretation of s 16(b) has been to make it more standard-like, and the general trend of interpretation of Rule 10b-5 has been to make it more rule-like, even though the two started in different places, and even though the two deal with the same large problem of insider trading.

These developments are surprising. Although there will inevitably be occasions for interpretation and litigation under any directive, one might have expected courts and other interpreters to take seriously s 16(b)’s rule-like character and thus be unwilling to detract from that character by the addition of exceptions, qualifications, and opportunities to look at the real character of the entire transaction. And one might have expected courts and others to recognise Rule 10b-5’s inherent flexibility and thus be reluctant to engraft onto it various rules, categories, and well-understood common law doctrines. Yet in both cases these expectations have not been satisfied, and instead we have seen what appears on preliminary analysis to be a good example of the convergence phenomenon. What we have seen is a persistent tendency of courts and regulators to make the rule more standard-like and the standard more rule-like.

A similar pairing — both rules and standards existing in the same regulatory milieu — exists with respect to the practice of criminal sentencing, even though the rules and standards do not — as they do in the case of insider trading — exist simultaneously. In criminal sentencing, standards were long the norm, and judges who sentenced convicted criminals had great freedom in determining a punishment that fit the crime. Starting in the early 1970s, however, concerns about sentencing disparity — discretion run amok — and about documented and morally uncomfortable distinctions between white collar criminals and others produced a movement to make sentencing more rule-like. The result was the adoption in many states, and in the federal system, of sentencing guidelines, moving sentencing from the far standards end of the rules–standards continuum to the far rules end.85 After the adoption of sentencing guidelines, the sentencing process, to the considerable annoyance of most judges,86 appeared to become a largely rule-based mechanical process.

Like the distinction between s 16(b) and Rule 10b-5, the distinction between guidelines sentencing and discretionary (usually called individualised)


sentencing presents rule-based and standards-based approaches to what is essentially the same problem, and with essentially the same cohort of interpreters and appliers. And as with insider trading, the pattern with respect to sentencing has been one of convergence. Under guideline-free sentencing based on standards, judges frequently constructed their own heuristics or rules of thumb in order to make their own sentencing tasks simpler and more consistent. In addition, they frequently discussed sentencing patterns with other judges in an attempt to harmonise their practices with those of their colleagues, and they encouraged the publication of sentencing averages in order further to achieve a measure of consistency. Even in the absence of rules, therefore, and even in contexts in which discretion was typically celebrated, those who possessed that discretion attempted to cabin it in numerous different ways.

With the introduction of sentencing guidelines, however, judicial behaviour has been just the opposite. The guidelines themselves have been modified on numerous occasions, almost always to allow greater freedom than before, typically by allowing a broader scope for permissible departures from the sentences specified by the guidelines. And on the individual level, judges have been inclined to stretch the limits of the guidelines (more often in the direction of impermissible leniency than in the direction of impermissible stringency) — a practice that, not surprisingly given that most appellate judges have previously served as trial judges, has been met with a substantial amount of appellate tolerance.

In the area of sentencing, the degree of convergence is empirically measurable, and it turns out that sentences under the sentencing guidelines, although exhibiting less disparity than was the case prior to adoption of the guidelines, have not reduced the disparity nearly as much as was initially expected.\(^{87}\) The shift from standards to rules, largely because of the rules that had previously been superimposed on standards and the flexibility that has been engrafted onto the rules, has made far less difference than might have been expected from looking solely at the initially governing legal instruments.

Another good example of the phenomenon of convergence comes from the international diversity in the styles in which written constitutions are drafted. Some constitutions, of which the Constitution of the United States is the best example, are written in the broad and open-ended language of standards, as the examples noted above illustrate. And others, as with some parts of the Constitution of South Africa, are substantially more specific. In

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theory, therefore, we might expect American constitutional decision-making to be as open-ended as are the provisions that ground it, and we might expect South African constitutional decision-making to be largely involved with smaller issues at the edges of the detailed provisions, but here again the phenomenon is mostly one of convergence. American constitutional law is replete with detailed tests and constitutional rules, as for example the categorisation of discrete levels of scrutiny for equal protection analysis\textsuperscript{88} and the highly detailed three- and four-part tests that structure and constrain free speech and freedom of religion adjudication.\textsuperscript{89} By contrast, judicial interpretation in South Africa, as well as in other countries also having highly detailed constitutions, embodies a pragmatic and open-ended style resembling decision-making under standards far more than it resembles decision-making according to rules.\textsuperscript{90}

Numerous other examples reflect the same dynamic. University honour codes that were drafted generations ago to mandate little more than “honour” or a prohibition on “lying, cheating, and stealing” have spawned highly detailed sub-rules and authoritative examples, while more modern and detailed codes have seen their detail rounded off and made more consequently flexible by the decisions of interpreting and enforcing bodies. As noted above, the extraordinarily vague prohibitions of the Sherman Antitrust Act have been made more precise by series of “per se” rules,\textsuperscript{91} while a parallel development has been the efforts by courts and enforcing authorities to make more flexible the considerably more precise but similar prohibitions in the Clayton Antitrust Act and the Federal Trade Commission Act. In American conflicts of law doctrine, the extreme flexibility of the \textit{lex loci delicti} and related rules that flourished in the first part of the twentieth century gave way to the hugely more flexible “interest analysis”, but that approach has in turn become substantially more concrete.\textsuperscript{92} And, finally, it would not be implausible to surmise that the well-documented convergence of civil law and common law


\textsuperscript{91} See \textit{United States v Arnold, Schwinn & Co}, 388 US 365 (1967); \textit{United States v Socony-Vacuum Oil Co}, 310 US 150 (1940); \textit{Dr Miles Medical Co v John D Park & Sons}, 220 US 373 (1911); Glazer, “Concerted Refusals to Deal Under Section 1 of the Sherman Act” (2002) 70 Antitrust LJ 1.

approaches throughout the world\textsuperscript{93} is in part a function of the way in which adjudicators and others have pressed against the excess precision of extreme civil law models, just as they have pressed against the excess flexibility and consequent unpredictability of the purest form of common law approaches.

Conclusion

In all of these areas, and likely many others, what seems initially to look like a contrast between rule-based and standard-based approaches has turned out on closer inspection to be less of a contrast, this phenomenon being largely a function of the quite different ways in which decision-makers adapt to the materials they are given. Even the sample in the previous section, of course, is incomplete, and there may well be counter-examples. Yet the sample seems at least large enough to suggest that the convergence hypothesis is sound, and to suggest that it reflects an important phenomenon in the domain of statutory and regulatory enforcement and interpretation.

If the phenomenon of convergence is genuine, the implications are obvious. Rule-makers who attempt to create an environment of discretion may be frustrated when the very discretion they wish to grant is narrowed in practice, and they may be equally frustrated when attempts at constraint by crisp rule are similarly unavailing. Faced with this, rule-makers may wish to change the larger environment, such that the adaptive behaviour we have observed is itself subject to sanctions or other negative signals, reducing the extent to which rule-enforcers and rule-interpreters, to say nothing of rule-followers, can alter the basic form of the rules they work with. Alternatively, however, and an approach that is both less ambitious but more feasible, is the fact that the phenomenon of convergence can be seen as a force to be counter-balanced. Recognising that sharp-edged rules will in practice be rounded, rule-makers may attempt to anticipate this effect by making the edges even sharper. And recognising the converse tendency to use heuristics to reduce discretion, rule-makers (or, more accurately, standard-makers) may incorporate appeals and other devices to ensure that the environment is not more rigid than they have intended. Such strategies will of course not be perfectly effective, but they will at least make it more possible for decision-making and regulatory environments to operate in the way in which their designers intend, and, more importantly, will retain the importance of the distinction between rules and standards as a crucial tool of institutional and regulatory design.